

MEMORIAL OF PANAMA

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

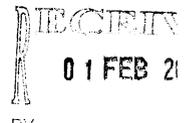
M/V “VIRGINIA G”

THE REPUBLIC OF PANAMA v. THE REPUBLIC OF GUINEA BISSAU

Case N° 19

MEMORIAL OF THE REPUBLIC OF PANAMA

23 JANUARY 2012



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MEMORIAL OF THE REPUBLIC OF PANAMA**CHAPTER 1****INTRODUCTION & BACKGROUND****I. Introduction and Procedural issues****A. The Special Agreement**

1. On 3 June 2011, the Republic of Panama ("Panama") instituted arbitration proceedings against the Republic of Guinea Bissau ("Guinea Bissau") (the "Arbitration Notification")¹. The proceedings were brought under Article 286 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (the "Convention") in relation to a dispute which had arisen by reason of the arrest, on 21 August 2009, and prolonged detention, by Guinea Bissau, of the Panama-flagged vessel *M/V VIRGINIA G* (the "*VIRGINIA G*") its master and crew, as well as the confiscation of the cargo of gas oil on board.
2. Panama requested the Arbitral Tribunal to adjudge and declare that:
 - a. the laws or regulations that Guinea Bissau cited as being applicable to the *VIRGINIA G* and its activities were not, in fact, applicable or enforceable against the vessel in the EEZ of Guinea Bissau; and if they were, then, as applied by Guinea Bissau, are incompatible with the Convention;
 - b. the actions of Guinea Bissau, *inter alia*, its interpretation of "fishing related activities" and other laws, rules and concepts on which its actions were based; the forceful treatment of the captain and crew in the EEZ of Guinea Bissau; the subsequent arrest of the vessel; its detention and the confiscation of the cargo of gas oil, were incorrect and unlawful, and violated the rights of Panama and the vessel to enjoy the freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation as set out in Articles 56 and 58 of the Convention and the related provisions of the Convention;
 - c. the actions of Guinea Bissau, *inter alia*, the exercise of powers beyond those warranted in terms of Article 73(1); the refusal to acquiesce to the willingness of the vessel's owner to post security in terms of Article 73(2) and the failure by Guinea Bissau to notify the flag State of the action taken, as well as the enforcement measures or penalties subsequently imposed, prejudiced the rights of Panama and the vessel; prevented an effective safeguarding of the interests of Panama and the vessel, including, without limitation, minimising losses; and caused serious financial damages and physical distress;

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

- d. the delay or length of time during which Guinea Bissau detained the *VIRGINIA G* was drastically outside the limits of reasonableness, especially in view of the fact that the vessel’s owners had expressly requested the setting up and posting of security, and that the length of the detention led to serious damages and losses incurred by the vessel;
 - e. the authorities of Guinea Bissau used intimidation and/or force unnecessarily and unreasonably in arresting the *VIRGINIA G* and in their treatment of the crew, and that compensation is due under international law;
 - f. the confiscation by the authorities of Guinea Bissau of the cargo of gas oil from on board the vessel was done in an abusive, forceful and illegal manner and that Guinea Bissau should immediately return the gas oil, or gas oil of an equivalent or superior quality; or an amount of financial compensation representing the value of the gas oil confiscated by Guinea Bissau;
 - g. the treatment of the *VIRGINIA G* was discriminatory in comparison to the treatment of other foreign vessels;
 - h. as a result of the above violations, Panama is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the *VIRGINIA G*, including the persons involved or otherwise affected by the actions of Guinea Bissau, including moral damages to persons, unlawful arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic loss, including loss of profit, with interest thereon;
 - i. Guinea Bissau should be ordered to pay all damages and losses suffered as a result of the violations set out above, with interest thereon; and that in the event of the arbitral tribunal finding against the amount quantified as compensation, that the arbitral tribunal should determine the compensation due as it sees fit and proper, with interest thereon.
 - j. Guinea Bissau should be ordered to pay for all costs of these proceedings, including those incurred by Panama.
3. By Exchange of Letters of 29 June 2011 and 4 July 2011 Panama and Guinea Bissau entered into a special agreement to transfer the arbitration proceedings concerning the dispute between the two States relating to the *VIRGINIA G* to the jurisdiction of the International Tribunal for the Law of the Sea (the “International Tribunal”) in terms of Article 55 of the Rules of the International Tribunal (the “Special Agreement”).
 4. The Special Agreement was notified to the Registrar of the International Tribunal by the Agent of Panama by letter dated 4 July 2011. The Registrar of the International Tribunal sent a copy of a Note Verbal to Guinea Bissau, wherein reference was made to Guinea Bissau’s agreement to transfer the case to the International Tribunal “whose jurisdiction in this case Guinea Bissau accepts fully”, adding that the “afore-mentioned proposal and this letter constitute a

special agreement between the two Parties for the submission of the case to ITLOS."

5. The dispute was, therefore, submitted to the International Tribunal by Special Agreement in terms of Article 24 of Annex VI of the Convention (Statute of the International Tribunal for the Law of the Sea).
6. By Order 2011/3 of 18 August 2011, in accordance with the Special Agreement and in terms of the agreement between the Panama and Guinea Bissau at a consultation meeting held on the 17 August 2011, the President of the International Tribunal fixed the 4 January 2012 as the date for the submission by Panama of its Memorial (in accordance with Article 59 and Article 60 of the Rules of the International Tribunal).
7. By letter dated 13 December 2011, addressed to the Registrar of the International Tribunal, the Agent for Panama appointed Professor Tullio Treves as *ad hoc* judge for Panama in terms of Article 17(3) and 19(1) of the Statute of the Tribunal.
8. By Order 2011/8, on the request of Panama, the President of the International Tribunal, having asked for the views of Guinea Bissau, extended the date for the submission by Panama of its Memorial to 23 January 2012.
9. This Memorial, with its accompanying annexes, is submitted in accordance with that Order.

B. Jurisdiction

10. The Parties, having reached the Special Agreement, have accepted to submit to the jurisdiction of the International Tribunal the dispute between them relating to the *VIRGINIA G*, originally submitted to arbitration, in terms of Article 24 of Annex VI of the Convention (Statute of the International Tribunal for the Law of the Sea).
11. Panama submits, therefore, that there is no question as to whether the International Tribunal has jurisdiction over this dispute.

C. The Parties

12. Panama and Guinea Bissau are, and were at the time the events giving rise to the dispute arose, Parties to the International Convention.
13. Part XV of the Convention establishes a regime for the settlement of disputes concerning the interpretation or application of the Convention.
14. Neither Panama nor Guinea Bissau has availed of the power under Article 298 of the Convention to make exceptions to the applicability of Section 2 of Part XV of the Convention, excluding the jurisdiction or competence of the International Tribunal. Furthermore, neither Panama nor Guinea Bissau has

made a written declaration pursuant to Article 287(1) of the Convention with respect of submission of disputes to the International Tribunal.

D. Locus Standi

15. 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.
16. 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.²
17. The (UN) Draft Articles on Diplomatic Protection (2006), in Article 1, state 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.³
18. In relation to situations, as with the present case, involving vessels where a number of nationalities and interests are concerned, the *SAIGA No.2 Case*⁴ judgment is unambiguous in that:

“The provisions referred to in the preceding paragraph⁵ indicate that [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, every thing 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.”
19. In this case, the International Tribunal did not accept Guinea’s contention that Saint Vincent and the Grenadines was not entitled to present claims for damages

² *The Mavrommatis Palestine Concessions Case*, P.C.I.J., Series A, No.17.

³ Draft Articles on Diplomatic Protection 2006, Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)).

⁴ *The M/V Saiga (No.2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgement of 1 July 1999, at para. 106.

⁵ Referring to boarding of vessels and hot pursuit.

in respect of natural and juridical persons who are not nationals of Saint Vincent and the Grenadines.

20. Moreover, Article 18 of the Draft Articles on Diplomatic Protection states that the right of the State of nationality of the member of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a 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.
21. Panama is, therefore, entitled to bring this action against Guinea Bissau within the framework of diplomatic protection.

E. Language

22. Panama recognises that the official languages of the International Tribunal are English and French.
23. Most of the supporting documents are in Spanish and Portuguese. In terms of Article 64 of the Rules of the Tribunal, Panama has provided translations in English of the relevant documents or extracts therefrom.
24. Panama certifies that the translations submitted are accurate. Panama will, however, furnish further translations or clarifications as may be required by the International Tribunal.

F. Supporting Statements

25. Supporting statements have been prepared by six individuals who were witnesses to the matter in dispute. The supporting statements are attached as **Annexes 1 to 6** as follows:
 - (a) **Annex 1** Statement of **Eduardo Blanco Guerrero**, Captain of the *VIRGINIA G*.
 - (b) **Annex 2** Statement of **Fausto Ocaña Cisneros**, Chief Mate/Officer on the *VIRGINIA G*.
 - (c) **Annex 3** Statement of **Pablo Cesar Dos Santos Mota**, Seaman on the *VIRGINIA G*.
 - (d) **Annex 4** Statement of **Manuel Samper Perez**, Safety and Operations Manager of Gabaspe SL in charge of the *VIRGINIA G* and *IBALLA G*.
 - (e) **Annex 5** Statement of **José Antonio Gamez Sanfiel**, representative of the owner of the *VIRGINIA G* and bareboat charterer of the *IBALLA G*.
 - (f) **Annex 6** Statement of **Robert Cockx**, General Manager of Lotus Federation (gas oil provider) and charterer of the *VIRGINIA G* and *IBALLA G*.

26. The above supporting statements were prepared in English with assistance of an English speaker.
27. Panama reserves its right to submit statements from additional persons and/or to request more detailed statements from the abovementioned persons for submission to the International Tribunal, as may be required.

G. Copies

28. On instruction of the Registrar of the International Tribunal, Panama has provided one original Memorial, one certified copy of the original Memorial and sixty five copies, in terms of Articles 64 and 65 of the Rules of the Tribunal, and Guideline 10 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.
29. Panama will furnish additional copies as may be required by the International Tribunal.

H. Agents for Panama

30. By virtue of a power of attorney dated 10 June 2010, Juan Carlos Varela, the Vice-President of the Republic of Panama and Minister for Foreign Affairs, appointed as Agents for Panama **José Ramón García-Gallardo** (of Spanish nationality with passport XD20B32) and **Alexander Mizzi** (of Maltese nationality with identity card number 351380M), being both lawyers registered with their respective national Bar Associations and with the Brussels Bar Association. The government of Panama authorised its abovementioned Agents to intercede as representatives of the Republic of Panama before the International Tribunal for the Law of the Sea and to represent the interests of the Republic of Panama against the Republic of Guinea Bissau, before an arbitral Tribunal or before the International Tribunal for the Law of the Sea, in relation to the vessel *VIRGINIA G* and its owners Penn Lilac Trading S.A.
31. A copy of the power of attorney granted by the government of Panama in favour of José Ramón García-Gallardo and Alexander Mizzi as Agents for Panama is attached as **Annex 7**.

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II. Background

A. Bunkering activities

32. “Bunkering” is 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: off-shore bunkering.

- Bunkering services can also include the delivery of food, fresh water and other provisions to vessels at sea.
33. Bunkering is recognised as an important business as it provides vessels at sea with essential supplies required for their operation and navigation, as well as for the subsistence of life at sea.
 34. Pertinent to the matter before the International Tribunal, one of the main activities in the bunkering industry is the supply of fishing vessels operating in fishing grounds on the high seas or in the exclusive economic zones (“EEZ”) of coastal States. In this context, the fishing grounds off the West African coast are a particularly important resource for developing nations in the area.
 35. Fishing vessels are often refuelled whilst at sea for a number of reasons, such as maintaining a constant level of efficiency on their missions. In the case of fishing operations off the West African coast, bunkering services rendered in this area are (or were, at the time of the events in question) particularly important owing to the general lack of bunkering facilities and gas oil product in the area.
 36. In relation to Guinea Bissau, it has been reported by the European Commission (in 2005) that the Port of Bissau, “does not have suitable facilities or conditions for transshipment, nor fuel, water and ice supplies. EU vessels generally never call into port except for formal inspections. Most refuelling and transshipping provisions is done at sea or in foreign ports (Dakar/Las Palmas mainly) [...] For industrial vessels, whilst it is possible to refuel in Bissau, most refuelling and transshipping provisions is done at sea or in foreign ports, due to the approach difficulties, the high cost and lack of reliable supplies. EU vessels generally do not call into port.”⁶
 37. Off-shore bunkering is not necessarily limited to the provision of gas oil to fishing vessels; it is a service that can be provided to any vessel requiring bunkering provisions whilst navigating.
 38. The services of vessels such as the *VIRGINIA G* are typically dependent on a number of factors; principally its location and planned route, the location of vessels in relation to the planned route, and, importantly, the fluctuations in the cost of gas oil (see **Annex 6**).
 39. The bunkering industry is competitive and well organised and is supported by its own trade association, the International Bunker Industry Association.⁷
 40. Bunkers are typically loaded by a seller/supplier onto a specialised oil tanker (owned or chartered), and delivery or supply arrangements are made with customers operating along a specific route.

⁶ Ex-post evaluation of the current Protocol to the Fisheries Agreement between the European Community and the Republic of Guinea Bissau, European Commission, Directorate General for Fisheries and Maritime Affairs, December 2005. In a similar ex-post evaluation carried out in 2010, it was commented that “No funding has been identified for all supporting equipment required, for example fuel depot, which will be an essential service required to attract vessels.”

⁷ www.ibia.net

41. The location, or way point, for refuelling is generally agreed a few weeks or days in advance, taking into account the requirements of the customer and the route of the vessel. It is not unusual for schedules to be changed owing to the unpredictable nature of navigation.
42. Whilst the contractual arrangements are made within the offices of the bunker supplier and the operator of the vessels requiring refuelling, the logistical details (such as the way point, fulfilment of formalities, and so forth) are typically done by radio, telephone, or other means, between the captains of the supplying and receiving vessels and their respective agents on land.
43. It is in this context that the *VIRGINIA G* was operating in August 2009. As per her usual deployment, she was engaged in transporting gas oil and supplying vessels operating off the West coast of Africa. She would typically load a gas oil cargo at the ports of the Canary Islands (Las Palmas de Gran Canaria and Santa Cruz de Tenerife) and proceed southwards to supply vessels operating between Mauritania and Angola. The vessel operated in territorial waters, in the EEZ and on the high seas, as required, and would occasionally be used to load and unload fuel between one port and another, or in the transshipment of gas oil from other vessels.

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

44. Guinea-Bissau is bordered by Senegal to the north and Guinea to the east and south, with the Atlantic Ocean to the West. It is estimated that 40% of budget revenue is generated by the export earnings of cashew nuts, the main source of export earnings, and fishing.⁸
45. Guinea Bissau and the European Union have, ever since 1980, concluded a number of fisheries agreements. A Fisheries Partnership Agreement (FPA) was in effect during the period relevant to this dispute in terms of which EU vessels mainly from Spain, Portugal, Italy, Greece and France were permitted to fish in Guinea Bissau waters. The FPA in question has been extended and is part of the tuna network fisheries agreements in West Africa.⁹
46. Guinea Bissau is a Party to the United Nations Convention on the Law of the Sea 1982. It signed the Convention on 10 December 1982 and ratified it on the 25 August 1986.
47. Guinea Bissau set its maritime delimitations by virtue of its national legislation, specifically Act No. 2/85 of 17 May 1985 establishing straight baselines, and Act No. 3/85 of 17 May 1985 on delimitation of the territorial waters, the contiguous zone and the continental shelf (**Annex 8**).
48. **Act No, 3/85 of 17 May 1985**, Article 3 states, as translated:

⁸ The European Commission's profile on Guinea-Bissau http://www.ec.europa.eu/guinea_bissau/index_en.htm

⁹ http://ec.europa.eu/fisheries/cfp/international/agreements/guinea_bissau/index_en.htm

1. The exclusive economic zone shall extend, within the national maritime frontiers, for a distance of 200 nautical miles measured from the straight baselines established by [Act 2/85 of 17 May 1985].

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

49. **Act No, 3/85 of 17 May 1985**, Article 4 states, as translated:

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

50. **The Constitution of Guinea Bissau** contains a number of articles relevant to this part, two of which are being reproduced hereunder, as translated:

ARTICLE 10

In its exclusive economic zone, as defined by law, the State of Guinea Bissau exercises exclusive competence in relation to the conservation and exploration of its natural resources, living or non-living.

ARTICLE 29

The fundamental rights established in the Constitution do not exclude any other rights contained in other laws of the Republic and the applicable rules of international law.

51. **Law (Decreto-Lei) No. 6-A/2000** (as amended by Law (Decreto-Lei) N^o 1-A/2005) (hereinafter "Decree 6A/2000") is the national legislation of Guinea Bissau relating to fisheries resources and the fishing rights in the waters of Guinea Bissau.

52. A full copy, with translated extracts is attached as **Annex 9**. However, the relevant provisions of Decree 6A/2000 are being reproduced hereunder (as translated) for ease of reference, starting with Article 2 which sets out the scope of the legislation:

ARTICLE 2 (Scope of application)

The provisions of this law are applicable to the Exclusive Economic Zone, to the territorial sea, to internal waters as defined in Laws 2/85 and 3/85 of 17 May, as well as to brackish waters and saline waters of estuaries and river mouths up to the limit of tidal reaches or as set by law. These waters are designated by the term "maritime waters of Guinea Bissau".

53. Article 3 of Decree 6A/2000 provides a definition of “fishing”, and “fishing related operations” or “activities”:

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 purpose of the above point, fishing related operations means:
 - (a) The transshipment 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.

54. Article 13 of Decree 6A/2000 states that fishing activities must be carried out under prior licence issued by the Guinea Bissau authorities.

