

Minutes of Public Sitings – Procès-verbal des audiences publiques

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER**



MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD FROM 2 TO 6 SEPTEMBER 2013
AND ON 14 APRIL 2014

*The M/V "Virginia G" Case
(Panama/Guinea-Bissau)*

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
TENUES DU 2 AU 6 SEPTEMBRE 2013
ET LE 14 AVRIL 2014

*Affaire du navire « Virginia G »
(Panama/Guinée-Bissau)*

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the corrected verbatim records.



En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux corrigés.

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**Minutes of the Public Sitings
held from 2 to 6 September 2013 and on 14 April 2014**

**Procès-verbal des audiences publiques
tenues du 2 au 6 septembre 2013 et le 14 avril 2014**

2 September 2013, a.m.

PUBLIC SITTING HELD ON 2 SEPTEMBER 2013, 10 A.M.

Tribunal

Present: President YANAI; Vice-President HOFFMANN; Judges MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; Judges ad hoc SÉRVULO CORREIA, TREVES; Registrar GAUTIER.

Panama is represented by:

Mr Ramón García-Gallardo,
SJ Berwin LLP, Brussels, Belgium,

as Agent and Counsel;

Mr Alexander Mizzi,
SJ Berwin LLP, Brussels, Belgium,

as Co-Agent and Counsel;

and

Ms Jana Smolkina,
Ship Registration Officer, Consulate General of Panama, Hamburg, Germany,

as Counsel;

Ms Veronica Anzilutti,
Administration Department Consulate General of Panama, Hamburg, Germany,

as Advisor.

Guinea-Bissau is represented by:

Mr Luís Menezes Leitão,
Full Professor, Faculty of Law, University of Lisbon, Portugal

as Agent and Counsel;

Mr Fernando Loureiro Bastos,
Professor, Faculty of Law, University of Lisbon, Portugal, and Fellow, Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria, South Africa,

as Co-Agent and Counsel;

M/V "VIRGINIA G"

and

Mr Rufino Lopes,
Lawyer, Assessor to the Government;

as Advisor.

2 septembre 2013, matin

AUDIENCE PUBLIQUE DU 2 SEPTEMBRE 2013, 10 H 00

Tribunal

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président*; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK, *juges*; MM. SÉRVULO CORREIA, TREVES, *juges ad hoc*; M. GAUTIER, *Greffier*.

Le Panama est représenté par :

M. Ramón García-Gallardo,
SJ Berwin LLP, Bruxelles, Belgique,

comme agent et conseil;

M. Alexander Mizzi,
SJ Berwin LLP, Bruxelles, Belgique

comme co-agent et conseil;

et

Mme Jana Smolkina,
Chargée de l'immatriculation des navires, Consulat général du Panama, Hambourg,
Allemagne,

comme conseil;

Mme Veronica Anzilutti,
Service de l'administration, Consulat général du Panama, Hambourg, Allemagne,

comme conseiller.

La Guinée-Bissau est représentée par :

M. Luís Menezes Leitão,
Professeur titulaire à la Faculté de droit de l'Université de Lisbonne, Portugal,

comme agent et conseil;

M. Fernando Loureiro Bastos,
Professeur à la Faculté de droit de l'Université de Lisbonne, Portugal, et membre de l'Institut de droit international et de droit comparé en Afrique, Faculté de droit de l'Université de Prétoria, Afrique du Sud,

comme co-agent et conseil;

NAVIRE « VIRGINIA G »

et

M. Rufino Lopes,
juriste, légiste auprès du Gouvernement,

comme conseiller.

OPENING OF THE ORAL PROCEEDINGS – 2 September 2013, a.m.

Opening of the Oral Proceedings

[ITLOS/PV.13/C19/1/Rev.1, p. 1-5; TIDM/PV.13/A19/1/Rev.1, p. 1-6]

THE PRESIDENT: The Tribunal meets today pursuant to article 26 of its Statute to hear the parties' arguments on the merits of the case concerning the vessel *M/V Virginia G*.

On 4 July 2011, proceedings were instituted before the Tribunal in the dispute between Panama and Guinea-Bissau regarding the vessel *Virginia G*, flying the flag of Panama. The case was entered in the List of Cases as Case No. 19.

Since the Tribunal does not include upon the bench a member of the nationality of the parties, both parties have availed themselves of the possibility, pursuant to article 17, paragraph 3, of the Statute of the Tribunal, to choose a judge *ad hoc*. Panama nominated Professor Tullio Treves and Guinea-Bissau Professor José Manuel Sérvulo Correia. The Judges *ad hoc* made the solemn declaration provided for in the Statute of the Tribunal during a public sitting held on 2 November 2012.

I now call on the Registrar to summarize the procedure in the case.

LE GREFFIER : Merci Monsieur le Président.

Par ordonnance du 18 août 2011, le Président du Tribunal a fixé les dates d'expiration des délais pour les dépôts des pièces de la procédure écrite dans l'affaire, à savoir le 4 janvier 2012 pour le mémoire du Panama et le 21 mai 2012 pour le contre-mémoire de la Guinée-Bissau.

A la suite de demandes formulées par les Parties, les dates d'expiration des délais ont été reportées au 23 janvier 2012 pour le mémoire et au 11 juin 2012 pour le contre-mémoire, et ce par une ordonnance du Président du 23 décembre 2011.

Le mémoire et le contre-mémoire ont été déposés dans les délais prescrits.

Par ordonnance du 30 septembre 2011, le Tribunal a autorisé la soumission d'une réplique par le Panama et d'une duplique par la Guinée-Bissau et a fixé les dates d'expiration des délais de dépôt de ces pièces au 21 août 2012 et au 21 novembre 2012 respectivement. Ces délais ont été, par la suite, reportés au 28 août 2012 et au 28 novembre 2012 par ordonnance du Président du 8 août 2012.

La réplique et la duplique ont été déposées dans les délais prescrits.

Par ordonnance du 2 novembre 2012, le Tribunal a décidé qu'une demande reconventionnelle présentée par la Guinée-Bissau dans son contre-mémoire, était recevable conformément au paragraphe 1 de l'article 98 du Règlement du Tribunal. Le Tribunal a également autorisé le Panama à présenter une pièce de procédure supplémentaire portant uniquement sur la demande reconventionnelle soumise par la Guinée-Bissau et a fixé au 21 décembre 2012 la date d'expiration du délai pour le dépôt de ladite pièce.

La pièce de procédure supplémentaire a été déposée dans le délai prescrit.

Monsieur le Président, je vais à présent donner lecture des conclusions des Parties.

(Continued in English) In paragraph 442 of the Memorial, Panama makes the following submissions:

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

1. The 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;

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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 20 November 2009, of equivalent or better quality, or otherwise pay adequate compensation;
15. Guinea-Bissau is to pay in favour of Panama, the VIRGINIA G, her owners, crew and all persons and entities with an interest in the vessel’s operations (including the IBALLA G), compensation for damages and losses caused as a result of the aforementioned violations, in the amount quantified and claimed by Panama, or in an amount deemed appropriate by the Tribunal;
16. Guinea-Bissau is to pay interest on all amounts held by the 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 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 Tribunal deems fit.

Further submissions were made by Panama in its Reply and the additional pleading. I will not read them but should indicate that they may be found in paragraph 86 of the Reply and in paragraph 118 of the additional pleading.

Guinea-Bissau, in its Counter-Memorial and its Rejoinder, asks the Tribunal:

... to dismiss the Submissions of Panama in total and to adjudge and declare that:

1. Panama violated Article 91 of the Convention;
2. Panama is to pay in favour of Guinea-Bissau compensation for damages and losses caused as a result of the aforementioned violation, in the amount quantified and claimed by Guinea-Bissau, or in an amount deemed appropriate by the Tribunal;
3. Panama shall pay all legal and other costs the Republic of Guinea-Bissau has incurred with this case.

THE PRESIDENT: Thank you, Mr Registrar.

By a further Order dated 24 April 2013, I fixed 2 September 2013, that is, today, as the date for the opening of the hearing. Pursuant to the Rules of the Tribunal, copies of the written pleadings are being made accessible to the public as of today. They will be placed on the Tribunal’s website. The hearing will also be transmitted live on this website.

The first round of the hearing will begin today and will close on Thursday, 5 September 2013. The second round of the hearing will take place on Friday, 6 September 2013.

I note the presence at the hearing of Agents, Co-Agents, Counsel and Advisors of the parties.

I call on the Agent of Panama, Mr García-Gallardo, to introduce the delegation of Panama.

MR GARCÍA-GALLARDO: Thank you, Mr President.

OPENING OF THE ORAL PROCEEDINGS – 2 September 2013, a.m.