ARTICLE 13
(Issue and formalisation of license)

1. The exercise of fishing activity is subject to a prior fishing license that must be issued on a template document by the Government department responsible for Fisheries and signed by the persons responsible for Fisheries, Economy and Finance.
 2. The license will be issued to a vessel in favour of its owner and will be valid in relation to the fishing activities mentioned therein.
55. Article 23 of Decree 6A/2000 stipulates that an authorisation is also required for the carrying out of fishing related operations (or activities):

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.
56. Article 52 of Decree 6A/2000 (as amended)¹⁰ provides for the enforcement by Guinea Bissau of the provisions of Decree 6A/2000 in cases where fishing vessels carry out unauthorised fishing activities:

Article 52
(Activities of non-authorized vessels)

1. All industrial or artisan fishing vessels, whether national or foreign, which carry out fishing activities within the limits of national maritime waters, without having obtained the authorisation in terms of Article 13 and 23 of this law, will be seized ex-officio, with its gear, equipment and fishery products in favour of the State, by the decision of a member of the Government responsible for Fisheries.
 2. Regardless of the confiscation provided for in the previous paragraph, the courts must apply the fines set out in Article 54(2) of this law.
 3. The decision taken in terms of paragraph 1 can be appealed.
 4. The Inter-Ministerial Fisheries Commission will decide how to dispose of the confiscated property and products in terms of the provisions of this law, which will revert to the Government.
57. It appears, therefore, that Guinea Bissau regulates fishing activities and fishing related activities in its waters (including in its EEZ) and, of particular relevance to this case, Guinea Bissau has opted to regulate, or interpret the law to so regulate, the supply of fuel to vessels operating in its waters (including in its EEZ) under the category of "Fishing-related operations" ("*operação de pesca conexa*") under Article 3(3)(c).
58. The provisions, however, do not appear to make a distinction between fishing vessels and non-fishing vessels.

*

¹⁰ It is, perhaps, worth noting that, before being amended in 2005, Article 52 read as follows (with added emphasis used to indicate the substantive changes):

1. *All foreign fishing vessels that carry out fishing operations within the maritime waters of Guinea Bissau without having obtained proper authorisation in accordance with Article 13 and Article 23 of this law shall be confiscated ex officio with their gear, equipment and fishery products in the name of the Government by decision of the government official responsible for fisheries.*

2. (...)

3. *The decision taken in terms of paragraph 1 is not subject to appeal.*

4. (...)

CHAPTER 2**STATEMENT OF RELEVANT FACTS**

59. In this section, Panama sets out the facts and circumstances on the basis of which it is claimed that Guinea Bissau acted unlawfully as contended in Chapter 3, and should be held internationally responsible at international law, as set out in Chapter 4.
60. Panama reserves all its rights to introduce and rely on any new facts not mentioned in this Memorial, as may be required to be introduced and developed throughout the process of this case in the pursuance of its claim against Guinea Bissau.

I. The M/V *VIRGINIA G*

61. The *VIRGINIA G* is an oil tanker with a gross tonnage of 857 and a net tonnage of 456. She is registered under the flag of the Republic of Panama, with Statutory Certificate Registration N^o. 29418-03-C. The vessel’s IMO number is 8135681 and her Call Sign is HO3031.
62. The vessel’s current Statutory Certificate of Register has recently been renewed. It was issued on 5 October 2011 and is valid until 16 November 2016. The vessel previously held Statutory Certificate of Register N^o. 29418-03-B, issued on 23 August 2007 and was valid until 16 November 2011. Copies of the Statutory Certificates of Registration are attached as **Annex 10**.
63. The *VIRGINIA G* is fully owned by Penn Lilac Trading S.A, a Panamanian company incorporated on 2 January 1998 (“Penn Lilac”). Penn Lilac has, as one of its objects, the purchase, sale and trade of merchandise of any kind for its own account or for third parties. Accordingly, one of its main activities over the years has been the supply of fuel oil, or gas oil, to vessels at sea – off-shore bunkering services.
64. Initially, Penn Lilac operated by contracting freight to its portfolio of customers. In January 2000 Penn Lilac bought the oil tanker *VIRGINIA G* with the commercial object of itself selling and supplying vessels, in particular those operating in the fishing grounds in the EEZs of West African coastal States, with gas oil purchased in the Canary Islands.
65. In January 2002, Penn Lilac entered into an agency commission agreement with a Seville-based Spanish company Gebaspe SL (“Gebaspe”) (**Annex 11**). With 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. Under the agreement, Gebaspe was entitled to a commission on a percentage basis, depending on the quantity of fuel supplied.

66. In January 2003 Penn Lilac bought the company Penn World Inc, the registered owner of the vessel *IBALLA G* (also Panama-flagged oil tanker with a gross tonnage of 4182.00 and IMO number 7393418, registered to Penn World Inc.). On the same day as the purchase of the company, the vessel *IBALLA G* was bareboat chartered to Penn Lilac. (**Annex 12** is a copy of the *IBALLA G*'s Statutory Certificate of Registration 29079-03-C and a copy of a Continuous Synopsis Record listing Penn World Inc as the registered owner and Penn Lilac Trading S.A. as the registered bareboat charterer).
67. In 2009, Penn Lilac changed certain parts of its operations, and decided that it would no longer sell and supply fuel itself, but rather charter out the *VIRGINIA G* and the *IBALLA G* to gas oil suppliers for the transport of the gas oil cargos to fishing vessels operating along the West coast of Africa. The agency commission agreement with Gebaspe was, at this time, still in force.
68. In January 2009, the *VIRGINIA G* and the *IBALLA G*, represented by Gebaspe, were chartered out to Lotus Federation ("Lotus"), an Irish company that sold and supplied gas oil to fishing vessels. The vessels were to be made available to Lotus, under the terms of the agreement, over a period of four years (**Annex 13**).
69. Lotus was to engage the two vessels exclusively in the transport of goods between safe ports and locations situated between the Canary Islands and West African States, no further south than Namibia.
70. The commercial arrangement was that Lotus would pay Penn Lilac the rate of forty (40) EURO per metric ton of transported cargo. In addition, the owner would assign its portfolio of clients to Lotus for the duration of the charterparty agreement. In effect, this agreement was reached in anticipation of a planned merger between the two companies.

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II. The *VIRGINIA G* never encountered law enforcement problems in West African coastal states

71. The West African coast is a crucial trade route for Penn Lilac, particularly because of the volume of fishing vessels operating in the area.
72. The majority of the vessels supplied are European vessels, operating West African EEZs under various Fisheries Partnership Agreements concluded with the European Union, as was the case with Guinea Bissau.
73. In all its years of providing gas oil at sea, that is, since 1998, Penn Lilac would ascertain in advance, or otherwise obtain sufficient assurance, that its customers operating in these fishing grounds were in line with the requirements of the coastal State, and, in particular, that they held a valid and appropriate fishing licence from the State in whose EEZ the fishing took place.

74. Indeed, companies that provide bunkering services to fishing vessels normally require a degree of certainty that the vessels they supply hold the appropriate fishing license from the State concerned. This is mainly to ascertain that the fishing vessels are operating in line with national requirements and, importantly, that they are not engaged in illegal, unreported and unregulated (IUU) fishing activities.
75. Over the years, bunkering companies began facing increased formalities from West African nations. In the case of Guinea Bissau, Decree 6-A/2000 (**Annex 9**) was applied not only to fishing vessels, but also to vessels such as the *VIRGINIA G*, and was interpreted as the legal basis for requiring that an authorisation be obtained for the provision of bunkering services.
76. Small operators such as Penn Lilac were left with little choice but to adhere to the requirements, despite doubts as to the lawfulness of such requirements within the realm of international law of the sea. However, not having sufficient resources and influence to challenge the validity of such measures at international law, the requirements were adhered to, despite instances where the law was applied with lack of transparency.
77. In respect of Guinea Bissau, since the entry into force of Decree 6-A/2000 (**Annex 9**), the *VIRGINIA G* never faced any legal problems. The August 2009 mission (the subject of this dispute) was, in fact, carried out in exactly the same way as all previous missions.
78. The usual practice of providing gas oil within Guinea Bissau's EEZ was for the fishing vessel to first request gas oil supplies. On conclusion of an agreement with a supplier, the fishing vessel owner would inform its agent in Guinea Bissau to obtain any permits necessary for the carrying out of refuelling operations.
79. After receiving conformation of the required authorisation (usually by telephone or radio) from the national authority, Fiscalización y Control de Actividades de Pesca (“FISCAP”), the agent would report by telephone to the fishing vessel that the authorisations have been obtained. The owner of the fishing vessel would then inform the FISCAP observers on board the fishing vessels (whose presence on board is a requirement when fishing in the EEZ of Guinea Bissau).
80. A way point and time would then be agreed with the captain of the oil tanker for which authorisation was obtained, and refuelling operations would then be carried out in the location agreed.
81. Other than that, no type of authorisation or formality is directly required of oil tankers rendering refuelling services outside territorial waters. An oil tanker such as the *VIRGINIA G* would render the services as agreed with the fishing vessel operator, with the operator of the oil tanker having ensured that the fishing vessels held their respective licenses, and that observers were on board to oversee the refuelling operations.
82. In relation to the above paragraphs, reference is made to **Annex 1** and **Annex 4**.

III. Suspicious and non-transparent practices by the authorities of Guinea Bissau

83. In setting out the context to the matter, it is appropriate to indicate that the dispute surrounding the activities and the arrest of the *VIRGINIA G* should be understood in context.
84. Indeed, this episode took place in circumstances that point towards organised yet non-transparent methods adopted by a number of high-ranking civil servants in Guinea Bissau.
85. Penn Lilac was never convinced that the requirement to obtain an authorisation for bunkering was in line with international law. Moreover, there were indications that the way in which such authorisations were managed and issued by certain Guinea Bissau officials, was, in fact, abusive and illegal, and carried out against the constant threat of seizure of vessel and cargo.
86. The events of the 21 and 22 August 2009 further supported this position. The *VIRGINIA G* was arrested along with two other vessels, the *AMABAL I* and *AMABAL II*. However, the two vessels were released very shortly after, whilst the *VIRGINIA G* was kept in detention.
87. National news bulletins and press articles published after the arrest mentioned the *VIRGINIA G*'s arrest, but no reference was made to the arrest of the *AMABAL I* and the *AMABAL II*. Similarly, practically identical press articles that appeared in local newspapers made no reference to the vessels arrested at the same time as the *VIRGINIA G*. Moreover, statements made by the Director of FISCAP, Hugo Nosoliny Vieira, appeared conclusive in their allegations against the *VIRGINIA G* (**Annex 14**).
88. On contacting the owner of the *AMABAL* vessels, Penn Lilac was informed that the release of the vessels had been obtained after transferring one hundred thousand Euro (€100,000) into the personal Portuguese bank account (Banco Espírito Santo) of Carlos Musa Baldé (the Guinea Bissau Minister of Fisheries), through a certain Mr Hamadi Busarai Emhamed as intermediary. The *AMABAL* vessels were released but not before the military took approximately 10 tons of fish from on board (this event is explained in more detail in **Annex 4**).
89. Although Penn Lilac had long suspected that the national civil service of Guinea Bissau had been acting in a non-transparent manner, Penn Lilac decided that on this occasion it would not acquiesce to the circumstances. In fact, it is safe to say that the *VIRGINIA G* case contributed to the exposure of the suspicious practices in Guinea Bissau.
90. A few months after the arrest of the vessel, and on the strong opposition applied by Penn Lilac (specifically by its representative José Antonio Gámez Sanfiel), the Attorney General of Guinea Bissau launched an investigation into an alleged corruption network concerning the transfer of funds from the Ministry of Fisheries and the irregular granting of licences to foreign vessels operating in Guinea Bissau's waters.

91. As a result of this investigation, Hugo Nosoliny, the Director of FISCAP (who was the person who initially signed the authorisation for the *VIRGINIA G* as explained later) was arrested on 17 December 2009 as a precautionary measure, together with other high civil servants such as Cirilo Vieira, Director of the Artisanal Fisheries. They were accused of embezzlement of public funds, diversion of funds of the Ministry of Fisheries to private accounts, and irregular concessions of licences to foreign vessels.
92. On 23 December 2009, the former Minister of Fisheries and actual Minister of Agriculture, Carlos Mussá Baldé, resigned from office in order to be heard before court in relation to the investigation, where he had to clarify his and Mala Sané’s responsibilities in the alleged corruption network.
93. On 30 December 2009, following the hearing of Carlos Mussá Baldé, Malal Sané, General Director of Industrial Fishery, was also put under preventive detention.
94. In this context there were also founded suspicions that one of the key members in the network was Hamadi Busarai Emhamed, ex-honorary consul of Spain in Guinea Bissau. Mr Emhamed was, at the time of the dispute, the representative of the agency Bigajos, which handled authorisations granted to Spanish fishing vessels operating in the waters of Guinea Bissau, as with this dispute.
95. A selection of press articles relating to these events is attached as **Annex 15**.

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IV. August 2009 - the refuelling of the BALMAR fishing vessels

96. **Annex 16** is an illustration of the different entities involved in the dispute, as described below, which is being provided for purposes of ease of reference.
97. In August 2009 the Las Palmas-based Spanish fishing company Empresa Balmar Pesquerías de Atlántico (“Balmar”) was operating fishing vessels in the EEZ of Guinea Bissau. These were the *AMABAL I*, *AMABAL II*, *RIMBAL I* and *RIMBAL II* (collectively the “Fishing Vessels”).
98. On 7 August 2009, Balmar purchased 297 MT of gas oil from Lotus for the refuelling of the Fishing Vessels, which were to be delivered by the *VIRGINIA G*. As explained above, at this time, the *VIRGINIA G* was under charter to Lotus and being managed by Gebaspe.
99. **Annex 17** is a proforma invoice issued by Lotus to Balmar, dated 7 August 2009, for the purchase of two hundred and ninety seven (297) MT (270MT plus 10%) of gas oil. At a cost of seven hundred and thirty United States Dollars (US\$ 730) per MT, the total value of the gas oil cargo purchased by Balmar was of two hundred and sixteen thousand and eight hundred and ten United States Dollars (US\$ 216.810,00).

100. The intended date of supply of the gas oil was 15 August 2009.¹¹ However, as at 17 August 2009, the vessel was delayed, and a precise date could not be calculated at that point (**Annex 34**).
101. **Annex 18** is a declaration by Lotus representative Robert Cockx (dated 14 September 2009, and, therefore, after the arrest of the *VIRGINIA G*) who confirms what is stated in the proforma invoice. Moreover, he states that on the 7 August 2009 Lotus was engaged by Balmar to provide gas oil to the Fishing Vessels via the oil tanker *VIRGINIA G*, and that, as was usual, Balmar would apply for, and obtain, the authorisations required under the law of Guinea Bissau.
102. The relevant Guinea Bissau national authority was FISCAP, which is the agency responsible for granting such authorisations (within the auspices of the Guinea Bissau Fisheries Ministry).
103. In the final part of his statement (**Annex 18**), Robert Cocks states that once the requirements to obtain such authorisations were fulfilled by Balmar, the *VIRGINIA G* was ordered to proceed to supply the fuel oil to the Fishing Vessels in the EEZ of Guinea Bissau.¹²

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V. The authorisation was obtained from Guinea Bissau for the *VIRGINIA G*'s August 2009 mission

104. This section will set out the manner in which the authorisation was obtained for the August 2009 mission of the *VIRGINIA G*.
105. By correspondence dated 14 August 2009, Balmar's agent in Guinea Bissau, Bijagos Lda ("Bijagos"), requested authorisation from FISCAP to carry out refuelling operations in the EEZ of Guinea Bissau.
106. By letter dated the same 14 August 2009 (reference N^o: 180/GCFISCAP/09, signed and stamped by Hugo Nosoliny Viera, the Director General of FISCAP), FISCAP authorised the refuelling services to be rendered to the Fishing Vessels. (**Annex 19**).
107. The letter of authorisation made reference to the request by Bijagos, and demanded information in relation to the coordinates of the refuelling operation, as well as the date and time of refuelling and the name of the fuel oil tanker which would render the service.

¹¹ The proforma invoice (Annex 17) mentions the date of delivery in the lower section of the page as being the 15 August 2008, which should have read 15 August 2009.

¹² It is common practice for the buyer of the fuel oil to request the authorisations necessary when refuelling is carried out in the EEZ of, in this case, Guinea Bissau. Where the service is intended to be carried out in territorial waters (not the contiguous zone) of a State, it is usually the oil tanker itself, or rather its owner, who requests the authorisations.

108. Bijagos replied by letter dated 20 August 2009, informing FISCAP that the coordinates of the refuelling operations would be “17,35 and 12,00”, and the service would be carried out at 1600hrs on the 21 August 2009, by the *VIRGINIA G*. The letter was received and stamped by FISCAP (Ref: 1106/2009) on the same date (**Annex 20**).
109. It is important to note, at this stage, that the way in which the authorisation is transmitted is both verbal and written, and that the documentation relating to the authorisation and the rendering of refuelling services can sometimes be unsynchronised. In this case, the agent of the Fishing Vessels communicated the authorisation to the Fishing Vessels, who then informed the FISCAP observers and the *VIRGINIA G*. All was done verbally, using telephone and radio. The documents in **Annex 19** and **Annex 20** were obtained after the arrest, when the parties involved were investigating the situation, as will be explained further on in this section.
110. It is also useful to note the exchange of correspondence that took place between Balmar (the consignee of the gas oil) and two of its vessels, a few days after the arrest of the *VIRGINIA G*, when Balmar was trying to ascertain certain important facts. The correspondence is attached as **Annex 42** (two e-mails marked "Documento N^o 1" and "Documento N^o 2"), however it is being reproduced hereunder – translated to English – for ease of reference:

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

111. Similarly, the captain of the *VIRGINIA G* confirms, in his statement (**Annex 1**), that he was given confirmation that the authorisation had been issued.
112. This was, indeed, meant to be a mission like any other.