I would like to introduce straight away Ms Janna Smolkina, Consulate General of Panama in Hamburg, Germany, from the Ships Registry Department, acting as Advisor; Ms Veronica Anzilutti, Consulate General of Panama in Hamburg, who will not speak today; and Mr Alex Mizzi, acting as Co-Counsel and Co-Agent. We will also present a number of witnesses and two experts. These are not part of the delegation, of course, but I am merely indicating their presence. We will do our utmost to respect our structure and timing. Mr President, that concludes the introduction of our delegation. Ms Smolkina will briefly address the Tribunal first.

THE PRESIDENT: Thank you, Mr García-Gallardo.

I now call on the Agent of Guinea-Bissau, Mr Menezes Leitão, to introduce the delegation of Guinea-Bissau.

MR MENEZES LEITÃO: Mr President, distinguished Members of the International Tribunal for the Law of the Sea. First, I must express my personal satisfaction in being present at this International Tribunal and before the learned Judges that compose it. I will first present myself. I am Luis Menezes Leitão, Counsel and Agent of Guinea-Bissau in this case. I am from Portugal and I am an attorney with my office in Lisbon. I also work as a full professor in the Law Faculty of the University of Lisbon. In that capacity I was responsible for the co-operation between this faculty and the Faculty of the Law of Bissau. Because of that, I also co-ordinated the reform of Guinea-Bissau's legislation after its integration in the OHADA, the Organization for the Harmonization in Africa of Business Law. Having worked with Fernando Loureiro Bastos, Counsel and Co-Agent of Guinea-Bissau in this case, he is also a professor in the Law Faculty of Lisbon and Fellow of the Institute for International and Comparative Law in Africa and of the Faculty of Law of the University of Pretoria, South Africa. He has several works published about international law and the law of the sea. We will be assisted by Mr Rufino Lopes, who is a lawyer in Guinea-Bissau, and presently is assisting the Prime Minister of Guinea-Bissau. Thank you very much for your attention.

THE PRESIDENT: Thank you, Mr Menezes Leitão.

Since both parties have indicated to the Tribunal that they intend to call a number of experts and witnesses, I wish to explain briefly the procedure that is to be followed in this regard.

Pursuant to article 80 of the Rules of the Tribunal, a witness or expert shall remain out of the courtroom before testifying. Only after a party signals to me that it intends to call a witness or expert will I invite the witness or expert to enter the courtroom. Once the witness or expert has taken his or her place, the Registrar will ask the witness or expert to make the solemn declaration in accordance with article 79 of the Rules of the Tribunal. Different declarations are to be made by witnesses and experts, as set out in subparagraphs (a) and (b) of article 79 respectively. Witness-experts will make the declaration as provided for experts.

Under the control of the President, witnesses and experts will be examined first by the Agents, Co-Agents or Counsel of the party who has called them. After that, the other party may cross-examine the witness or expert. If a cross-examination takes place, the party calling the witness or expert will, when the cross-examination is concluded, be asked if it wishes to re-examine. I wish to emphasize that a re-examination shall not raise new issues but shall limit itself to the issues dealt with in cross-examination.

Thereafter, if the Tribunal wishes to put questions to the witness or expert, questions will be posed by the President on behalf of the Tribunal, or by individual Judges. After that, or if the Tribunal does not wish to put questions, the witness or expert will be allowed to withdraw.

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In accordance with article 86, paragraph 5, of the Rules of the Tribunal, witnesses and experts will also have the opportunity to correct the verbatim record of their testimony produced by the Tribunal. However, in no case may such corrections affect the meaning and scope of the testimony given.

As a further procedural remark, let me highlight that, pursuant to article 71 of the Rules of the Tribunal, after the closure of the written proceedings, no further documents may be submitted to the Tribunal by either party except with the consent of the other party or if authorized by the Tribunal.

Before we proceed to the first statement of Panama, an administrative issue has to be dealt with. During the hearing, the parties will call witnesses and experts to testify before the Tribunal who will be speaking Spanish or Portuguese.

In accordance with the Rules of the Tribunal, those statements will be interpreted from Spanish or Portuguese into English, one of the official languages of the Tribunal. For this purpose, interpreters are made available to the Tribunal by the party concerned. The interpreters provided by Panama, Mr Alejandro Caffarini and Mr Roger Wolfe, are present with us today and I would like to welcome them.

Mr Caffarini and Mr Wolfe will be interpreting the statements made in Spanish into English, and the Tribunal’s interpreters will interpret from English into French. The same will apply *vice versa* for questions put to witnesses and experts in English or French. Further interpreters made available by Guinea-Bissau who will translate from Portuguese into English will join us at a later stage of the hearing.

The Rules of the Tribunal require that interpreters made available by a party must make a solemn declaration. I therefore ask the Registrar to invite Mr Caffarini and Mr Wolfe to make the solemn declaration.