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VI. The journey of the *VIRGINIA G*: from Las Palmas, via Mauritania and on to Guinea Bissau

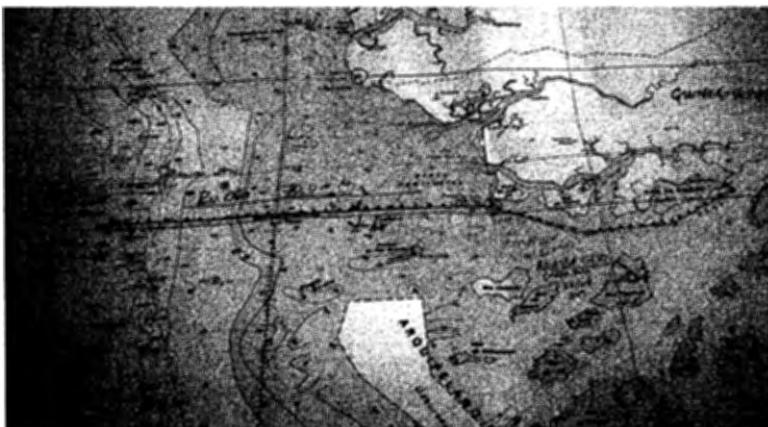
113. In order to provide additional background, this part will briefly explain the activities of the *VIRGINIA G* during the days preceding the events in dispute.
114. On the 29 June 2009, the *VIRGINIA G* arrived at the port of Las Palmas de Gran Canaria, and remained in port until 5 August 2009 (**Annex 21**). During her stay, the main engines were repaired (clutch) and maintenance was carried out on deck. Upon completion of maintenance, the vessel was loaded with 1,310.53 Tons (1,541.80 m³) of gas oil destined for supply to a number of fishing vessels operating off the coast of Mauritania (reference is made to the statements of the captain and chief mate of the *VIRGINIA G*, **Annex 1** and **Annex 2**).
115. Prior to her departure, a detailed inspection was carried out by Port State Control authorised officials, in accordance with the Paris Memorandum of Understanding of Port State Control (**Annex 22**).
116. Between the 09 August and 16 August 2009, the *VIRGINIA G* supplied 1,274.35 Tons (1,499.24 m³) to a number of fishing vessels in the EEZ of Mauritania, following which the *VIRGINIA G* was left with 36.18 Tons (42,56m³) of gas oil on board.
117. On 17 August 2009, 1002.3 Tons (1,160.07 m³) of gas oil were loaded onto the *VIRGINIA G* from the *IBALLA G*, in the bay of Nouadhibou (Mauritania).
118. On completion of loading, the *VIRGINIA G* commenced a new trip, this time under charter by Lotus. The *VIRGINIA G* was ordered to supply two fishing vessels the *MAR TERRA* and the *BALAMIDA* (at the time operating off the coast of Mauritania) with gasoil.
119. On completion of the refuelling of the *MAR TERRA* and the *BALAMIDA*, 17.28 Tons (20m³) of gas oil were transferred from the *VIRGINIA G*'s cargo tanks to its consumption tanks.
120. On the 19 August 2009 the *VIRGINIA G* was ordered to proceed towards the EEZ of Guinea Bissau in order to supply the Fishing Vessels, that is, the *AMABAL I*, *AMABAL II*, *RIMBAL I* and *RIMBAL II*.
121. On the 20 August 2009, the *VIRGINIA G* supplied gas oil to the *RIMBAL II* (115 Tons (133.10 m³)) and the *RIMBAL I* (81 Tons (93.75 m³)) with confirmation of the granting of the authorisation having been received by the captains of the two fishing vessels.
122. By the time the refuelling of the *RIMBAL II* and the *RIMBAL I* had been completed, the captain of the *VIRGINIA G* had not received any news from the *AMABAL I* and *AMABAL II*. The captain then received information from the captains of the *RIMBAL* vessels that the *AMABAL I* and *AMABAL II* had been arrested in the port of Guinea Bissau, and that there had been no communication with them.

123. At 2300hrs on the 20 August 2009, the fishing vessel *AMABAL II* called the *VIRGINIA G* and informed the captain that the *AMABAL* vessels had been released. Accordingly, a way point and an estimated time of arrival were planned for the supply of fuel.
124. On the 21 August 2009 the *AMABAL II* was supplied with 113 Tons (130.78 m³) of gasoil.
125. In relation to the above paragraphs, reference is made to **Annex 1**, **Annex 2** and **Annex 4**. Reference is also made to an office ledger kept by Gebaspe/Penn Lilac noting the events of the period in question based on the captain's information (**Annex 23**).

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VII. The arrest and detention of the *VIRGINIA G*

A. The arrest – 21 and 22 August 2009



126. In relation to the following paragraphs, reference is made to **Annex 24** and to the relevant parts of **Annex 1**, **Annex 2** and **Annex 3**.
127. 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.
128. Captain Eduardo Blanco Guerrero states, in this affidavit, that on the 21 August 2009 at 1900 hours, being in the position latitude 11° 48' N and longitude 017° 31.6' W (approximately 60 miles (96.56 kilometres)) off the Guinea Bissau coast and, therefore, outside the territorial sea and contiguous zone of Guinea

Bissau) the *VIRGINIA G* ship under his command was boarded violently by six (6) persons (**Annex 24**).

129. As witnessed by Captain Blanco Guerrero and his crew, the *VIRGINIA G* was boarded unannounced, by men who bore no identification, three of them carrying fire arms (AK-type). The *VIRGINIA G* was visibly flying the Panamanian flag and could easily be identified by its IMO number, painted on the front of the bridge, and by its name on the bow and on the stern.
130. During the assault the crew was confined to the accommodation quarters and were kept there at gunpoint. Similarly, the officers on the bridge were kept there at gunpoint.
131. The captain was prohibited from communicating with the owners of the *VIRGINIA G*.
132. Given the speed of the assault, the weapons and threats against their lives, as well as the fact that the men were not identifiable, the situation appeared to be one of attack or assault, possibly by pirates. When Captain Blanco Guerrero finally attempted to ask for identification, he was only informed of the identity of one of the men: Joao Nunes Ca from FISCAP.
133. 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.
134. The voyage took place under very difficult conditions, endangering the crew, the ship and the environment, and this for the following reasons:
 - a. The captain was ordered to sail at night, with near zero visibility caused by the rain. He was not allowed to use any of the communications equipment normally used to transmit signals to alert ships in the vicinity of the *VIRGINIA*;
 - b. The crew was highly anxious and the captain feared that in case of emergency it would not have been possible to engage in the planned emergency and security plans/protocols. The emergency plans/protocols established a series of actions and controls that would not have been executable by the crew since the crew was detained in the accommodation quarters. The usual posts were not manned (main engines, auxiliary engines, equipment, etc). In other words, the crew could not have carried out their tasks whilst the vessel was sailing (under orders of the FISCAP officials), and the normal operational parameters were not being monitored or controlled. This situation was inherently dangerous and could, of itself, have led to a serious emergency situation.
 - c. The journey was made without the use of navigational charts of the Guinea Bissau Port and its approach. This amounted to unsafe navigation and

substantially increased the possibility of running aground in areas of low depth, potentially resulting in the loss of the vessel, human life and irreparable damage to the environment.

- d. No adequate pilot was on board to provide the captain with guidance and advice on the approach and arrival in the bay of Guinea Bissau. The VIRGINIA G officers protested, and one FISCAP official stated that he was a pilot. However, he did not have the experience required for this particular voyage. The only nautical map produced was a torn and outdated one. The Pilot also admitted to not being able to perform the requested manoeuvres, such that the captain of the *VIRGINIA G* took over the navigation of the vessel.

135. Later the same evening of the arrest, at 2348hrs and during a brief unguarded moment, the captain managed to send scant information to the owner of the *VIRGINIA G* by electronic mail (**Annex 25**), stating, in Spanish (and as translated):

“Navegamos rumbo a Guinea Bissau, el buque a sido retenido por suministrar combustible a 52 millas, se nos prohíbe hacer cualquier tipo de llamadas”

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“We are sailing to Guinea Bissau, the ship has been arrested for providing fuel at 52 miles, we are forbidden from making any calls.”

136. After much insistence on the captain's part, the FISCAP officials allowed the captain to contact the *VIRGINIA G*'s owner. The captain prepared a fax dated 21 August 2009, which was received on the 22 August 2009 at 0018hrs (**Annex 26**) stating, (as translated):

To: ATTE Don José Antonio Gámez
From: Virginia G

21/08/09

I am proceeding to Guinea Bissau with authorities (officials) on board, they arrived on board whilst delivering fuel to Amabal – 2. The authorities (officials) tell me that permission is required to carry out such operations. The vessel was situated at 52 miles from the coast whilst supplying, I cannot call before tomorrow according to them. As soon as I can I will call. Position when boarded Lat:11° 48N; Log 017° 31W

BRGDS
Master
Eduardo Blanco

137. During the voyage to the port of Bissau, the FISCAP officials forced the captain at gun-point to sign a document written in Portuguese. The captain, not knowing Portuguese (only English and Spanish) and could not, therefore, properly discern the contents of the letter. His request for a copy was rejected. The captain felt constrained to sign the document, even though he could not

understand its contents, given the state of fear and apprehension on board, and in order to avoid an escalation of an already dangerous situation - particularly the threat of use of further force against himself or any member of the crew under his command.

138. The vessel arrived in the port of Bissau on the 22 August 2009 at 1400hrs, and was anchored outside port. The FISCAP officials confiscated the passports of the crew as well as the vessel's documents, thus prohibiting both the crew from disembarking and the vessel from leaving.
139. It should be noted that the *AMABAL I* and *AMABAL II* were also arrested on the 21 August 2009, and were taken to, and detained at, the port of Bissau.
140. On 30 September 2009, the captain sent a more detailed report, providing the owners with more information regarding the events of the 21 and 22 August 2009 (**Annex 27**).

B. 14 months of detention - the situation on board

141. In relation to the following paragraphs, reference is made to the relevant parts of **Annex 1, Annex 2, Annex 3 and Annex 4**.
142. The situation for the crew on board was one of stress and anxiety as the crew felt captured or imprisoned at the hands of the authorities of Guinea Bissau.
143. On 28 August 2009 at 1300 hours eight FISCAP inspectors/officials boarded the vessel and carried out an inspection of the ship. They inspected all the equipment of the bridge, deck, engine room and store rooms and then requested the expiration dates of the vessel's certificates and asked for the characteristics of the equipment. These were the same certificates that were already in their possession, at their offices.
144. The officials took photos of the vessel and also inspected the cargo tanks by taking soundings. When the captain asked for the purpose of the inspection, he was told that it was to know the technical condition of the vessel and to verify the amount of gas oil on board.
145. At the end of the inspection the captain was asked to sign a report. However, when he demanded a copy (in order to inform the owners and agents) he was told that this was not possible as the inspection was an internal matter. The captain replied saying that henceforth he would not sign any further documentation, unless signed by the vessel's agent.
146. The vessel remained at anchor in the Bay of Guinea Bissau, guarded by armed soldiers.
147. On 27 October 2009, FISCAP representatives again boarded the vessel and, once again, inspected the cargo tanks (soundings) and the vessel. They informed

the captain that the following day the vessel would have to be docked at the port, and that the crew would have to abandon the vessel.

148. However, between 28 October 2009 and 5 November 2009 the vessel remained anchored in the Bay of Guinea Bissau, guarded by armed soldiers.
149. On 6 November 2009, armed soldiers boarded the *VIRGINIA G* and violently and threateningly forced the captain to berth the vessel against a pier so that the cargo of gas oil on board could be discharged. On this occasion it was possible to inform the owners, and, through the swift efforts of their attorneys, it was also possible to avert the action of the military. The vessel was returned to anchor on 12 November 2009 (**Annex 53** and **Annex 54**, as explained in more detail below).
150. Between 12 November 2009 and 19 November 2009, the vessel remained anchored and guarded by armed soldiers.
151. On 20 November 2009, armed soldiers once more came on board and, threateningly (brandishing fire arms and in an intimidating manner), told the captain that it would be in his interest to obey their orders. The captain was forced to berth the vessel to the pier for discharge of the gas oil on board.
152. The 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 Combustibles de Guinéa-Bissau (CLC). The captain informed the officers that there was an order from the Bissau Court prohibiting them to take the product from the vessel. However, the letter stated:

By virtue of Decision N° 7 of the Maritime Inspection Interministerial Commission, the Oil Tanker Virginia G was seized ex officio with its gear, engines and cargo, due to the repetitive practice of fishery-related activities, in the form of "non authorized sale of oil to fishery vessels in the EEZ, namely to N/M Amabal 2".

Notwithstanding the judicial order of suspension of the seizure,¹³ and not having the opposition of the Public Prosecutor, the Government Attorney and Supervisor of Legality, (Ref. n° 716/GPGR/09), for the Government to proceed to "(...) the use of the oil that the vessel traded in our EEZ (...)", we order hereby that the Oil Tanker Virginia G be authorized to discharge its content estimated at 436 tonnes gas oil in your premises.

153. Owing to the violent manners of the military, and faced with the officials' threats causing fear amongst the crew members, and, ultimately, to avoid any harm to the crew, the vessel and the environment, the captain obeyed the order and proceeded with berthing manoeuvres.

¹³ Added emphasis.

154. The captain notified the owners, the P&I agent and the lawyers in Guinea Bissau, however, it was not possible to prevent berthing and unloading of product, as on the 6 November.
155. Once berthed, hoses were connected to the vessel and the unloading of all the cargo tanks commenced. The captain was not permitted to take soundings prior to the unloading, nor was he able to record a report of the products discharged.
156. When the cargo tanks were emptied, the military officials sent persons (not crew members) into the tanks, who, using manual equipment and without protection against hazardous gasses, removed the remaining gas oil which could not otherwise be extracted using the vessels pumps. The *VIRGINIA G*'s tanks were left completely dry.
157. The vessel was ordered to return to anchor in the Bay of Guinea Bissau under the same conditions of detention as before.

C. 14 months detention - the procedural, administrative, legal and financial efforts made to solve the situation

158. In relation to the following paragraphs, reference is made to the relevant parts of **Annex 4** and **Annex 5**.
159. The message sent by the captain of the *VIRGINIA G* on the 21 August 2009 was seen by the vessel's owner, José Antonio Gamez Sanfiel, early in the morning of the 22 August 2009. The owner called Manuel Samper, the Director of Security and Operations (Gebaspe), informing him that he had received information from the captain that the vessel had been arrested on the previous day, and that it was heading to the Port of Bissau without the possibility to communicate further.
160. Manuel Samper immediately went to his office and looked up the contact details of the vessel's Protection and Indemnity (P&I) Club (NAVIGATOR). He contacted the P&I Club's representative in Guinea Bissau, AFRICARGO, and spoke to a certain Domingo Alvarenga.
161. Manuel Samper explained the situation over the telephone and followed up the conversation with an e-mail, setting out the main events and detailing the features of the *VIRGINIA G*. Manuel Samper requested Domingo Alvarenga to assist with finding out the situation in Guinea Bissau and with obtaining the vessel's immediate release (**Annex 28**).
162. Manuel Samper then proceeded to inform the vessel's P&I Club in Spain (**Annex 29**) as well as the owner of the Fishing Vessels that were supplied with gas oil, José Baldo, in an effort to obtain evidence that the authorisations for refuelling were available. As has been pointed out, as is normal practice, the *VIRGINIA G* and the Fishing Vessels did not always receive documentary evidence of the authorisation – only confirmation of their existence by telephone and radio.

163. The documents appeared to be in the hands of the Fishing Vessels’ agent in Guinea Bissau, Bijagos. The contact persons were a certain Mr Hamadi (Busarai Emhamed) and Mr Fofana. Manuel Samper then forwarded the contact information of these two persons to Domingo Alvarenga of the P&I Club in Guinea Bissau (**Annex 30**).
164. In an e-mail dated 23 August 2009, Domingo Alvarenga informed Manuel Samper that on the day after the arrest, he contacted Hugo Nosoliny Vieira, the Director General of FISCAP (in fact, the same person who signed the document authorising the refuelling services that led to the arrest of the *VIRGINIA G*) in an attempt to clarify the circumstances surrounding the arrest of the *VIRGINIA G* and two other vessels (a Spanish-owned fishing vessel and a Chinese oil tanker) which were taken to the Port of Bissau and anchored there.
165. Domingo Alvarenga stated that Hugo Nosoliny Vieira personally informed him that the *VIRGINIA G* was found to be the “territorial waters” of Guinea Bissau, rendering refuelling services to fishing vessels without license or authorisation as is normal practice when supplying fuel in Guinea Bissau’s territory (**Annex 31**).
166. After some difficulty in getting in touch with Bijagos, and after applying some pressure on the owner of the Fishing Vessels, on the 25 August 2009 the owner of the Fishing Vessels received a copy of the refuelling authorisation – as issued by FISCAP – from Mr Fofana, and forwarded the document to Manuel Samper (**Annex 32**, which contains as an attachment the same document as **Annex 19** hereto).
167. On the 26 August 2009, Manuel Samper sent the copy of the authorisation to Domingo Alvarenga, who then asked for an accompanying document containing the information required by FISCAP in its letter of authorisation.
168. Manuel Samper requested this document of José Baldo, but Mr Baldo replied that he did not have it, adding that it was the FISCAP observers on board the Fishing Vessels who would normally communicate by radio with the FISCAP offices (in the morning and again in the evening) as to the situation and actions carried out on board. He added that, moreover, it is prohibited to fish in Guinea Bissau in the absence of a FISCAP representative on board (**Annex 33**).
169. Manuel Samper replied by reiterating that he needed to obtain proof that a communication was sent to FISCAP containing information required, and commented that since the observers had to be on board and were required to communicate with FISCAP, then FISCAP should have been aware of the refuelling operations and of the vessel that would be used to supply the gas oil, the date and position (**Annex 33**).
170. On the 26 August 2009 Manuel Samper received the proforma invoice between Lotus and Balmar evidencing the purchase of the gas oil on the 7 August 2009. This invoice had been sent to Mr Hamadi of Bijagos in order that the process for obtaining authorisation could commence (**Annex 34**, which contains as an attachment the same document as **Annex 17** hereto).

171. Manuel Samper again insisted with José Baldo, of Balmar, that it was important to obtain a copy of the communication sent to FISCAP with the information required to fulfil the conditions (**Annex 35**).
172. Later in the evening of the 26 August 2009, Manuel Samper received a copy of the communication from Bijagos to FISCAP, containing the information required for the fulfilment of the conditions applied by FISCAP when issuing its authorisation on the 14 August 2009. The document was forwarded to the *VIRGINIA G*'s P&I Club, specifically to Domingo Alvarenga, who reacted positively, stating that with this information in hand he could now approach FISCAP (**Annex 36**, which contains as an attachment the same document as **Annex 20** hereto).
173. On the 28 August 2009, Domingo Alvarenga wrote to Manuel Samper, explaining that it had so far proved impossible to meet Hugo Nosoliny Vieira (Director General of FISCAP), and that a letter had been sent to FISCAP in relation to the arrest of the *VIRGINIA G* the previous week, which letter provided documentary evidence of the authorisation granted by FISCAP and the conditions fulfilled by Bijagos.
174. In its letter to FISCAP dated 28 August 2009, Africargo, as represented by Domingo Alvarenga, asked FISCAP for a formal clarification on the detention of the *VIRGINIA G* as well as on the possible solutions for the immediate release of the vessel. Documents evidencing the authorisation granted by Hugo Nosoliny Vieira himself, as well as the document sent by Bijagos to FISCAP containing the required information in fulfilment of FISCAP's conditions were attached. Africargo's letter was received by FISCAP on the same date, as evidenced by the stamp at the bottom of the page (**Annex 37**).
175. It is worth reiterating, at this stage, that on this same date - 28 August 2009 - eight FISCAP inspectors went on board the *VIRGINIA G* and carried out an inspection. They inspected all the equipment of the bridge, deck, engine room and store rooms. The officials took photos of the vessel and inspected the cargo tanks by taking soundings. When the captain asked for the purpose of the inspection, he was told that it was to know the technical condition of the vessel and to verify the amount of gas oil on board. At the end of the inspection the captain signed a report. However, when he demanded a copy (so as to inform the owners and agents) he was told that this was not possible as the inspection was an internal matter. The captain replied saying that he would sign no further documents, unless signed by the vessel's agent.
176. On the 31 August 2009, the captain of the *VIRGINIA G* informed Manuel Samper that the fishing vessels *AMABAL I* and *AMABAL II*, which had been arrested at the same time as the *VIRGINIA G*, had been released. Moreover, from what the captain could make of a local radio news bulletin, the military mentioned that the oil tanker *VIRGINIA G* had been arrested owing to an infringement of national law; however no mention was made of the *AMABAL I* and the *AMABAL II* (**Annex 1** and **Annex 4**).

177. José Antonio Gamez Sanfiel and Manuel Samper, therefore, contacted the owner of the *AMABAL I* and *AMABAL II* (José Baldo) who informed him over the phone that he had obtained the release of the vessel after paying one hundred thousand Euro (€100,000) into the personal Portuguese bank account (Banco Espírito Santo) of Carlos Musa Baldé (Guinea Bissau Minister of Fisheries), through Mr Hamadi as intermediary. The vessels were released after the amount was paid, but not before the military stole 10 tons of fish from the *AMABAL* vessels.
178. This news angered Manuel Samper, firstly because it was becoming clear that the real reason for the arrest of the *VIRGINIA G* was unlikely to be that claimed by Guinea Bissau authorities; secondly, because Balmar had negotiating behind the back of Penn Lilac/Gebaspe. Manuel Samper told José Baldo that this was unacceptable, to which Mr Baldo replied: “No estamos en el mismo saco que ustedes” – *you cannot compare our situation to yours* (**Annex 4**).
179. After a somewhat strong exchange of words, José Baldo asked José Antonio Gamez Sanfiel and Manuel Samper whether the conversation was being recorded. José Antonio Gamez Sanfiel and Manuel Samper replied that it was not, and that they were respectable persons who do not do this sort of thing. This last exchange ended the conversation (**Annex 4**).
180. By letter dated 31 August 2009, ten days after the *VIRGINIA G* was arrested, FISCAP informed the owner of the *VIRGINIA G*, through Mr Alvarenga, about a decision taken by the Interministerial Commission of Maritime Surveillance (CIFM), which decision 7/CIFM/09, purported to explain the reasons for the arrest to the representative of the vessel (**Annex 38**).
181. The letter, signed by Hugo Nosoliny Vieira, the Director of FISCAP, and the very same person who had issued the authorisation on the 14 August 2009, stated the CIFM’s decision to (as translated):
- Confiscate ex-officio the oil tanker *VIRGINIA G* with its gear, equipment and products on board in favour of the State of Guinea Bissau owing to the repeated practise of fishing related activities in the form of unauthorised sale of fuel to fishing vessels in our EEZ, specifically to the *AMABAL 2*, and in accordance with paragraph 1 of Article 52, in its wording as set out in DL No. 1-A/2005, and in conjunction with article 3(c)¹⁴ and Article 23 of DL No. 6-A/2000.
182. Domingo Alvarenga informed Manuel Samper that the FISCAP decision can be appealed within 15 days or possibly negotiate a security for the release of the vessel.
183. Also on the 31 August 2009, the captain of the *VIRGINIA G* called Manuel Samper to inform him that a FISCAP representative (called John Mimo) visited the vessel twice, and told the captain that he would look at the owner in a good light if he were to call him, providing the captain with a telephone number to

¹⁴ This should read Article 3(3)(c).

find a solution “a la Africana”, in the African way. Manuel Samper told the captain to declare that anyone who wanted to speak to the owners would have to go through the vessel’s P&I representative. Manuel Samper relayed this information to Domingo Alvarenga, who in turn asked for a meeting with this person (**Annex 39**).

184. It turned out, that the FISCAP official’s name was João Nunes Cá. A meeting was held in Guinea Bissau on the 1 September 2009, during which Domingo Alvarenga showed João Nunes Cá the FISCAP authorisation and the accompanying documents, and also the FISCAP notification of the arrest of the vessel. João Nunes Cá stated that he was aware of the *VIRGINIA G*, and that the matter was entirely in the hands of the Inter-Ministerial Commission, and that he could not help at all (**Annex 40**).
185. By letter dated 4 September 2009, the *VIRGINIA G*’s owners, through their P&I Club, Africargo, sent a letter to FISCAP. Penn Lilac strongly rejected the allegations that the *VIRGINIA G* had violated the laws; denounced the news published by the press (**Annex 14**); condemned the arrest of the crew members; requested FISCAP to state their views on the subject and asked for a swift solution for this unfortunate situation in line with procedures established in the law, including the fixing of a bond or other security for the immediate release of the vessel, its crew and cargo (**Annex 41**).
186. In particular, Penn Lilac denied the statement that the *VIRGINIA G* had repeatedly engaged in unauthorised refuelling activities, and insisted that authorisations had always been obtained for it in the previous months and that there was no sale (let alone unauthorised) of fuel oil as Penn Lilac and Gebaspe were mere carriers of already sold gas oil.
187. On the 7 September 2009 the owner of the *VIRGINIA G* received information from Domingo Alvarenga that the 4 September letter had been received by FISCAP, and that, in relation to the vessel itself, FISCAP had granted permission for the vessel and crew to be supplied with provisions.
188. On the 9 September 2009, Domingo Alvarenga sent, to FISCAP, eight documents in support Penn Lilac’s letter of the 4 September 2009 (**Annex 42**).
189. In the meantime arrangements were underway to appoint lawyers in preparation of the challenge to the FISCAP decision dated 31 August 2009.
190. On the 11 September 2009, the *VIRGINIA G* left its anchorage and berthed in the Port of Bissau to receive supplies. 25,000 litres of water were supplied and a pipeline in the engine room was repaired.
191. By letter dated 11 September 2009, FISCAP replied to the letter sent by the *VIRGINIA G*’s P&I Club (of 4 September 2009). In its letter, FISCAP listed a number of grounds on the basis of which it claimed to be justified in having arrested the *VIRGINIA G* (**Annex 43**).
192. In brief, FISCAP stated that:

1. On the 21 August 2009, FISCAP caught the vessel supplying fuel to fishing vessels in the EEZ of Guinea Bissau;
 2. On an investigation into the matter, it was found that the vessel did not have the required licence to carry out fishing-related activities;
 3. The vessel was arrested and led to the Port of Bissau;
 4. After inspection, it was found that the vessel had 436.666 MT of gas oil on board (attaching the vessel’s plan) (Annexed to FISCAP’s letter);
 5. Having checked the documents during the inspection, it was also found that on 20 July 2009 the *VIRGINIA G* supplied the ships AMABAL I and AMABAL II without any license whatsoever to assist mentioned vessels;
 6. These actions constitute a continuous violation of the fishing laws, specifically relating to fishing-related activities;
 7. These actions were punishable under Article 52 [...];
193. In relation to the contents of the letter sent by Penn Lilac on the 4 September 2009, FISCAP stated, in paragraph 8 of its letter, that:
- a. It is true that the *VIRGINIA G* operated in the waters of Guinea Bissau with license number 19 and 20/MP-OP/09. In fact the document with number 7 was exclusively dedicated to the vessels of the company AFRIPECHE, and valid from the 17 to 24 June 2009. Therefore, these licenses were expired at the moment of seizure last 21 August (licenses annexed to FISCAP’s letter).
 - b. The captain/owner cannot now claim the mechanism through which he was operating in the EEZ of Guinea Bissau.
 - c. It means that the captain/owner know that fishing related activities in Guinea Bissau needed a duly signed authorisation.
 - d. Not abiding by this requirement leads to a violation of the Fishing laws in terms of the abovementioned Article 52 (DL 1-A/2005).
 - e. We are faced, therefore, with a fishing related activity in the form of a non-authorized sale or supply of gas oil in the EEZ of Guinea Bissau.
 - f. It cannot be argued that the agency Bijagos received from FISCAP an authorisation to refuel its fishing vessels (points 1, 2, 3 and 6 of your reply).
 - g. Indeed, from the correspondence between Bijagos and FISCAP it only results that FISCAP:
 - i. Accepts that the fishing vessels of Bijagos can receive fuel from vessels carrying out fishing related activities which are already authorised according to law
 - ii. Although the vessel carrying fishing related activities has the authorisation, it is required to indicate the coordinates of the area where the operation will take place.
 - iii. That the carrying out of fishing related activities must be carried out in the presence of FISCAP agents

194. FISCAP's letter continued:

- 9) It is clear that these requirements were neither verified nor respected by the captain of the *VIRGINIA G*.
- 10) The statement of your point 4, as to how the fishing observers were aware of the operation and did not denounce its illegality, makes no sense;
- 11) In terms of the Fishing laws, a fishing observer has no powers to verify whether an infringement is taking place; an observer can only denounce those who violate the law;
- 12) The fact that the captain/owner operated with a license from the 17 to the 24 June 2009 shows that the captain/owner is aware of the procedure for obtaining a license in Guinea Bissau for the carrying out of fishing related activities; therefore, he acted deliberately, knowing that his behaviour is not permitted by law.
- 13) Therefore, there is a continuous and repeated infringement of the general Fishing laws since on the 20 July 2009 there are records of the commitment of the same infringement by the *VIRGINIA G*.
- 14) Regardless of how the owners wants to understand the situation, it is clear that the refuelling operations in the EEZ of Guinea Bissau must be preceded by a license, which did not happen on the 21 August 2009 when the *VIRGINIA G* was intercepted in our EEZ while operating without a license for fishing related activities.

195. FISCAP concluded that there was an infringement committed by the captain of the *VIRGINIA G* and that the decision of the Inter-Ministerial Commission for Maritime Surveillance to sanction the vessel is legal, fair and adequate.

196. By letter dated 14 September 2009 (**Annex 44**), Penn Lilac replied to FISCAP's letter of 11 September 2009, stating, in summary, that (as translated):

1. The accusation (in paragraph 5 of FISCAP's letter of the 11 September 2009) that the *VIRGINIA G* was supplying vessels on the 20 July 2009 is false. The vessel was, in fact, in the Port of Las Palmas Port as evidenced by the dates on the documents attached to Penn Lilac's letter.
2. In light of the point raised in the above paragraph, the registration of a repeated illegal practice is false.
3. They were aware of the mechanisms for operating in the EEZ of Guinea Bissau, as confirmed by Bijagos which received orders from Balmar, and who hold the relevant authorisations to carry out the activities legally.
4. If it is the case that the authorisations do not exist, then one is facing an omission by BIJAGOS to obtain the oil tanker's license and the incitement by the BIJAGOS Agency to commit an offence.
5. As demonstrated, by the documents presented by FISCAP in its letter N° 208/FISCAP/09 of the day 11/09/09, the *VIRGINIA G* - every time it

realized operations within the EEZ of Guinea Bissau EEZ - has operated in compliance with the General Law of Fisheries.

6. as well as not pleading the ignorance of the mechanism under which one operates in the EEZ of Guinea Bissau, the rules of international law are known in relation to the definition of the Exclusive Economic Zone “THAT SHALL NOT EXTEND BEYOND 200 NAUTICAL MILES FROM THE BASELINES STARTING FROM THE ONE MEASURED IN THE TERRITORIAL SEA, AND IN WHICH THE STATE HAS SOVEREIGN RIGHTS FOR THE PURPOSE OF EXPLORING, CONSERVING AND MANAGING THE NATURAL RESOURCES OF THE WATERS SUPERJACENT TO THE SEABED AND OF THE SEABED AND ITS SUBSOIL”.
 7. For these reasons the seizure of the vessel was carried out about 60 nautical miles from the Guinea Bissau coast, this zone corresponding to Exclusive Economic Zone and given that the activity that was carried out did not constitute a violation of the exploration, conservation and managing of the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil, it must be understood that the State of Guinea Bissau has no competence or jurisdiction in this ambit.
 8. For the reasons explained in the previous points, it is not accepted that it could be concluded that the decision of the Interministerial Commission of Maritime Surveillance to sanction the vessel *VIRGINIA G* is legal, just and appropriate.
 9. The authorities have not followed the established procedures, and no answer has yet been received denying the opportunity to defend their interests by not knowing which procedure to follow, further requiring guidance on this point.
197. In concluding, Penn Lilac, again, asked for the release of the vessel, crew and cargo.
 198. In the interim, by letter dated 15 September 2009, the vessel’s P&I Club agent delivered a letter to International 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 (**Annex 45**).
 199. By letter dated 16 September 2009, Africargo requested the Ministry of Fisheries to return the passport of crew member and Chief Mate Fausto Ocaña Cisneros (as explained in another part of this Memorial and in the statement by Mr Cisneros), who needed to leave the country for urgent personal reasons. FISCAP replied by letter dated 22 September 2009, denying the request and stating that the decision is within the competence of the Inter-Ministerial Commission (**Annex 46**).
 200. On the 23 September 2009, the owner of the *VIRGINIA G*, through its P&I Club Africargo, received a letter from FISCAP (**Annex 47**), wherein the following was stated:

N/REF N° 227/GCFISCAP/09

Bissau, 23 September 2009

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

201. On the 25 September 2009, by letter with the same date, the owners, through their representative Africargo, were notified by FISCAP of the actual confiscation of the vessel and all cargo on board owing to the stated violation of the Fishing laws, and owing to the lack of reaction, by the owner, to the notification of decision No. 07/CIFM/09 dated 27 August 2009 (**Annex 48**).
202. By letter dated 28 September 2009, Penn Lilac vehemently denied the statements made by FISCAP in its letter dated 25 September 2009. Penn Lilac strongly denied the alleged failure to react to the notification of arrest, referring, to each item of correspondence sent up until that point, and to all the supporting documents. Penn Lilac reiterated the importance of avoiding further damage and liability and the intervention of the courts, including international tribunals. Penn Lilac, once again, solicited FISCAP to release the vessel, its crew and the cargo (**Annex 49**).
203. On the 5 October 2009, the *VIRGINIA G*'s P&I Club received a letter from FISCAP, dated 30 September 2009. It contained an apology and a correction in relation to its letter of the 11 September 2009, wherein the date 20 July 2009 (in paragraph 5) should have read 20 June 2009.
204. FISCAP also listed a number of grounds in support of its continued detention of the *VIRGINIA G* (**Annex 50**).
205. The letter concluded by stating that the vessel's gasoil 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.
206. On the 1 October 2009, the owners of the *VIRGINIA G* engaged the law firm Miranda Correia Amendoeira & Associates as counsel, and instructed the firm to commence the necessary judicial procedures in Guinea Bissau to release of the vessel, crew and cargo.

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

207. On the 27 October 2009, the captain of the *VIRGINIA G* contacted the vessel's owner, informing him that FISCAP inspectors were on board the vessel, taking soundings of the cargo tanks. The captain reported that the FISCAP inspectors

told him that he would have to berth the vessel the following day and that all the crew would have to leave the vessel (**Annex 1** and **Annex 4**).

208. On receiving this call, the owner of the vessel immediately informed the company’s lawyers, Miranda, and P&I Club agent in Guinea Bissau, asking them to assist in clarifying the situation (**Annex 51**). The owner of the *VIRGINIA G* then contacted the captain to inform him of the efforts being made.
209. The captain then informed the owner that the FISCAP representatives on board told him 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 the law firm or, indeed, by the P&I Club who had been in constant contact with FISCAP throughout the previous weeks and months. The owner informed the company’s lawyers to this effect. (**Annex 52**).
210. On the 4 November 2009 the owners were informed by their lawyer that according to their investigations in Guinea Bissau, the government had not yet ordered the execution of the confiscation of the *VIRGINIA G*.
211. In the meantime, the owner of the *VIRGINIA G* 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 issued a judgement ordering the Secretary of State for Fisheries to "refrain from the practice of any and all acts relating to the confiscation of the vessel *VIRGINIA G* and its products on board and that the applicant’s (PENN LILAC TRADING) crew is allowed entry to the vessel to proceed with their usual services." (**Annex 54**)
212. The operative part of the Judgement stated:

V – Operative part

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

- a) Order the suspension and warned the defendants (FISCAP, the Inter-ministerial Commission for Fisheries) to refrain from the practice of any and all acts concerning the confiscation of the vessel Virginia G and any product onboard until final decision in the declaratory process that will be brought.
- b) Authorize the applicant and force the defendants to allow the entrance of applicant’s staff [crew] in the vessel to proceed with its services of maintenance of the vessel without prejudice to the parties bringing a main action.
- c) Authorize the applicant to perform the tasks related to the normal management and maintenance of the vessel.