THE REGISTRAR: Thank you, Mr President.

Good morning, Mr Caffarini and Mr Wolfe. The interpreters provided by one of the Parties are required to make the solemn declaration under article 85 of the Rules of the Tribunal before entering upon their duties.

The interpreters are sworn in (in English).

THE REGISTRAR: Thank you, Mr Wolfe and Mr Caffarini. You can now both go to the interpretation booth.

Mr President.

THE PRESIDENT: Thank you, Mr Registrar.

The Tribunal has been informed that the first statement of Panama will be made by Ms Janna Smolkina. May I ask the Agent of Panama, Mr García-Gallardo, to confirm this?

MR GARCÍA-GALLARDO: Yes.

THE PRESIDENT: Thank you, Mr García-Gallardo.

I give the floor to Ms Janna Smolkina to make her statement.

STATEMENT OF MS SMOLKINA – 2 September 2013, a.m.

First Round: Panama

STATEMENT OF MS SMOLKINA
COUNSEL OF PANAMA
[ITLOS/PV.13/C19/1/Rev.1, p. 5-6]

MS SMOLKINA: Mr President, distinguished Members of the Tribunal, I am here today as a representative of Panama from the Ministry of Foreign Affairs, seconded in the Panamanian General Consulate here in Hamburg, Germany, where I am responsible for the ships registry. It is indeed an honour for me to be representing Panama before this distinguished Tribunal.

Panama is represented here today in the interest of its flag, its entities, the vessel *Virginia G* and the persons associated with the vessel. The Panamanian flag and her protected entities were subject to circumstances which, it is my hope, will be explained and appreciated during this week's hearings, in the hope of obtaining a just outcome.

Panama is a maritime nation and is recognized as a world-class registry. Panama takes the law of the sea extremely seriously, and we are determined not only to keep in line with international obligations but also to protect the rights of our subjects, including our flagged vessels and persons or entities associated with it, in line with our entitlements under UNCLOS and international law.

This is very important for Panama and for her registry – and the *Virginia G* case is being followed with great interest, as it poses some interesting and challenging questions. To this end, I hope that these hearings will be conducive to a more detailed understanding of the case.

I will now proceed to pass the floor to my members of the Panamanian delegation. I present first Panama's lead Counsel and Agent, Ramón García-Gallardo, an international lawyer who has a wealth of experience in the fisheries and shipping sector and in the international law of the sea, including before this esteemed Tribunal. Mr García-Gallardo will be addressing the Tribunal in detail regarding the factual and legal circumstances of this matter. He is accompanied by Co-Counsel and Co-Agent Alex Mizzi, a Maltese lawyer who also practises in international law of the sea. Together with Mr García-Gallardo, he will be setting out and discussing the points on which the parties are in dispute.

Your Honours, that concludes my brief introduction. With your permission, I will now leave the floor to Mr García-Gallardo to make his opening statement.

Mr President, Members of the Tribunal, I thank you very much for your attention.

THE PRESIDENT: Thank you, Ms Smolkina.

I now give the floor to the Agent of Panama, Mr García-Gallardo, to make his statement.

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STATEMENT OF MR GARCÍA-GALLARDO
AGENT OF PANAMA
[ITLOS/PV.13/C19/1/Rev.1, p. 6-10]

MR GARCÍA-GALLARDO: Mr President, distinguished Members of the Tribunal, with all respect, in view of the time taken in the introduction of today’s hearing, 20 minutes, I would respectfully request that this time be added to Panama’s time equally for the formal presentation.

Mr President, distinguished Members of the Tribunal, colleagues, it is indeed an honour for me to have been entrusted again by the Republic of Panama with the task of representing it as Agent in a new case. I also have the privilege to appear in these proceedings as Counsel and Advocate.

This is the fourth occasion on which I have appeared as Agent before this distinguished Tribunal. Previously I appeared in the “*Camouco*”, the “*Monte Confurco*” and the “*Juno Trader*” cases.

As a legal practitioner in international law, this time I am acting as claimant against Guinea-Bissau. In the “*Juno Trader*” Case, as you might know, I acted as Counsel and Advocate of Guinea-Bissau.

Perhaps you will be glad to know that only a few days after this Tribunal rendered the Order in the “*Juno Trader*” Case, following my recommendation, I was mandated by Guinea-Bissau to settle the case amicably with the flag State, Saint Vincent and the Grenadines, and the shipowner of the *Juno Trader*. That was a prompt release case, and this Tribunal and the Parties did not have the material time and necessity to consider it as a full case, like the one we have today, where a claim for damages has been lodged by Panama against Guinea-Bissau.