- d) In case the defendants infringe or prevent the fulfilment of the above mentioned, they incur in the penalty of the crime of disobedience, in terms of the criminal law.
 - e) Determine the personal notification to the defendants and the applicant in these terms.
 - f) Costs by the applicant with the court fee reduced to $\frac{1}{4}$ - Article 453 and 446 both from the Code of Civil Procedure.
213. On the 6 November 2009, the captain of the *VIRGINIA G* called the owner to inform him that that he had been ordered by Commandante Mita, the Port administrator, to berth the vessel at the fuel dock at around noon. The captain asked Commandante Mita for a written order, to which the reply was that no such document would be necessary as these were “orders from above”.
214. The captain then called the owner again to report that the vessel had been violently taken over by Navy officials who gave the order for the vessel to proceed to berth.
215. The owner of the *VIRGINIA G* immediately informed the company’s and the P&I representative (Domingo Alvarenga). The quick efforts were successful and the authorities were notified of the court order suspending the seizure (**Annex 53**).
216. The captain then informed the owner that the vessel was berthed at the fuel pier, but that he had not permitted any hoses to be connected for the unloading of the gas oil on board since he had seen no official document of confiscation. At that point, the officials left the vessel, leaving on board four military personnel (**Annex 53**).
217. On 10 November 2009 the vessel’s lawyers informed the owner of the *VIRGINIA G* that they had requested the Court to notify the Ministry of Defence and the Ministry of the Economy (copying in both ministries), in order to inform them of the Judge’s order, and to avoid either entity issuing further orders for the confiscation of the vessel and for the sale of the cargo on board, with the excuse of not being aware of the Judge’s order (**Annex 55**).
218. On the 20 November 2009, the captain of the *VIRGINIA G* called the owner of the vessel to inform him that military personnel again boarded the vessel in a violent and threatening manner, ordering him to berth the vessel.
219. This time, the captain was handed a document issued by the Ministry of Finance forward dated to the 30 November 2009 (**Annex 56**). It was addressed to the *Compañía de Lubricantes y Combustibles de Guinéa-Bissau (CLC)* and stated:

By virtue of Decision N° 7 of the Maritime Inspection Interministerial Commission, the Oil Tanker Virginia G was seized ex officio with its

gear, engines and cargo, due to the repetitive practice of fishery-related activities, in the form of "non authorized sale of oil to fishery vessels in the EEZ, namely to N/M Amabal 2".

Notwithstanding the judicial order of suspension of the seizure,¹⁵ and not having the opposition of the Public Prosecutor, the Government Attorney and Supervisor of Legality, (Ref. n° 716/GPGR/09), for the Government to proceed to "(...) the use of the oil that the vessel traded in our EEZ (...)", we order hereby that the Oil Tanker Virginia G be authorized to discharge its content estimated at 436 tonnes gas oil in your premises.

- 220. Owing to the violent behaviour of the military, and faced with the officials' threats causing fear amongst the crew members, and, ultimately, to avoid any harm to the crew, the vessel and the environment, the captain obeyed the order and proceeded with berthing manoeuvres.
- 221. The owners, the P&I Club and the lawyers in Guinea Bissau, did their utmost to prevent the events which were unfolding on board, but were unsuccessful. In fact, the cargo tanks of the *VIRGINIA G* were completely emptied of their contents.
- 222. The vessel was then ordered to return to anchor in the Bay of Guinea Bissau under the same conditions of detention as before.

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IX. The difficult situation on board and the perilous state of the owning company until the vessel's release in October 2010

- 223. In relation to the following paragraphs, reference is made to **Annexes 1 to 6**.
- 224. The vessel's lawyers in Guinea Bissau instituted legal actions in relation to the abovementioned events, which the owners considered to be in blatant disregard of the terms of the order granted by the Guinea Bissau Court.
- 225. In the meantime, the *VIRGINIA G* remained detained, and the situation on board as well as within the owning company worsened.
- 226. The vessel was detained for 14 months during which the owners made significant legal, administrative and financial efforts both to maintain the vessel and to release it from detention. The owners faced a major challenge in trying to keep the company financially viable, having lost the use of the *VIRGINIA G*. The costs incurred by the owners – running expenses, including salaries, provisions and legal costs – seriously affected the liquidity of the company, also resulting in the loss of the *IBALLA G* which was proceeded against by creditors for failure of payment.

¹⁵ Added emphasis.

227. Living conditions on board the *VIRGINIA G* deteriorated quickly and severely, and remained so until the vessel was released in October 2010. The below facts are being set out to describe the situation.
228. A few days after the gas oil cargo was confiscated, and as reported by ordinary seaman Pablo Cesar Dos Santos Mota (**Annex 3**), military officers appeared on board with a high-ranking military official (possibly a Commander) together with two people who appeared to be of Russian origin. The latter were shown the vessel for a possible sale, with the military officers stating that the vessel already belonged to Guinea Bissau. The captain protested with the military officials, who left shortly afterwards.
229. Throughout a number of weeks, one of the crew members, Fausto Ocaña Cisneros, faced serious problems, in having his passport returned for an urgent personal trip he needed to make to Las Palmas.
230. In his statement, Mr Ocaña Cisneros relates that he needed to appear before the Las Palmas authorities on a specific date in order to renew his residence permit.
231. In order to travel to Las Palmas, Mr Ocaña Cisneros needed his passport, which had been confiscated by the Guinea Bissau authorities. In his efforts to retrieve his passport, Mr Ocaña Cisneros faced incessant and unreasonable administrative hurdles and difficulties. It took four months of considerable personal and diplomatic effort to retrieve his passport, by which time the date on which he was meant to appear before the Las Palmas authorities lapsed.
232. Mr Ocaña Cisneros returned to Las Palmas on the 24 December 2009, four months and three days after the *VIRGINIA G* was arrested. Reference is made to the statement of Mr Ocaña Cisneros, attached as **Annex 2**, for a more detailed description of the difficulties faced in obtaining his passport.
233. The *VIRGINIA G* was kept under constant guard. Military officers were stationed on board and would change shift by means of a small boat that carried them to and from land.
234. The situation on board the vessel became arduous and inhumane:
 - a. There were serious delays in payment of the crew's salaries. This caused serious problems for breadwinner crew members, whose families depended entirely on the money sent to them for subsistence in their home country.
 - b. The owners did not, and could not, send money and provisions on a frequent enough basis as the company was facing serious financial difficulties.
 - c. Provisions had to be heavily rationed, and there were days when there was no food and potable water on board. Rain water would be used as the only source of potable water.

- d. Rain water was also used for washing, cleaning and even cooking. It was collected in plastic containers, previously used for refuse.
 - e. There was insufficient fuel for subsistence on board, such that the crew was denied basic amenities on board, including lack of light at night. On some occasions, the crew had to purchase ice as the only way of preserving the food on board.
 - f. The idle vessel deteriorated quickly, especially the main engine, auxiliary generator and the vessel’s equipment. The company could not adopt a lay-up policy due to the uncertainty as to how long the situation would last.
 - g. The area was infested with mosquitoes, causing several of the crew to contract malaria.
 - h. The crew was kept on board under military guard - effectively imprisoned, with their passports confiscated. Members of the crew were constantly anxious of forceful measures that the military might enforce.
235. The company quickly ran into serious financial difficulty, having lost a main source of income whilst still having to pay expenses such as wages, legal costs and provisions on board the *VIRGINIA G*.
236. It is recalled that the *IBALLA G* was bareboat chartered to Penn Lilac. In turn, she was chartered out to Lotus Federation for 4 years. In fact, both the *VIRGINIA G* and the *IBALLA G* were chartered out to Lotus Federation under similar contracts (see sub-section 1 of this Chapter 2 above).
237. When the *VIRGINIA G* was arrested and detained together with the cargo of gas oil on board, the charter contract with Lotus was rescinded. (**Annex 57**). Owing to this cancellation, the companies with a direct commercial interest in the vessel's operation (Gebaspe SL, Hidrocasa SL and Penn Lilac Trading) lost a main source of income, and experienced sudden liquidity problems.
238. It was not possible to pay the crew, office employees, banks, Finance Ministry, social security contributions, port taxes, agents and suppliers, as the companies were virtually bankrupted.
239. On 6 September 2009 at 0200 hrs the *IBALLA G* berthed in the Reina Sofia pier of the Las Palmas Port to receive bunkers, fresh water and food, when she was seized by creditors via four legal actions (brought by Central Reparaciones La Luz, Albatros, Cepsa and Taller Sanper).The ship *IBALLA G* was docked in the Las Palmas Port. The crew then also seized the vessel for lack of payment of wages.
240. The *IBALLA G* was retained, and remains, in Las Palmas Port to this date.

241. In an attempt to remain viable and to regain what was lost, Penn Lilac began legal actions against the Guinea Bissau Government. It sold 50% of its shares to raise capital for the legal action. Gebaspe and Hidrocasa, their contract with Penn Lilac being their main source of income, were declared bankrupt.
242. It is worth recalling that the Regional Court of Bissau had considered the financial prejudice that could be caused to the owners of the *VIRGINIA G* as a most valid reason for issuing the order preventing the seizure of the vessel and its cargo (**Annex 54**).

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X. The release of the *VIRGINIA G* and the immediate repairs required

243. By a unilateral decision dated 20 September 2010 (Decision n° 5/CIFM/2010), received by the owner's P&I Club on 18 October 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 his Excellency the Prime Minister regarding to the danger to the security of the maritime navigation caused by the long presence of the vessel *VIRGINIA G*, seized in our *EZZ* because of the practice of non- authorized fishing in its form of fishing-related activity without licence;

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

Therefore, the CIFM decides without more delay:

1. To order the release of the vessel *VIRGINIA G* and to consider repealed the previous Decision which orders its confiscation.
 2. To notify the owner of the vessel, or its captain and/or its local representative of this Decision.
 3. This Decision enters immediately into force.
244. The gas oil cargo, however, was never returned, nor was any compensation offered by Guinea Bissau for its actions over the previous months.
245. The owners of the vessel immediately commenced preparations to put the vessel back in service. Before this, however - and as shall be better explained in the full economic and damages report - a preliminary survey by Panama Shipping Registrar Inc. was carried out to determine the scope of the first necessary repairs that needed to be carried out (**Annex 59**).
246. Several deficiencies were discovered, as contained in the Panama Shipping Registrar Inc. report, and it was considered sensible to apply a two-stage repair plan:

- a. **Urgent repairs** needed to make the vessel seaworthy and certifiable as soon as possible. This involved mainly carrying out works on the main engines, auxiliary generators, cargo system and bridge equipment.
 - b. **Secondary repairs** to be carried out whilst the vessel is in service, specifically to the vessel's structure, machinery and equipment.
247. It proved impossible to find the right equipment and technical skill in Guinea Bissau, and a special team had to be brought in from Las Palmas and Santa Cruz de Tenerife (Canary Islands, Spain).
248. The parts and provisions had to be brought in by several container loads from Las Palmas Port to Guinea Bissau.
249. This was the only way for the vessel to be supplied with the necessary personnel and parts for the urgent and serious repairs to be carried out as a consequence of the arrest and detention of the vessel. The limited number of photos available illustrating the extent of deterioration are attached as **Annex 60**.
250. The *VIRGINIA G* finally started operating again in December 2010 by virtue of a charterparty agreement entered into with another gas oil provider entered into on the 10 December 2010.

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CHAPTER 3**STATEMENT OF LAW****I. Procedural aspects**

251. In terms of Article 293(1) of the Convention, the International Tribunal (having jurisdiction as submitted above) shall apply the Convention and other rules of international law not incompatible with the Convention. If the Parties so agree, the International Tribunal is empowered to decide the case *ex aequo et bono*.
252. Furthermore, as stated by the Parties to the Convention in the last paragraph of the preamble, matters not regulated by the Convention continue to be governed by the rules and principles of general international law; indeed, it is submitted, including “by the general principles of law recognised by civilized nations.”¹⁶
253. Panama, therefore, submits that whilst the majority of the questions and claims raised in this claim against Guinea Bissau relate mainly to the application of the Convention, and whilst the majority of the said questions are argued within the framework of the Convention, it is not to be excluded that other rules and principles of international law may be introduced and relied upon.
254. Panama reserves all its rights to introduce and rely on any and all relevant rules and principles of general international law, treaties, customary international law and other various sources of international law, as may be required to be introduced and developed, throughout the process of this case, in the pursuance of its claim against Guinea Bissau.

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II. Violations committed by Guinea Bissau

255. In this section, Panama addresses the substantive violations of the Convention and of general international law by Guinea Bissau. On the basis of the factual background set out in Chapter 2, Panama will submit, in this Chapter 3, that Guinea Bissau acted illegally and in violation of its international obligations, and that as a consequence of its wrongful acts, it is responsible for the injury caused, as set out in Chapter 4.
256. The arguments set out by Panama below are without prejudice to other arguments that Panama may raise at a later stage in this case, as may be necessary, in respect of which Panama reserves its rights.

¹⁶ Article 38 of the Statute of the International Court of Justice:
http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II

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

257. The events that gave rise to this dispute, that is, the bunkering services rendered by the *VIRGINIA G* to the *AMABAL II* on the 21 August 2009, were carried out beyond the territorial waters and beyond the contiguous zone of Guinea Bissau, but within its EEZ, at position latitude 11° 48' N and longitude 017° 31.6' W (approximately 60 miles) off the coast of Guinea Bissau. The position is marked as “A” on the copies of the nautical map attached as **Annex 24**.
258. It is conceded 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.
259. The *Saiga* cases¹⁷ were an opportunity for the International Tribunal to consider the legal consequences of such bunkering activities. In the *Saiga No.2 Case*,¹⁸ rival contentions were made by both St. Vincent and the Grenadines and Guinea. However, the customs jurisdiction context of the dispute ultimately made it unnecessary for the International Tribunal to make any general findings about the legal aspects of bunkering in the EEZ, despite invitations by the Parties.
260. Panama submits that the dispute at hand again raises the question as to whether bunkering services provided in the EEZ of a coastal State 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).
261. It is, indeed, Panama's contention 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).
262. Article 55 of the Convention states:

Specific legal regime of the exclusive economic zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

263. It is, indeed, reasonable to state that the main purpose of the establishment of the EEZ, as a *sui generis* zone, was to enable coastal States to control and manage their marine resources; and this is perhaps true in particular of fishing resources in the EEZ of developing States. Indeed, a historical overview of the law of the sea would reveal that a main impetus for the codification of the EEZ institution was the concern of developing States regarding the exploitation, by fishing fleets of other States, of fishing resources in the seas adjacent to their coast.

¹⁷ *The M/V Saiga (Prompt release) case*, Judgement of 4 December 1997, ITLOS Reports 1997, p.16 and the *The M/V Saiga (No.2) (merits)*, Judgement of 1 July 1999, ITLOS Reports 1999, p.10.

¹⁸ *ibid.*

264. It is worth referring to the fourth and fifth paragraphs of the preamble to the Convention, which illustrate that the Convention was drafted with a main aim of establishing a just and equitable international economic order:

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,

Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked,

265. It is relevant to add that the codification of the EEZ institution, particularly in regard to living resources, resonates, in general, the institution of the exclusive fishing zone, which has long existed in State practice in the law of the sea, and which is part of customary international law.

266. Article 56 of the Convention states:

**Rights, jurisdiction and duties of the coastal State
in the exclusive economic zone**

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
 - (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
 - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.
267. In the circumstances of the current dispute, Panama does not contest that Article 56(1) of the Convention confers certain sovereign rights and a defined jurisdiction (as well as other rights) in favour of Guinea Bissau, in its EEZ, for the purpose of exploring and exploiting, conserving and managing living or non-living resources.
268. Panama does not, therefore, contest that Guinea Bissau has sovereign rights over the exploitation, conservation and management of the fish stocks in its EEZ (in terms of Article 56(1)(a)) and rights to impose and enforce measures to ensure that fishing vessels exploiting the fish stocks comply with its laws and regulations. Indeed such sovereign rights are enforceable by virtue of Article 73(1) of the Convention.
269. Indeed, Article 61 and 62 of the Convention articulate the manner in which a coastal State such as Guinea Bissau can regulate the conservation and utilisation of its living resources. For instance, Article 62(4) provides that:

“Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to the following:

- (a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;
- (b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;
- (c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;
- (d) fixing the age and size of fish and other species that may be caught;
- (e) specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;
- (f) requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;
- (g) the placing of observers or trainees on board such vessels by the coastal State;

- (h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;
 - (i) terms and conditions relating to joint ventures or other cooperative arrangements;
 - (j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;
 - (k) enforcement procedures.
270. The regime of the EEZ does not, however, stand only in favour of the coastal State. It is generally accepted that certain rights, whilst subject to the sovereignty and jurisdiction of the coastal State, are shared with other States. This is not necessarily the case, for instance, in respect of the regime of the contiguous zone, where certain rights and competences are exclusive to the coastal State.
271. In terms of Article 56(2), the coastal State, in exercising its rights and performing its duties under the Convention in the EEZ, shall have due regard to the rights and duties of other States and shall act in a manner compatible with the rules of the Convention, and, indeed, with the rules of international law.
272. As the counterpart to Article 56(2), Article 58(3) provides that in exercising their rights and performing their duties under this Convention in the EEZ, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.
273. It is also recognised that such freedom of navigation may be subject to the general limitations governing all freedoms on the high seas, such as those as set out in Article 87(2) of the Convention and possible further limitations under Articles 88 to 115 (through Article 58(2)).
274. Principal 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, which provides:
- 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
275. Article 87 of the Convention provides, *inter alia*, that:
- 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this

Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) **freedom of navigation**;¹⁹
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

276. In the context of this case, it is true that the Convention does not deal specifically with bunkering activities. However, it is Panama’s contention that a logical interpretation, in good faith and based on the ordinary meaning to be given to the terms of the Convention, in their context and in the light of the object of the Convention (in terms of Article 31(1) of the Vienna Convention on the law of Treaties) would lead to the reasonable conclusion that bunkering should be considered to classify under freedom of navigation, as an “internationally lawful use of the sea” and as being “associated with the operation of ships” in the sense of Article 58(1) of the Convention.
277. The Article 87 freedom of navigation and other internationally lawful uses of the sea related to those freedoms – as applied to the EEZ through Article 58 – would, it is submitted, include those freedoms not reserved or recognised expressly in favour of a coastal State in terms of Article 56(1). In other words, 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 freedom of the seas should only be limited where the rights are recognised expressly to a coastal State in terms of Article 56(1).
278. Panama submits that, and especially given the non-exhaustive nature of the Article 87 list of freedoms, the freedom of a vessel flagged by one State (Panama) to provide fuel to other vessels operating legally (and, as in this case, in terms of a Fisheries Partnership Agreement between the EU and Guinea Bissau) in the EEZ of a coastal State (Guinea Bissau) should be considered as a freedom falling within freedom of navigation and other internationally lawful uses of the sea.

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279. The bunkering activity carried out by the *VIRGINIA G* is a commercial activity for which vessels, including fishing vessels, in the EEZ of West African coastal

¹⁹ Added emphasis.

States offer a particular market for selling gas oil. The supply of bunkers to vessels is, therefore, the very purpose of the *VIRGINIA G*'s navigation.

280. The commercial nature of the activities of the *VIRGINIA G* should not, however, distract from the intended meaning which, Panama submits, is logically derived from Part V of the Convention.
281. The argument is sometimes propounded that it is the connection between the rendering of bunkering services to fishing vessels in the EEZ and the resulting increased efficiency of the fishing vessels that would justify stripping the bunkering vessel of its freedom of navigation and making such activities akin to fishing activities, thus, allowing a coastal State to regulate such bunkering activities.
282. In other words, a distinction is sometimes made between the pure and simple navigation of a bunkering vessel in the EEZ on one hand, and the rendering of bunkering services in the EEZ, on the other hand. It is submitted that whilst distinctions *ratione materiae* and *ratione loci* might be held valid within the ambit of exploitation or use of natural resources in the EEZ of a coastal State – such that fishing vessels simply navigating through the EEZ or actively fishing in the EEZ could be treated differently – the extension of this logic to bunkering vessels would be misleading and unfaithful to the Convention. Indeed, provision for the mere *right* of navigation is made in Article 90 of the Convention (also made applicable to the EEZ by virtue of Article 58(2)).
283. Panama contends that, logically, the contrary conclusion should be reached: that it is precisely the inherent connection between bunkering and navigation, and, therefore, the necessity of the former for the performance of the latter, that would lead to conclude 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(1). Indeed, the fuel inside a vessel does not have a unique purpose. In effect, fuel is necessary to operate the vessel but also to *keep* the vessel operating at sea (subsistence on board, safe navigation, electrical power, positioning systems, radar, communications, and many other uses).
284. In Guinea Bissau's case, 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 – in the way Guinea Bissau purports to legislate and argue – that the rules applied to that fishing vessel would apply also to the bunkering vessel, in this case, the *VIRGINIA G*.
285. Moreover, the activities conducted with a view to providing a commercial service to fishing vessels (operating legally in the EEZ of Guinea Bissau) by no means amount to an economic exploitation of the EEZ of Guinea Bissau.
286. In this regard, Guinea Bissau cannot reasonably contend that the activity of bunkering of vessels, even in relation to fishing vessels, would be captured by

its sovereign rights or jurisdiction in its EEZ, in terms of Article 55 of the Convention.

287. Indeed, the vessel is neither a fishing vessel nor (by definition) engaged in exploring, exploiting or utilising the natural resources in the EEZ of Guinea Bissau in the context of the rights and jurisdiction accorded to Guinea Bissau under Part V of the Convention.
288. The 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,²⁰ and it is perhaps reasonable that these terms can even be described as “sufficiently wide to embrace all normal enterprising and governmental functions that pertain to living resources.”²¹ However, it would also be reasonable to state that even a wider interpretation would necessarily preserve the fundamental link to the living resources themselves. Indeed:

‘Exploring and exploiting’ would normally be considered to cover all the activities involved in commercial or recreational fishing. These activities include the initial searching and finding of the valuable fish populations; the use of fishing gear to capture them; their placement on board vessels for processing, or transport to other vessels or ports where processing may occur prior to their disposal by sale, barter or other transaction.

Similarly, ‘conserving and managing’ are broad concepts that incorporate all the activities that bear on deciding about the wise use and disposition of living resources. These activities include the gathering, analysis, and dissemination of information; the public and private processes of deciding about permissible levels of fish utilization; the myriad choices about time, place, equipment, machinery, gear and instruments that may be used in exploring and exploiting stocks; and all other phases of the business process that relate to fishing, such as investment, subsidization, taxation, credit arrangements, and so forth.²²

289. Furthermore, whilst it can reasonably be argued that Article 56 establishes a high degree of control over the resources in the EEZ of a coastal State, one cannot ignore that Article 58(1) provides that all States enjoy (in the EEZ) the high seas freedom of navigation, overflight and communication. Article 58 reinstates these three freedoms in the EEZ from Article 87, and the drafting of 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.
290. It is contended, therefore, 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

²⁰ D. Anderson, *Modern Law of the Sea: Selected Essays*, Publications on Ocean Development Vol. 59 (Martinus Nijhoff 2008), p. 212.

²¹ W. Burke, *The New International Law of Fisheries*, (Clarendon Press Oxford 1994), p. 41.

²² *Ibid.*

these freedoms, such as those associated with the operation of ships [...]” understood in terms of the high seas regime, in good faith and based on the ordinary meaning to be given to the terms of the Convention, in their context and in the light of the object of the Convention.

291. Although Guinea Bissau's practice appears to be that of extending its interpretation of fishing activities and fishing related activities to include bunkering, or refuelling at sea, they, in fact, constitute neither fishing nor conservation or management activities with respect to the living resources themselves. Instead, it is submitted that 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.
292. Panama reiterates that Guinea Bissau's sovereignty over living resources in its EEZ, and the resulting regulation of fishing activities by fishing vessels, is not under contention. Rather, the extent to which its 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.
293. This rationale is reflected in Guinea Bissau's legislation, Decree 6A/2000 (**Annex 9**). The law's provisions are worded to encompass fishing activities and fishing related activities, however, Article 52 of Decree 6A/2000 specifically mentions “fishing vessels”, which the *VIRGINIA G* is not, and “fisheries products”, of which the *VIRGINIA G* caught or carried none.
294. It is submitted, therefore, that it was, and is, unlawful for Guinea Bissau to exercise sovereign rights and jurisdictional rights not attributed to it under the Convention, and that Guinea Bissau denied the *VIRGINIA G* the freedoms under Article 58(1) of the Convention in imposing a requirement on the *VIRGINIA G* to obtain authorisation to provide bunkering activities in its EEZ.
295. The law of Guinea Bissau, namely, but without limitation, Decree 6A/2000, to the extent that it was applied by Guinea Bissau to the activities of the *VIRGINIA G*, was not in accordance with the Convention and other rules of international law.

B. Violations of Article 56(2) and Article 73 of the Convention

296. Without prejudice to the legal argument set out in sub-section “A” of this Chapter, Panama submits that if the International Tribunal were to find that the bunkering activities performed by the *VIRGINIA G* in the EEZ of Guinea Bissau were, in fact, activities that Guinea Bissau was entitled to regulate as fishing activities, or fishing related activities, then it is submitted that Guinea Bissau, nevertheless, violated the Convention in the manner described in each of sub-sections (1) to (5) below.

1. Violation of Article 56(2)

297. It is Panama’s contention that the *VIRGINIA G* did, in fact, have the authorisation to provide bunkering services to the *AMABAL II* on the 21 August 2009, in the EEZ of Guinea Bissau (**Annex 19** and **Annex 20**), and that, therefore, the requirements of the law of Guinea Bissau were respected and fulfilled by the *VIRGINIA G*, her captain and owners.
298. Panama contends that Guinea Bissau was not justified in enforcing its laws and regulations, and that, in any case, such enforcement was carried out in a manner not compatible with the Convention, having acted in an unjustified, incorrect, inconsistent and arbitrary manner and in violation of Article 56(2).
299. Although being in disagreement with the requirement for authorisation from the authorities of Guinea Bissau (principally for the reasons explained in the above sub-section), the owners of the *VIRGINIA G* still ensured that the requirements set out by the Guinea Bissau authorities were respected, and this in line with Article 58(3) of the Convention.
300. It is worth stating that, in all previous operations, the *VIRGINIA G* and its owners were never found to have breached the fisheries laws of Guinea Bissau. Similarly, in its many years of operation in the EEZs of Mauritania, Senegal, Guinea Conakry, Ivory Coast, Nigeria and Angola, the *VIRGINIA G* operated without problems, having always ensured that national requirements were being complied with, despite the doubt as to whether such requirements were, in fact, in accordance with the provisions of the Convention.
301. As a normal practise, the owners of the *VIRGINIA G* ensure that an authorisation is obtained and also ensure, or obtain such certainty, that the fishing vessels (to which they provide gas oil) operate under a valid and appropriate fishing licence issued by the coastal State in whose EEZ bunkering services are provided.
302. Indeed, the customary practice whereby the owner of the fishing vessels procures the necessary authorisation for the *VIRGINIA G* is, of itself, indicative of the reliance on the fishing licence held by the fishing vessel.
303. In the typical chain of events, the owner of the fishing vessel informs its agent in Guinea Bissau about the need for refuelling, and instructs the agent to make arrangements to obtain the necessary authorisations, for the *VIRGINIA G*, from FISCAP.
304. Once the authorisation is confirmed to the agent by FISCAP – most times simply over the telephone – the agent proceeds to inform the fishing vessels by telephone, radio or SMS. In turn, the captain of the fishing vessels informs the government observers on board (FISCAP observers/inspectors), as well as the attending oil tanker about the authorisation obtained, whereupon the parties agree on a way point and a time. The process is mostly verbal (SMS, radio, telephone).

305. It is important to note that in the off-shore bunkering sector, it is difficult to ascertain with certainty when exactly a vessel will arrive at a particular location. It is for this reason that the authorisation formalities required by FISCAP are not always able to be fulfilled by the owner or agent of the fishing vessel much in advance. Moreover, the authorisations usually cover a range of dates.
306. Moreover, given the logistics involved, it is often the case that the actual authorisation document is not actually seen or physically obtained before the operations take place. Indeed, the documents are typically preceded by verbal authorisation, and the *VIRGINIA G* relies on the certainty of its previous operations, carried out with the consent of the Guinea Bissau authority, FISCAP.
307. The law of Guinea Bissau appears to lend support to this reality, and, to illustrate this, it is relevant to draw a parallel between Article 13 and Article 23 of Decree 6A/2000 (if, for the sake of the argument, and, therefore, without admitting, that Article 23 were applicable to the *VIRGINIA G*)
308. Article 13 is clear in that a prior and written license is required before fishing activities are carried out in the “maritime waters of Guinea Bissau”. It is a specific document required for a specific activity, issued in advance and in a specific format.
309. On the other hand, Article 23 of Decree 6A/2000 appears to be more flexible, in that the *VIRGINIA G*, as interpreted by the Guinea Bissau authorities, would be required to operate under an authorisation – not a full license – which is not strictly required to be issued beforehand and in a specific format.

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310. As has been detailed at length in Chapter 2, an authorisation was obtained for the *VIRGINIA G* to provide bunkering services. The Guinea Bissau authorities authorised and were fully aware of the *VIRGINIA G*'s August 2009 mission in the same manner in which similar authorisations were obtained in past operations of the vessel, for which operations no particular objection was raised.
311. The authorisation for the August 2009 refuelling of the *AMABAL II* was requested by Bijagos (the agent of the Fishing Vessels); granted by FISCAP and confirmed by the captains of the Fishing Vessels and by the captain of the *VIRGINIA G*.
312. It has been demonstrated that FISCAP received from Bijagos (the Fishing Vessels' agent) a request, on the 14 August 2009, for authorisation to be granted for the supply of fuel to take place in its EEZ in August 2009, and this, in terms of Guinea Bissau law.
313. It has also been demonstrated that FISCAP did, in fact, authorise the August 2009 operation in respect of the Fishing Vessels in a letter to Bijagos (with the same date, 14 August 2009) (**Annex 19**).

314. Authorisation was, therefore, granted in terms of Guinea Bissau law for a refuelling mission to take place in August 2009, subject to certain operational and logistical formalities which could only be fulfilled closer to the date of the refuelling operation. The information that was required was the location, date, time and name of the oil tanker which would refuel the Fishing Vessels. The letter was signed by Hugo Nosoliny Viera, the coordinator of FISCAP.
315. By letter dated 20 August 2009, the agent of the Fishing Vessels, Bijagos, provided FISCAP with information in writing that the *VIRGINIA G* would render the refuelling services on the 21 August 2009 at 1600 hours at location 17,35; 12,00 (**Annex 20**).
316. It is, therefore, submitted, that FISCAP’s conditions were fulfilled and that the provision of gas oil to the *AMABAL II* by the *VIRGINIA G*, contrary to what was claimed by FISCAP (**Annex 38**), was carried out in the full knowledge and with the consent of FISCAP, in accordance with the law.
317. Despite the procedures undertaken by the parties involved, Guinea Bissau nevertheless proceeded to arrest and detain the *VIRGINIA G* for the refuelling activities it rendered to the *AMABAL II* on the 21 August 2009, claiming that the *VIRGINIA G* did not have the necessary authorisations (**Annex 38**).
318. In rebutting this allegation further, it is useful to recall the exchange of correspondence that took place between Balmar (the consignee of the gas oil) and two of its fishing vessels, a few days after the arrest of the *VIRGINIA G*, when Balmar was trying to ascertain certain important facts. The correspondence is attached as **Annex 42** (two e-mails marked "Documento N^o 1" and "Documento N^o 2"), however it is being reproduced hereunder – translated to English – for ease of reference:

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

319. Similarly, the captain of the *VIRGINIA G* confirms, in his statement (**Annex 1**), that he was given confirmation that the authorisation had been issued:

“On the same day I communicated with the RIMBAL vessels, which confirmed to me that they had confirmation from the Agent that the authorization had been issued for the bunker operations, as confirmed by the representatives on board. I informed the fishing vessels about the quantities that were to be supplied [...] This was the first time that this happened to me and I did not know the exact reasons for the arrest. I could not understand because we always carried out operations in the EEZ in the same way. The Authorities in the area knew about us, as was informed by both the fishing vessels, and the Company never performed a supply operation without confirmation (by telephone) that the fishing vessels had obtained the appropriate authorizations from local authorities.”

320. Indeed, the *VIRGINIA G* was faced with rather an anomalous situation, seeing that the authorisation was granted by the FISCAP Director, Mr Hugo Nosoliny Vieira, who, only days afterwards, himself proceeded to justify the arrest of the *VIRGINIA G* on the basis of the same law as that under which the authorisation had been requested of, and granted by, him.
321. In the circumstances, it is submitted that Guinea Bissau violated its obligations in terms of the Convention, namely, but without limitation, under Article 56(2), especially considering that the *VIRGINIA G* was in line with its obligations in terms of the Convention, namely, but without limitation, under Article 58(3).
322. Panama’s contention that Guinea Bissau violated Article 56(2) is to be taken in conjunction with the contention that Guinea Bissau violated further obligations under international law, specifically, but without limitation, as set out in subsection “C” and “D” of this Chapter.

2. Violation of Article 73(1)

323. Article 73(1) of the Convention states that the coastal State “may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with laws and regulations adopted by it in conformity with this Convention,”
324. It would be necessary, therefore, to question whether laws and regulations of a coastal State – which is granted sovereign rights and jurisdiction in terms of Article 56(1) – are both adopted and executed in accordance with the provisions of the Convention, specifically, but without limitation, as provided under Article 73(1) and Article 56(2).
325. Panama will demonstrate that that Guinea Bissau violated its obligation as its domestic legislation and practices resulted in an abuse of what is permitted within the framework of Article 73(1).

3. Violation of Article 73(2)

326. Article 73(2) states:

Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

327. Panama submits that Guinea Bissau violated Article 73(2) as it both failed to cooperate in the fixing of a reasonable bond, and prevented or impeded a reasonable bond from being fixed, thus
328. On the 31 August 2009, 10 days after the arrest of the *VIRGINIA G*, FISCAP communicated to the vessels' owner the reason for the arrest (**Annex 38**). On the 4 September 2009, the owner, through its representative, formally requested what proceedings were established by law to be complied with as well as for the fixing of the necessary bond for the release of the vessel, its crew and cargo (**Annex 41**).
329. Requests to this effect were, in fact, sent by the owner of the *VIRGINIA G* to the Guinea Bissau authorities on several occasions (such as those evidenced in **Annex 44** and **Annex 49**), which requests were never replied to.
330. Not only did Guinea Bissau fail to acquiesce to the *VIRGINIA G*'s owner's request to fix a security, but it also failed, on all levels, to notify the flag State of the *VIRGINIA G* thus preventing the intervention of the flag State in safeguarding its national's rights.
331. The instances where the vessel's owner was approached with proposals to pay a "fine" (something in the region of US\$600.000) cannot be said to be in fulfilment, by Guinea Bissau, of Article 73(2). The proposals were always "unofficial" and, as it later turned out, unauthorised and illegal.
332. In hindering or suppressing the possibility for fixing a bond, Guinea Bissau in effect denied the *VIRGINIA G* its rights under the Convention.
333. Moreover, even if (as will be explained in more detail in the process of the case) the method and justification for the confiscation of the gas oil on board the vessel was unlawful, abusive and subject to challenge on its own merits, it is nonetheless reasonable to state that such a seizure did, of itself, amount to security.
334. Had Guinea Bissau acted according to Article 73(2) and, moreover, in good faith, the fixing of security and the prompt release of the vessel, her crew and cargo would have, on the one hand, secured any claims that Guinea Bissau may have levelled against the *VIRGINIA G* during judicial proceedings, whilst, on the other hand, allowing the vessel to continue serving as a main asset and

source of income of its owners. This concept was also expressed in the judgement issued by the Regional Court of Bissau (**Annex 54**).