I must remark that it is unpleasant for me to have to plead against the Republic of Guinea-Bissau. I am not really happy to plead against the Republic or her people. However, to tell you the truth, it feels more as though I am pleading against certain of her high-ranking officials, politicians and legal advisers who represented Guinea-Bissau at the time of the dispute.

I decided to accept this instruction from Panama because only weeks after the Order rendered in 2004 by this Tribunal in the “*Juno Trader*” Case I realized that parts of the administration of the Guinea-Bissau Government suffered from an element of malpractice, lack of transparency and lack of governance. I will elaborate further on this during my pleadings.

There are the similarities between the case of the *Juno Trader* and the *Virginia G*; certainly there are. These relate to the discussion of the definition of the Guinea-Bissau law on fishing-related operations and confiscation issues, but the Prime Minister was the same. The Prime Minister in the “*Juno Trader*” Case was the same as was in position again, some years later, in the case of the *Virginia*. Certainly this is a case of maritime dispute. In the “*Virginia*”, as in the “*Juno Trader*” case, we have a case with a reefer. I will elaborate on this during my statements. This case relates to the supply of gas oil, which is an activity where it is publicly known in Guinea-Bissau that this Prime Minister, the richest person in Guinea-Bissau, has a vital interest in the company Petromar, the company that unloaded the cargo of the vessel. In my view, this case too should have been settled some time ago between the flag State of the vessel on the one hand and Guinea-Bissau on the other.

Allow me to underline something which I feel is very important. The mere announcement of the decision to initiate international legal proceedings for violations of UNCLOS and other rules of international law have allowed many practitioners and shipowners across the years to

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settle a lot of disputes involving vessels unlawfully arrested by coastal States in different parts of the world.

In this case, the vessel *Virginia G* was released 14 months after its arrest, but it was left in poor condition, without its cargo, and plenty of debts that provoked the bankruptcy proceedings of the shipowner and management company, and without the payment of a single euro penalty to Guinea-Bissau.

The “official” reason for the release of the *Virginia G* was “the danger to the security of maritime navigation for the long presence of the vessel”, also the good relationship with Spain. However, the only reason was that we were empowered by Panama already in June 2010 (three and a half months before the release) to institute international legal proceedings against Guinea-Bissau, and the mere fact of announcing the legal action of provisional measures proceedings was enough to release the vessel.

Your Honours, the United Nations Convention on the Law of the Sea represented, and continues to represent, a milestone in the development of the international law of the sea, and indeed international law in general. Its power is curative but mostly preventive and is very evidently a constitution of the seas. This time, unfortunately, we must take curative action.

Your Honours, this dispute arose in August 2009, in the EEZ of Guinea-Bissau. We will most probably listen to my esteemed colleagues again that Guinea-Bissau is a less developed country, that foreign fleets abusively exploit the living resources, that it is an important source of income for the country, that they are fighting against IUU practices. This message, with all due respect, I think is over. In this case, as happens more and more often, there are fewer related cases on fishing licences or fishing permits. It relates to the actions and conduct of the respondent coastal State against the claimant flag State. This brings the matter within UNCLOS and other provisions on international law.

The events of 21 August 2009 -

THE PRESIDENT: I am sorry to interrupt you, Mr García-Gallardo. It seems that there is no translation into French. Will you please repeat the remarks that you made a few minutes ago?

MR GARCÍA-GALLARDO: You will be able to read the transcript, but I can repeat it.

Your Honours, this dispute arose in August 2009 in the EEZ of Guinea-Bissau. Certainly you will most probably listen to my esteemed colleagues that Guinea-Bissau is a less developed country, that foreign fleets continuously abuse the exploitation of living resources, that it is an important source of income for the country, that they are fighting against IUU. I said that this message is over against fishing licences that are legally granted, legally operating, with observers and mechanisms for regulatory regulation that do not allow this type of practice such as in the past. It relates to actions and conduct on the respondent coastal State against the claimant flag State.

The events of 21 August 2009 and subsequent events have been amply explained in Panama’s Memorial, and supported in detail by witness statements and relevant documentation.