335. Indeed, the owners of the *VIRGINIA G* and the P&I Club representatives found themselves in administrative and legal isolation on this matter, especially in the context of the conflicting verbal and non formal indications that the matter would be solved by negotiating a release – a commitment which was not respected by the Guinea Bissau authorities.
336. Guinea Bissau has an obligation, under Article 73(2), to promptly release the vessel upon the posting of a reasonable bond. However, it is submitted that Guinea Bissau prevented or hindered the fixing of any sort of security in the first place.
337. The violation of Article 73(2) has a corollary under the next sub-section since the direct result of Guinea Bissau's failure to cooperate in fixing a bond was the forced detention of the *VIRGINIA G*, her crew and cargo, beyond what was reasonable by any measure.
338. This prolonged detention caused the vessel, its crew and owners and other related entities to suffer serious injury, financial and moral, owing to 14 months (more than 400 days) of inactivity of the *VIRGINIA G*.
339. In the circumstances, it is submitted that Guinea Bissau violated its obligations in terms of the Convention, namely, but without limitation, under Article 73(2).

4. Violation of Article 73(3)

340. Article 73(3) states:

Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporeal punishment.

341. Panama contends that the crew of the *VIRGINIA G* was in effect imprisoned on board owing to the confiscation by Guinea Bissau of the crew's passports and the vessel's documents. The *VIRGINIA G* was detained under military guard whilst, at the same time, the Guinea Bissau authorities refused to acquiesce to the request of the vessel's owners to post security for the release of the vessel.
342. These circumstances amounted to *de facto* imprisonment or arbitrary detention in breach of Article 73(3) and in breach of general international law. This reasoning has been upheld by the International Tribunal in a number of cases.

343. In the *Monte Confurco* case,²³ the International Tribunal held that the France, as respondent State, had to liberate the captain of the vessel as the authorities were *de facto* impeding him to leave Reunion island by withdrawing his passport and yet allowing free movement on the island. In the *Camouco* case²⁴ and the *Juno Trader* case,²⁵ the International Tribunal was express in stating that the liberation of the crew and the unconditional freedom to leave the territory of the respondent States were on the same level.
344. The law of Guinea Bissau does not appear to provide for imprisonment as a penalty or punishment for the violation of its fisheries law (Decree 6A/2000), which could be said to be, at least notionally, in enforceable as provided in Article 73(1).
345. However, although the crew were not, in effect, placed in prison, the confiscation of their passports for more than four months and the resulting inability to leave Guinea Bissau constituted a *de facto* imprisonment or arbitrary detention and a serious violation of their fundamental rights.
346. It is recalled that the crew was held in Guinea Bissau, on board the *VIRGINIA G*, against their will and under military guard, without lawful trial for over 4 months – until their passports were returned in early January 2010. Their presence in Guinea Bissau was not needed and no criminal charges were levelled against them.
347. The situation was especially problematic for one of the members of the crew, Chief Mate Fausto Ocaña Cisneros, who needed to leave Guinea Bissau for urgent personal reasons. In his statement (**Annex 2**), he relates that he needed to appear before the Las Palmas authorities on a specific date in order to renew his residence permit.
348. In order to travel to Las Palmas, Mr Ocaña Cisneros required his passport, which had been confiscated by the Guinea Bissau authorities. In his efforts to retrieve his passport, Mr Ocaña Cisneros faced incessant and unreasonable refusals and administrative hurdles and difficulties (reference is made to **Annex 46**). It took months of considerable personal and diplomatic effort to retrieve his passport, by which time the date on which he was meant to appear before the Las Palmas authorities lapsed.
349. Mr Ocaña Cisneros’s situation illustrates the manner in which the Guinea Bissau authorities persisted in keeping the vessel and its crew detained.
350. Moreover, the vessel was kept under constant guard. Armed guards were constantly stationed on board, and would change shift by means of a small boat that carried them to and from land.

²³ *The "Monte Confurco" Case (Seychelles v. France)*, *Prompt Release*, Judgement of the International Tribunal for the Law of the Sea, 18 December 2000.

²⁴ *The "Camouco" Case (Panama v. France)*, *Prompt Release*, Judgement of the International Tribunal for the Law of the Sea, 7 February 2000.

²⁵ *The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, *Prompt Release*, Judgement of the International Tribunal for the Law of the Sea, 18 December 2004.

351. Although no bond was able to be posted in terms of Article 73(2), it should be recalled that in the *Saiga No.2* case and in the *Camouco* case, the International Tribunal ordered the liberation of the crew, stating that there could be a violation of Article 73(2) of the Convention even when no bond has been deposited.
352. Panama contends that the 14 months detention of the vessel and the several months of detention of the crew as a result of the confiscation of the vessel's documents and the crew's passports as well as Guinea Bissau's violation of Article 73(2) in effect amounted to imprisonment or detention beyond what was legal and reasonable. In the circumstances, it is submitted that Guinea Bissau violated its obligations in terms of the Convention, namely, but without limitation, under Article 73(3), international law and the fundamental rights of the crew.

5. Violation of Article 73(4)

353. Article 73(4) states:

In the cases of arrest or detention of foreign vessels, the coastal state shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

354. Panama contends that Guinea Bissau violated Article 73(4) in failing to notify Panama, as the flag state of the vessel, of the boarding, arrest, detention and confiscation of the gas oil of the *VIRGINIA G*, thus denying Panama a fair and just opportunity to promptly intervene in safeguarding its interests and those of its nationals.
355. Article 73(4) is clear in establishing that Guinea Bissau was under an obligation to promptly notify Panama, as the flag state of the *VIRGINIA G*, of the action taken against the vessel and her owners, and of the subsequent penalties imposed or actions taken.
356. Indeed, there is also a connection between paragraphs (2) and (4) of Article 73, since absence of prompt notification may have a bearing on the ability of the flag State to invoke Article 73(2) and other measures under the Convention (for instance Article 292) in a timely and efficient manner.²⁶
357. Panama was not promptly notified by the Guinea Bissau authorities that the *VIRGINIA G* had been arrested. Similarly, Panama was not promptly notified of the detention of the *VIRGINIA G*, of the inspections carried out and of the confiscation of the cargo of gas oil.
358. In fact, Panama was never officially, and through appropriate channels, informed by Guinea Bissau of any occurrence in relation to the *VIRGINIA G*

²⁶ *The "Camouco" Case (Panama v. France)*, Prompt Release, Judgement of the International Tribunal for the Law of the Sea, 7 February 2000, at para. 59.

during the entire 14 months of detention. Even the release of the *VIRGINIA G* was never officially notified to the Panamanian authorities.

359. The first information relating to the arrest, detention and allegations levelled at the activities of the *VIRGINIA G* was, in fact, obtained by Panama not from Guinea Bissau, but from the owner of the vessel during the preparations leading up to the current proceedings submitted before the International Tribunal.
360. Panama contends that Article 73(4) imposes the obligation to notify flag States not only in respect of the initial action taken against the vessel in question, but also every time important new measures are taken against the vessel, as indicated by the words “penalties subsequently imposed”. This is, perhaps, especially true where the freedom of the vessel and its crew is concerned.
361. As explained, the *VIRGINIA G* was boarded and arrested on the 21 August 2009. A detailed inspection of the vessel was carried out on the 28 August 2009 and again on the 27 October 2009. On the 6 November 2009 the Guinea Bissau authorities forced the captain to berth the *VIRGINIA G* in order to unload and confiscate the cargo of gas oil, which operation was prevented through legal measures taken by the owners of the vessel. On 20 November 2009, Guinea Bissau military or FISCAP officials once again boarded the vessel and forced the captain to berth at a fuel dock where the cargo of gas oil was confiscated.
362. Panama, as the flag State of a vessel under arrest, was never informed of the events of the 21 August 2009, 28 August 2009, 6 November 2009 and 20 November 2009, or of any other event that occurred in the 14 months detention.
363. Guinea Bissau, in fact, failed to fulfil its obligations under Article 73(4) and Article 56(2) and, in so doing, denied Panama the opportunity of intervening in order to safeguard the interests of its national from the outset.
364. Panama further challenges Guinea Bissau’s good faith in light of the wording of Decision 05/CIFM/2010 (**Annex 58**) – releasing the *VIRGINIA G* and repealing the previous decision to confiscate the vessel and its cargo – wherein it is stated “Taking into consideration our relationship of friendship and cooperation with the Kingdom of Spain in the field of fisheries, **knowing**²⁷ that although the vessel has a Panamanian flag ...”
365. It would appear, therefore, that Guinea Bissau officially acknowledged that the *VIRGINIA G* was a Panamanian vessel, yet failed to notify Panama as required under Article 73(4) of the Convention.
366. In the circumstances, it is submitted that Guinea Bissau violated its obligations in terms of the Convention, namely, but without limitation, under Article 73(4).

²⁷ Added emphasis

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

367. In relation to the following paragraphs, reference is made to the statements of the crew of the *VIRGINIA G*, attached as **Annexes 1 to 3**, and to the statements of the owner and manager of the vessel, as well as the statement of the gas oil supplier, attached as **Annexes 4 to 6**. In general, reference is made to the facts set out in more detail in Chapter 2.
368. Panama contends that in any event, and irrespective of the arguments set out in sub-sections A and B above, Guinea Bissau violated other provisions of the Convention and of international law by acting in an abusive, violent, unlawful and excessive manner in respect of the *VIRGINIA G* and her crew.
369. Specifically, Panama submits that on the 21 and 22 August 2009, as well as during the period of detention over 14 months, the authorities of Guinea Bissau breached the principles of general international law, fundamental rights, maritime and navigation safety standards and the provisions of the Convention by acting in an abusive, violent, unlawful and excessive manner.
370. In particular, Panama recalls the manner in which the *VIRGINIA G* was boarded without any prior warning, announcement or signal, by personnel travelling in unidentified craft, when the *VIRGINIA G* was clearly identifiable by its name, flag and IMO number.
371. The speed and manner in which the *VIRGINIA G* was boarded was forceful and intimidating, yet unnecessary as the *VIRGINIA G* posed no threat or obstruction whatsoever to the safety of the FISCAP officers and the carrying out of their functions.
372. The use of force and intimidation used during the boarding and inspection was unjustified and went drastically beyond what was reasonable. The FISCAP officers boarded the vessel without identifying themselves, they acted in a forceful, inconsiderate and intimidating manner, brandishing weapons, and confined the crew at gunpoint even though no resistance was made by the crew.
373. The captain was made to sign documents at gunpoint, and without being given an explanation or translation of the contents, or a copy of the documents.
374. The captain was not permitted to immediately communicate with the owner of the *VIRGINIA G* thus isolating the captain from immediate assistance and preventing him from carrying out his full duties towards the owners of the vessel.
375. The FISCAP officials violently ordered the captain to sail the vessel to the Port of Bissau in highly perilous circumstances:
- a. The captain was ordered to sail at night, with near zero visibility caused by the rain. He was not allowed to use any of the communications equipment normally used to transmit signals to alert ships in the vicinity of the *VIRGINIA G* (according the International Collision Regulations);

- b. The crew was highly anxious and the captain feared that in case of emergency it would not have been possible to engage in the planned emergency and security plans/protocols. The emergency plans/protocols established a series of actions and controls that would not have been executable by the crew since the crew was detained in the accommodation quarters. The usual posts were not manned (main engines, auxiliary engines, equipment, etc). In other words, the crew could not have carried out their tasks whilst the vessel was sailing (under orders of the FISCAP officials), and the normal operational parameters were not being monitored or controlled. This situation was inherently dangerous and could, of itself, have led to a serious emergency situation.
 - c. The journey was made without the use of navigational charts of the Guinea Bissau Port and its approach. This amounted to unsafe navigation and substantially increased the possibility of running aground in areas of low depth, potentially resulting in the loss of the vessel, human life and irreparable damage to the environment.
 - d. No adequate pilot was on board to provide the captain with guidance and advice on the approach and arrival in the bay of Guinea Bissau. The VIRGINIA G officers protested, and one FISCAP official stated that he was a pilot. However, he did not have the experience required for this particular voyage. The only nautical map produced was a torn and outdated one. The Pilot also admitted to not being able to perform the requested manoeuvres, such that the captain of the *VIRGINIA G* took over the navigation of the vessel.
376. The forceful and intimidating manners of the officials when visiting the *VIRGINIA G* during its prolonged period of detention worsened the already stressful and apprehensive situation amongst the crew on board.
377. During the 14 months of detention, the vessels owners made significant legal, administrative and financial efforts to release the *VIRGINIA G* and its crew. However, the owners faced a severe challenge in trying to keep the company financially viable, having lost the use of the *VIRGINIA G*. A further consequence was that the *IBALLA G*, under time charter to the owners of the *VIRGINIA G*, was seized by creditors for the owning company’s failure to meet its dues.
378. The financial problems faced by the owners of the *VIRGINIA G* were a principal cause of the dire conditions that resulted on board:
- a. There were serious delays in payment of the crew’s salaries. This caused serious problems for breadwinner crew members, whose families depended entirely on the money sent to them for subsistence in their home country.

- b. Provisions had to be heavily rationed, and there were days when there was no food and potable water on board. Rain water would be used as the only source of potable water.
 - c. Rain water was also used for washing, cleaning and even cooking. It was collected in plastic containers, previously used for refuse.
 - d. There was insufficient fuel for subsistence on board, such that the crew was denied basic amenities on board, including lack of light at night. On some occasions, the crew had to purchase ice as the only way of preserving the food on board.
 - e. The idle vessel deteriorated quickly, especially her main engine, auxiliary generator and the vessel's equipment. The company could not adopt a lay-up policy due to the uncertainty as to how long the situation would last.
 - f. The area was infested with mosquitoes, causing several of the crew to contract malaria.
 - g. The crew was kept on board under military guard - effectively imprisoned - with their passports confiscated. Members of the crew were constantly anxious of forceful measures that the military might enforce.
379. Finally, but not limitedly, the manner in which the confiscation of the oil cargo was executed by the Guinea Bissau authorities was, likewise, illegal and abusive and carried out in a violent and threatening manner in spite of – in fact, in express disregard – of a court order preventing the seizure.
380. On the basis of the facts set out in Chapter 2, as supported by the statements of the crew and other supporting documents, Panama contends that Guinea Bissau violated its obligations at international law, in the broadest of senses, for at least the following reasons:

1. Excessive use of force

381. Guinea Bissau violated the principle that the use of force should be avoided, and that even when it cannot be avoided, it should not exceed what is reasonable and necessary. In all cases, considerations of humanity must apply in the law of the sea, as they do in other areas of international law. The description of the manner in which the vessel and crew were treated leaves little room for doubting Guinea Bissau's violations.
382. Since the Convention does not make express reference to the issue of use of force in arrest of vessels, the International Tribunal has established certain principles in conformity with general international law (through Article 293(1) of the Convention).

383. Indeed, in the *Saiga No.2* Case,²⁸ the International Tribunal for the Law of the Sea restated the essential principles in relation to the use of force in the arrest of ships:

“155. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

156. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (*S.S. “I’m Alone” case (Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609; The Red Crusader case (Commission of Enquiry, Denmark - United Kingdom, 1962), I.L.R., Vol. 35, p. 485*). The basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Article 22, paragraph 1(f), of the Agreement states:

1. The inspecting State shall ensure that its duly authorized inspectors:

...

- (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.”

384. The facts set out above clearly put Guinea Bissau in breach of these most basic principles in respect of the boarding, inspection and coercion of the captain to navigate for many hours in perilous conditions. In the circumstances, it is submitted that Guinea Bissau violated its obligations in terms of the Convention, and under general international law.

²⁸ *The M/V Saiga (No.2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, Judgement of 1 July 1999

2. Violation of Article 224 and 110

385. The Convention contains further principles that are to be observed by States when exercising their rights under the Convention. The below articles lend further credence to the principles set out in the *Saiga No. 2* Case and emphasise an underlying obligation of the enforcing State to exercise its rights in good faith, within reason and in respect of the rights of other States.
386. Reference is made to Article 224 of the Convention, which although belonging to a specific section of the Convention, can be used to extract a principle which would be difficult not to apply to all actions of enforcement against foreign vessels.
387. It states that the powers of enforcement against foreign vessels may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.
388. Article 224 can be linked to Article 110 of the Convention, which, by virtue of its sub-paragraph (5) applies to “other duly authorized ships or aircraft clearly marked and identifiable as being on government service.” It is recalled that Article 110 is made applicable to the EEZ by virtue of Article 58(2), and that Article 110(5) makes the provision applicable to the boarding of the *VIRGINIA G* carried out by the FISCAP officials on the 21 August 2009.
389. In addition to the obligation to display clear markings and identification of being on government service, Article 110 also contains the principle that the boarding of a vessel must be carried out with all possible consideration.

Article 110
Right of visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
 - (a) the ship is engaged in piracy;
 - (b) the ship is engaged in the slave trade;
 - (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
 - (d) the ship is without nationality; or
 - (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the

documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.²⁹

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply mutatis mutandis to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

390. In the circumstances, it is submitted that Guinea Bissau violated its obligations in terms of principles set out in the Convention, namely, but without limitation, under Articles 110 and 224, and under general international law.

3. Violation of Article 225

391. Article 225 has a more general application than Article 224, and states that:

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

392. It is submitted that by ordering the navigation of the vessel to the Port of Bissau on the 21 August 2009, in the perilous circumstances described, and particularly as described by the captain of the *VIRGINIA G*, the FISCAP officials severely disregarded the most basic rules of safety of life at sea, thus endangering the crew, themselves, the vessel and the environment, and this against the very same laws that Guinea Bissau was seeking to enforce.

393. Moreover, the orders of the FISCAP officials meant that Guinea Bissau not only breached the most basic of rules of safety of navigation, preservation of life at sea, but also the very purpose of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention),³⁰ which came into force in Guinea Bissau a few months earlier - January 2009.

394. It is pointed out that the main purpose of the SUA Convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships, including the seizure of ships by force and acts of violence against persons on board ships.

395. In the circumstances, it is submitted that Guinea Bissau violated its obligations in terms of the Convention, namely, but without limitation, under Article 225, and under the SUA Convention.

²⁹ Added emphasis.