I should mention at this point that the captain of the *Virginia G*, Eduardo Blanco Guerrero, unfortunately passed away in 2012, only some months after the release of the vessel after a serious illness, most probably provoked by the difficult living conditions on board the vessel in the Bay of Bissau. He was a professional and wanted to defend his vessel to the end. I would not, of course, like to attribute to Guinea-Bissau sole responsibility for his death, but certainly to spend 14 months on board a ship in Guinea-Bissau, officially arrested and confiscated according to Guinea-Bissau, physical and psychological abuse, undignified living, hygiene and sanitary conditions, lack of food and water, exposure to malaria, constant

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guard by the military, rough and disgraceful treatment, and so forth, your Honours, would have its consequences. His presence here would, of course, have been very relevant. Fortunately, on this occasion, he might at least be spared having to re-live the experience.

Your Honours, this is a multi-faceted and detailed case, and one which calls upon several principles and provisions of international law and of overall legal doctrine. Panama has submitted this dispute to the Tribunal in order to seek reparation, in the requested form of financial compensation to Panama and the individuals entitled to protection under its flag. With your permission, your Honours, within the allocated time, we will very shortly proceed to address some of the key areas of this dispute.

Before that, I would like to highlight an important issue for Panama. Panama has raised certain limited objections to the witness and expert witnesses proposed by Guinea-Bissau. The objections were not raised on account of Guinea-Bissau adding a witness or three expert witnesses; rather, the objection was raised because Panama was not provided with the written statements or reports of the new witness and three experts. Panama, on the other hand, provided its written witness and experts' reports well in advance. Even a couple of days before the hearing, following consultations, Panama agreed to list a new expert witness whose reports have long been submitted.

We are aware of the provisions of articles 63 and 72 of the Rules of the Tribunal that there would appear to be no specific requirement under article 72 for written statements to be provided in advance.

In this respect, we agree with the Honourable President's reference to article 63 of the Rules of the Tribunal in the letter of 19 August. However, this would apply in full only if written statements were, in fact, presented.

It is precisely in the spirit of this article 63 that Panama first presented its detailed written witness and expert statements as part of its submissions. Guinea-Bissau did likewise with its witness statements only in its Counter-Memorial, and of course there is no objection to that.

The missing element, however, is that it will have no material time to prepare questions to be asked of the new witness and the three experts, because cross-examination of those individuals must be made immediately after their examination by Guinea-Bissau. Panama can only do so "blindly", or on the basis of an evaluation of a few minutes.

Your Honours, I refer to the Separate Opinion of Judge Lucky in the "*Juno Trader*" Case. He rightly relied on the well-known principle that justice must not only be done but must be seen to be done, and that fairness is paramount in every case. In other words, one party must not be placed at a disadvantage in a matter before the Tribunal.

Indeed, there has been no written statement by the Respondent's new witness, who, as you might have determined from the submissions, is an important witness – in fact, a former top officer of the Bissau administration who was arrested for alleged corruption related to this case. Similarly, no full and affirmed report was presented by Guinea-Bissau's three expert witnesses.

Judge Chandrasekhara Rao's Separate Opinion in the "*Juno Trader*" Case set out that it is inherent in the general principles of procedural law that each party must enjoy equal rights for the submission of its case to the Tribunal.

In any proceedings, it is not equitable to fail to disclose one's defence – and, I would respectfully add, a part of one's defence – to the other party. Yet it seems that Guinea-Bissau prefers disclosing its defence and witnesses on an *ad hoc* basis, even as new evidence before or during the hearings.

In that Separate Opinion Judge Chandrasekhara Rao continued by stating that where a party fails to submit a statement or evidence on which it relies, and where the opposite party does not have sufficient time to respond to that evidence made by the former during the oral proceedings, it may be difficult to maintain that the former has not obtained an unfair

STATEMENT OF MR GARCÍA-GALLARDO – 2 September 2013, a.m.

advantage over the other. The fact that both parties are given equal speaking time does not necessarily restore the requisite balance and fairness.

Maybe there is a debate to be had for the record, but I would point, in particular, to the fact that certain international guidelines on the taking of evidence, which provide more detailed rules on the submission of evidence, witnesses and experts, would be very important and practical for the future.

With the permission of the Tribunal, Mr President, I will now invite my colleague Alex Mizzi to briefly address the Tribunal next.

THE PRESIDENT: Thank you, Mr García-Gallardo.

I now give the floor to the Co-Agent of Panama, Mr Mizzi, to make his statement.

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STATEMENT OF MR MIZZI
CO-AGENT OF PANAMA
[ITLOS/PV.13/C19/1/Rev.1, p. 10-20]

MR MIZZI: Mr President, distinguished Members of the Tribunal, colleagues, good morning.

It is a tremendous privilege for me to appear for the Republic of Panama before this distinguished and learned Tribunal.