³⁰ International Maritime Organisation (IMO) website on the SUA Convention:
<http://www.imo.org/OurWork/Facilitation/SUAConvention/Pages/Default.aspx>

D. Violation of article 300

396. Article 300 of the Convention states that:

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

397. By boarding, inspecting, arresting and detaining the *VIRGINIA G*, Guinea Bissau, as the coastal State, had already exercised its sovereign rights to conserve the living resources in its EEZ - even if, as elsewhere stated in this Memorial, Panama contests the very lawfulness of the measures taken by Guinea Bissau.

398. Panama submits, however, that Guinea Bissau demonstrated a high level of disregard to its obligations under the Convention, as evidenced by the facts in Chapter 2 supported by the annexed documents.

399. The manner in which the Guinea Bissau (FISCAP and military officials) treated the vessel and crew from the very outset demonstrated a great deal of bad faith, a situation that was also recognised by the Regional Court of Bissau (**Annex 54**).

400. Panama claims, therefore, that Guinea Bissau not only violated its obligations under the provisions of the Convention cited above, but also the more general Article 300 in respect of each of its actions in relation to the *VIRGINIA G*, her crew, owners, Panama and all affiliated entities.

401. The most telling evidence of Guinea Bissau's bad faith was, however, the manner in which the confiscation of the cargo of gas oil was carried out and justified in complete and blatant disregard of a court order expressly prohibiting such action (**Annex 54**).

402. The gas oil on board was not a resource gathered or utilised as envisaged in terms of the Convention. It was not, in other words, a resource subject to the sovereignty, jurisdiction and other rights under Article 56 the Convention and it was not subject to enforcement in terms of Article 73 of the Convention.

403. FISCAP also grossly misapplied its national law in achieving its illicit objective of gaining possession of the gas oil, which law did not provide for the confiscation of such a cargo.

404. It is recalled that on the day of the confiscation (20 November 2009) the captain was handed a letter signed by the Secretary of State for Finance, José Carlos Varela Casimiro, forward-dated 30 November 2009 (**Annex 56**) and addressed to the CLC (Compañía de Lubricantes y Combustibles de Guinéa-Bissau). The letter stated:

By virtue of Decision N° 7 of the Maritime Inspection Interministerial Commission, the Oil Tanker Virginia G was seized ex officio with its gear,

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

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

405. The person who signed the first notification of confiscation (31 August 2009); the two FISCAP replies to the owners of the *VIRGINIA G* (7 and 11 September 2009) and the subsequent letters informing the owners of the effective confiscation of the vessel and its product on board, was the same Hugo Nosoliny Vieira - who, it is recalled, was the very same person who received, and granted, the request for authorisation for the *VIRGINIA G* to provide bunkering services in the EEZ of Guinea Bissau.
406. Moreover, the 30 day deadline mentioned in the FISCAP letter dated 23 September 2009 (**Annex 47**) had not, in fact, expired, when notice of the impending confiscation was served by FISCAP letter dated 23 September 2009. Similarly, the 72-hour ultimatum imposed therein also had not lapsed when the notice of confiscation was served by FISCAP letter dated 25 September 2009 (**Annex 48**).
407. Panama further recalls that by letter dated 30 September 2009 (**Annex 50**), FISCAP informed the owners of the *VIRGINIA G* that a public auction had been initiated for the sale of the fuel, and, as though to deliberately amplify the injustice, that the owners had the right of first refusal to purchase the product confiscated (according to Guinea Bissau legislation which was not quoted for reference).
408. Guinea Bissau has never explained the whereabouts of the cargo of gas oil which was unlawfully confiscated. It can only be stated that the gas oil was never returned or compensated for by Guinea Bissau.
409. Panama submits that it is reasonable to conclude that this is a clear example where Guinea Bissau has acted in bad faith (especially considering the court order preventing the action) and has abused its rights, particularly, but without limitation, in terms of Article 300 of the Convention. Guinea Bissau also benefited from its own wrongful acts to the prejudice of its owner, and against international law and against the general principle of equity *nullus commodum capere de sua injuria propria*.
410. Moreover, Panama contends that other instances mentioned in Chapter 2 and the arguments set out in Chapter 3 clearly show an underlying and constant breach by Guinea Bissau of Article 300 of the Convention and of international law,

³¹ Added emphasis.

which Panama will have the opportunity to further explain as the case progresses.

411. In the circumstances, Panama contends that Guinea Bissau did not fulfil in good faith the obligations assumed under this Convention exercised its rights, jurisdiction and freedoms in a manner which constituted an abuse of right.

E. Conclusions

412. On the basis of the above arguments, Panama submits to the International Tribunal that Guinea Bissau violated the Convention and the general rules and principles of international law. Guinea Bissau acted illegally and in violation of its international obligations, and that as a consequence of its wrongful acts, it is responsible for the injury caused, as set out in the next section.

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CHAPTER 4

DAMAGES

413. In terms of the Special Agreement between Panama and Guinea Bissau to transfer the arbitration proceedings to the jurisdiction of the International Tribunal, it was agreed that the International Tribunal 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.
414. This section of the Memorial addresses the basis of the claim by Panama for the award of compensation for losses and damages suffered and categorises the claims under the following main, but non-exhaustive, heads:
- (a) Loss, damages and costs suffered by the owners of the *VIRGINIA G*, and by other operators and entities with an interest in the vessel’s operation;
 - (b) Loss, damages and costs suffered by the owners of the *IBALLA G*, and by other operators and entities with an interest in the vessel’s operation;
 - (c) Loss, damages and costs suffered by the owners and/or agents or the *VIRGINIA G* and by the owners of the gas oil on board, as a consequence of the unlawful confiscation of the cargo of gas oil from on board the *VIRGINIA G*;
 - (d) Loss, damages and costs suffered by the Republic of Panama
 - (e) Loss, damages and costs suffered by the crew of the *VIRGINIA G*
 - (f) Interest
 - (g) Legal costs

I. Basis of claim for compensation

415. The claim for reparation brought by Panama, principally in the form of compensation, is based on Guinea Bissau’s responsibility at international law, specifically, but without limitation, under the provisions of the Convention, and under existing and further rules on the responsibility of States for the consequences of their unlawful actions, in terms of Article 304 of the Convention.
416. Indeed, in international relations as in other social relations, the invasion of the legal interest of one subject of the law by another legal person creates responsibility.³² “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form.”³³
417. Panama submits that Guinea Bissau is liable to compensate Panama as well as all physical and legal persons for all the consequences of its unlawful actions as described in this Memorial. In accordance with the general rules of international

³² I. Brownlie, *Principles of Public International Law* (Oxford 1998, 5th Ed.), p.435

³³ *Factory at Chorzów* case, Jurisdiction, 1927, PCIJ, Series A No. 9, p.21

law, it is submitted that Guinea Bissau is internationally responsible to Panama for the violations of international law occasioned by its actions in respect of the vessel *VIRGINIA G*, its owners, crew and cargo owners, as well as the rights of Panama and other interested parties. Panama also submits that Guinea Bissau did not fulfil its obligations under the Convention in good faith, and exercised its rights, jurisdiction and freedoms recognised in the Convention in a manner which constituted an abuse of right.

418. As provided in Article 1 of the International Law Commission's Articles on State Responsibility (the "Law Commission's Articles"),³⁴ a breach of international law by a State entails its international responsibility:

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

419. Indeed, when a State commits an internationally wrongful act against another State, international responsibility is established "immediately as between the two States."³⁵
420. "Responsibility is the necessary corollary of a right, All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation."³⁶
421. The International Court of Justice has applied this principle on several occasions, for instance, in the *Corfu Channel* case³⁷ and in the *Gabčíkovo-Nagymaros Project* case.³⁸
422. Arbitral Tribunals have also repeatedly affirmed the principle, for instance,³⁹ in the *Rainbow Warrior* case the Arbitral Tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility."⁴⁰
423. The principle that every internationally wrongful act of State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognised both before and since Article 1 above was formulated by the Commission.⁴¹

³⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, in *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), <http://www.un.org/law/ilc>

³⁵ *Phosphates in Morocco*, Preliminary Objections, 1938, PCIJ, Series A/B No. 74, p.10 at p.28. See also J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press), p.77.

³⁶ *The Spanish Zone of Morocco Claims*, RIAA ii. 615 at 641, per Judge Huber, in I. Brownlie, *Principles of Public International Law* (Oxford 1998, 5th Ed.), p.437.

³⁷ ICJ Reports 1949, p. 4 at p. 23.

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

³⁹ Other instances can be found in J. Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press), pp. 77 and 78.

⁴⁰ *New Zealand v. France*, RIAA, vol. XX, p.217 (1990), p.251, para. 75.

⁴¹ J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press), p.78.

424. As set out in the second part of the Law Commission’s Articles, the international responsibility of a State which is entailed by an internationally wrongful act involves legal consequences.
425. One of the core legal consequences of an internationally wrongful act is to make full reparation for the injury caused by such internationally wrongful act.
426. In the *Saiga (No. 2)* judgement,⁴² the International Tribunal stated that reparation may also be due under international law as provided for in article 304 of the Convention, which provides:

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

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

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the Convention itself. Differences relating to reparation, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.⁴³

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

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

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

⁴² The *M/V Saiga (No.2)* (Saint Vincent and the Grenadines v. Guinea), International Tribunal for the Law of the Sea, judgement of 1 July 1999, at para. 169.

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

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.
430. In relation to compensation, Article 36 states:
1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.
431. Panama submits that on the basis of the facts and legal arguments set out in the above sections, and on the basis of general international law, case law and the Law Commission's Articles, Guinea Bissau is liable to provide reparation which will wipe out all the consequences of its illegal acts suffered by the *VIRGINIA G*, its owners, crew and cargo owners, as well as to Panama.

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II. Heads of damages

A. Heads of damages claimed

432. On the basis of the facts set out in Chapter 2 and in connection with the legal arguments submitted in Chapter 3 of this Memorial, Panama's claim for reparation for injury caused Guinea Bissau in the form of compensation for damages, losses and cost suffered by the *VIRGINIA G*, its owners, crew, Panama and other entities as a result of the actions of Guinea Bissau on and after the 21 August 2009, are classified under a number of headings.
433. By way of general recapitulation, the vessel and crew were treated violently and abusively; the basic rights of the parties involved, especially of the crew, were often denied or disregarded; for 14 months the vessel was detained resulting in heavy expenses and financial losses being incurred by the vessel's owner; the vessel suffered severe and costly deterioration; the cargo of gas oil was abusively and unlawfully confiscated; the vessel *IBALLA G* was arrested and laid up as the owners could not meet their dues; a number of entities ended up in technical bankruptcy.
434. Consequently, and as identified in Chapter 2, the main headings under which Panama will claim reparation for injury in the form of compensation by Guinea Bissau are as follows, without limitation:
- (a) **Loss, damages and costs suffered by the owners of the *VIRGINIA G*, and by other operators and entities with an interest in the vessel's operation:** loss, damages and costs suffered by Penn Lilac Trading SA,

Gebaspe SL, Hidrocasa SL, resulting from the arrest and duration of detention of the *VIRGINIA G* and other losses and costs incurred or suffered by Penn Lilac Trading SA, Gebaspe SL, Hidrocasa SL during and after the period of detention of the *VIRGINIA G*, and loss of earnings and profit caused as a consequence of the unlawful actions of Guinea Bissau (*damnum emergens* and *lucrum cessans*), including, without limitation:

- i. loss of *VIRGINIA G* as a main source of income, including loss of charter party income;
- ii. Bunkering, agency fees and port fees in the Port of Bissau;
- iii. Salaries and maintenance of the crew during detention in the Port of Bissau;
- iv. Salaries and maintenance of the crew after release of the vessel until it was put back into operation;
- v. Travel expenses for the crew to return home and to reconstitute the crew again after the vessel's release;
- vi. Travel expenses, legal expenses and expert report expenses
- vii. Maintenance of Protection and Indemnity Insurance during detention
- viii. The inspection, repairs and re-certification of the *VIRGINIA G*;

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

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

(d) **Loss, damages and costs suffered by the Republic of Panama** resulting from Guinea Bissau's detention of the *VIRGINIA G* and the arrest and lay up of the *IBALLA G* and loss and damage resulting from Guinea Bissau's failure to promptly notify Panama of the measures taken against the *VIRGINIA G*.

(e) **Loss, damages and costs suffered by the crew of the *VIRGINIA G* and the ground crew employed by the owning and managing companies:** including moral damages suffered by the crew as a result of

their detention (confiscation of passports) and ill-treatment on and after the 21 August 2009, namely, but without limitation:

- i. Violent treatment and ill-treatment during the arrest on the 21 August 2009;
- ii. Unlawful detention of the captain and crew (confiscation of passports and constant guarding by armed soldiers) and the resulting dire conditions on board the *VIRGINIA G*:

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

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

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

B. Quantification

436. In respect of the quantification of each of the headings and sub-headings of damages, losses and costs indicated under the above headings, Panama states that a detailed expertise report will be submitted at a subsequent stage.

437. Specifically, two reports will be submitted to the International Tribunal, as follows:

- a. An updated version of a draft report commissioned by the owners of the *VIRGINIA G* following the arrest and detention of the vessel, prepared by economist and auditor **Alfonso Moya Espinosa**, a member of the Registry of Auditors of Spain. This report includes a Condition Survey and Internal Audit prepared by Panama Shipping Registrar Inc.
- b. A full report commissioned by Panama prepared by independent expert, **Kenneth Arnott** of BRAEMAR (an international marine surveying and technical consultancy based in London) who will be presenting his expert review and opinions on a comprehensive list of damages, losses and costs incurred by the parties involved in relation to the arrest and detention of the *VIRGINIA G*, including those listed in the report by Alfonso Moya Espinosa.

438. Therefore, for present purposes only, the provisional and non-final headings identified in the Arbitration Notification are an indication of the quantification of the principal damages, losses and costs incurred by the owners of the *VIRGINIA G* and by other affiliated entities. This list, although not conclusive, will be updated and will form part of the final list to be contained in the report prepared by **Kenneth Arnott** of BRAEMAR, and submitted by Panama in this case before the International Tribunal. The provisional list of main categories of damages, losses and costs contained in the report of Alfonso Moya Espinosa will be updated, and that updated list will be contained in the BRAEMAR report together with the categorisation and quantification of additional headings and categories of damages, losses and costs.
439. It follows, therefore, that the provisional and non-final amount of four million and sixty five thousand and four hundred and nine Euro and twenty three cents (**€4.065.409,23**) indicated in the Arbitration Notification will be the minimum amount claimed by Panama. The final amount quantified and submitted to the International Tribunal will, therefore, be higher than that indicated in the Arbitration Notification as will be elaborated in the BRAEMAR Report.
440. By way of indication only, the main headings contained in the Arbitration Notification are recalled for ease of reference:
- a. One million and one hundred and sixty two thousand and five hundred and twenty nine Euro and ninety nine cents (**€1.162.529,99**) as direct damages resulting from the arrest and duration of arrest of the *VIRGINIA G*.
 - b. One million and three hundred and thirty three thousand and two hundred and ninety six Euro and fifty nine cents (**€1.333.296,59**) as losses incurred during the detention period;
 - c. One million and two hundred thousand Euro (**€1.200.000**) as losses incurred owing to consequential termination of the charter contract with Lotus
- Provisional total: three million and six hundred and ninety five thousand and eight hundred and twenty six Euro and fifty eight cents (**€3.695.826,58**)
441. A 10 *per centum* (10%) increase was applied to the above amount to compensate for the cost of the period of inactivity of the *VIRGINIA G*, bringing the total to four million and sixty five thousand and four hundred and nine Euro and twenty three cents (**€4.065.409,23**).

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CHAPTER 5**SUBMISSIONS**

442. For the abovementioned reasons, or any of them, or for any other reason that may be submitted during the procedure, or that the International Tribunal deems to be relevant:

Panama respectfully requests the International Tribunal to declare, adjudge and order that:

1. The International Tribunal has jurisdiction under the Special Agreement and under the Convention to entertain the full claims made on behalf of Panama;
2. The claims submitted by Panama are admissible;
3. The claims submitted by Panama are well founded;
4. The actions taken by Guinea Bissau, especially those taken on the 21 August 2009, against the *VIRGINIA G*, violated Panama's right and that of its vessel to enjoy freedom of navigation and other internationally lawful uses of the sea in terms of Article 58(1) of the Convention;
5. Guinea Bissau violated Article 56(2) of the Convention;
6. Guinea Bissau violated Article 73(1) of the Convention;
7. Guinea Bissau violated Article 73(2) of the Convention;
8. Guinea Bissau violated Article 73(3) of the Convention;
9. Guinea Bissau violated Article 73(4) of the Convention;
10. Guinea Bissau used excessive force in boarding and arresting the *VIRGINIA G*, in violation of the Convention and of international law;
11. Guinea Bissau violated the principles of Article 224 and 110 of the Convention;
12. Guinea Bissau violated Article 225 of the Convention as well as the SUA Convention, as well as the fundamental principles of safety of life at sea and collision prevention;
13. Guinea Bissau violated Article 300 of the Convention;
14. Guinea Bissau is to immediately return the gas oil confiscated on the 20 November 2009, of equivalent or better quality, or otherwise pay adequate compensation;

“VIRGINIA G”

15. Guinea Bissau is to pay in favour of Panama, the *VIRGINIA G*, her owners, crew and all persons and entities with an interest in the vessel's operations (including the *IBALLA G*), compensation for damages and losses caused as a result of the aforementioned violations, in the amount quantified and claimed by Panama, or in an amount deemed appropriate by the International Tribunal; ;
16. Guinea Bissau is to pay interest on all amounts held by the International Tribunal to be due by Guinea Bissau;
17. Guinea Bissau is to reimburse all costs and expenses incurred by Panama in the preparation of this case, including, without limitation, the costs incurred in this case before the International Tribunal, with interest thereon;
18. Guinea Bissau is to compensate Panama, the *VIRGINIA G*, her owners, crew and all persons and entities with an interest in the vessel's operations (including the *IBALLA G*) in the form of any other compensation or relief that the International Tribunal deems fit.

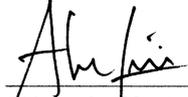
Without prejudice to additional claims for damages, losses and costs as may be submitted for the International Tribunal's consideration in relation to this case.

* * *

23 January 2012



Ramón García-Gallardo
Agent for Panama



Alexander Mizzi
Co-agent for Panama