I am perhaps particularly fortunate to have this opportunity relatively early in my legal career. I am sincerely in awe of the eminence and scholarship before which I shall now humbly put forward my contribution.

I propose to spend a short time setting out the factual framework of the key facts and events – the “bare-bones” if you will – in respect of which this dispute arises. I shall, therefore, seek to avoid for the time being any discussion on issues on which there is contention.

Panama’s arguments will be progressively presented during the hearings in order to develop the particular points around the facts.

What I set out below is supported by the annexes already presented by Panama in its Memorial and Reply. Where necessary, I will refer the Tribunal to specific annexes.

Your Honours, the West African coast is a main route for maritime traffic. Scores of merchant ships sail along this route transporting cargo to Africa and to the western side of Europe. It is also the main route northwards towards one of two main access points to the Mediterranean Sea.

The West African coast is also a recognized fishing area. Several fishing operations take place along these routes, and there are in force a number of bilateral cooperation programmes. These seek to promote commercial cooperation with West African States, within the limits of sustainability, conservation and management.

Guinea-Bissau and the European Union were parties to a 2007–2011 Fisheries Partnership Agreement (FPA), which is included in tab 2 of the Legal Extracts Bundle. Reference to this FPA will be made later on, but I would point out for now that this genre of agreement ties in with article 62 of the United Nations Convention on the Law of the Sea, whereby States that are not able to harvest their entire allowable catches grant access to the surplus allowable catches.

Guinea-Bissau also grants fishing licences to fishing vessels flagged in neighbouring countries such as Senegal and Mauritania.

When fishing in the exclusive economic zone of coastal States, certain measures and other conditions established by that coastal State apply, provided those measures and conditions are in line with the Convention.

Examples of measures that may be required by coastal States include the placing of observers on board; licensing of fishing vessels; allowable species, and so forth. This is provided for in UNCLOS.

We now turn to the *Virginia G*. The *Virginia G* is an oil tanker. She is not a fishing vessel and she is not a logistics vessel. Her operations are not connected with fisheries. She does not support fishing activities. She provides marine gas oil to her customers. This point will be developed shortly.

In August 2009, the *Virginia G* was operating normally along the immense and impressive stretch of coastline. Her typical schedule and route were the same as many other times – she would load her marine gas oil cargo at the ports of the Canary Islands and proceed southwards to supply different merchant vessels sailing along the West African coast. She was also scheduled to provide fuel to fishing vessels operating both in

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international waters (catching migratory species such as tuna) and also within the exclusive economic zones specifically between Mauritania and Angola.

The location, or way point, for refuelling is generally agreed a few weeks or days in advance, between the owners/operators of the *Virginia G* and her customers, taking into account the particular routes of the vessels.

Contractual arrangements are made on-shore, between the supplier, the customer and, where applicable, the charterer of the vessel – or their agents. Instructions and orders are then executed by email, radio, telephone, or other means, between the agents of the vessels and the captains of the vessels, in coordination with onshore staff.

On a few occasions in 2008 and 2009, the *Virginia G* supplied marine gas oil to fishing vessels in the exclusive economic zone of Guinea-Bissau; hence outside its territorial sea. The owners of fishing vessel always explained that an authorization is required in Guinea-Bissau for refuelling to take place. The owner of the *Virginia G* never understood the reason for this. Indeed, any other vessels in the exclusive economic zone of Guinea-Bissau, including those requiring far larger quantities of fuel, were supplied freely. The discriminating factor, it seems, was the fishing vessel, which the *Virginia G* certainly is not.

Nevertheless, on the few occasions the *Virginia G* operated in the exclusive economic zone of Guinea-Bissau, the owner of the receiving fishing vessel, through its agent, applied and obtained authorization. The *Virginia G* would then get the green light before proceeding with refuelling, not being aware of the fees.

The green light – or the communication or confirmation that authorization has been obtained – is done by phone and radio. It would, indeed, defeat the very purpose of offshore bunkering if the tanker were requested to visit port to obtain the original.

The mandatory Guinea-Bissau-appointed observers on board the fishing vessels did and do observe this. They also report to Guinea-Bissau once or twice a day.

In this case, a refuelling operation was planned to take place in August 2009 – approximately 60 miles off the Guinea-Bissau coast. The coordinates are not disputed, and we are therefore speaking of the exclusive economic zone of Guinea-Bissau.

The fishing vessels that needed refuelling belonged to a company called Balmar (which I am abbreviating for the time being) and it was planned for these vessels to be refuelled by the *Virginia G*. The fishing vessels were called the *Amabal I*, *Amabal II*, *Rimbal I* and *Rimbal II*.

On 11 August two of these vessels – *Amabal I* and *Amabal II* – were arrested by Guinea-Bissau, apparently for the transfer of fuel between themselves. This is set out in Annex 5 of Guinea-Bissau's Counter-Memorial, which is a witness statement, by the then acting Fisheries Minister, Mr Augusto Artur Antonio da Silva. Mr da Silva explains in his statement that the two vessels were owned or represented by the former Consul of Spain, Mr Hamadi Bursarai Emhamed.

Between 14 and 20 August 2009, correspondence was exchanged between the agent of the fishing vessels and the Guinea-Bissau authorities – in particular Mr Hugo Nosoliny Vieira, Director of FISCAP (the fisheries authority in Guinea-Bissau).

The correspondence related to an authorization for the refuelling of the fishing vessels I mentioned earlier. I refer here to Annexes 19 and 20 of Panama's Memorial, which I shall refer to in more detail shortly. FISCAP requested information, as a condition to the authorization, in respect of the location, date and time of the refuelling operation, and in respect of the oil tanker that was to provide the service. This information was provided in full.

However, the question as to how and whether the authorization was granted is contentious, and I shall not focus on that point now but in the next section.

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The day before the scheduled refuelling, the two vessels *Amabal I* and *Amabal II* were released without any formality and based solely on the trust and good relationship between Guinea-Bissau and Spain. Mr da Silva states this quite candidly.

Although released, the two vessels still required gas oil and that is when the *Virginia G* was requested to provide the fuel.

We now move to the point when the *Virginia G* was in the process of providing fuel to the two *Amabal* vessels.

In the evening of 21 August 2009, two Zodiac craft approached the *Virginia G* at speed, and unannounced. She was very suddenly boarded by persons armed with AK-47 rifles, and by other persons in plain clothes.

These events stunned the captain and crew.

Eventually, the captain asked who they were, and he was told that they were from FISCAP.

Details of the manner of approach, the boarding, the treatment of the captain, the treatment of the crew, as well as the events on board, are contentious, and I shall limit myself for the time being.

However, on board, the question arose as to whether the *Virginia G* was in possession of an authorization to provide fuel in the exclusive economic zone of Guinea-Bissau.

The Guinea-Bissau officials carried out an inspection of the *Virginia G* and her documents. They ordered the captain to cease the operation, and to proceed to the port of Bissau. The crew was kept under guard, and means of communication were not permitted. During a short unguarded moment, a telegraphic communication was sent to the owner, briefly informing of the incident.

The journey to port was an overnight ordeal for the crew of the *Virginia G*. During the voyage, the captain was, we might say, “requested” to sign a report or document which was written in Portuguese. He was not provided with an interpretation or translation, and his request for a copy was rejected. For reasons we will enter into later, the captain felt he rather had to sign the document.

The *Virginia G* proceeded to the port of Bissau, with the two Zodiacs in tow (even having supplied one of them with fuel at the request of one of the Guinea-Bissau officials). The *Amabal I* and *Amabal II* were also arrested, and followed the *Virginia G*.

Once the *Virginia G* arrived at the port of Bissau – at approximately 2 o’clock in the afternoon the next day – documents and passports were confiscated.

More detailed communications were sent to the owners, who in turn contacted the vessel’s P&I Club in order to start finding out what might have happened.

We are now at one week after the arrest. On 28 August 2009, FISCAP officials boarded the *Virginia G*. They inspected the vessel, her bridge, equipment, engine room and store room and took photos of the vessel and also soundings of the cargo tanks. This was done in order to determine the quantity of the fuel cargo on board.

THE PRESIDENT: Mr Mizzi, I am sorry to interrupt you. Would you speak a little bit more slowly because our interpreters have some difficulties following you?

MR MIZZI: Around the same time, therefore around 28 August, the *Amabal I* and *Amabal II* were released. I refer again to the witness statement of Mr Augusto Artur Antonio da Silva, where he refers to the second arrest of these two vessels – and I quote:

After much thought and aware of the fact that the *Amabal I* and *Amabal II* belonged to the former Consul of Spain and taking into account our good cooperation relations with the Kingdom of Spain, we eventually made a political decision to release them.

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This is set out in the witness statement. We hope to shed further light on this matter later on today.

Ten days after the arrest – that means on 31 August 2009 – FISCAP (again, Mr Hugo Nosoliny Viera) notified the *Virginia G* of the decision that had been taken by the Interministerial Commission of Maritime Surveillance (No 07/CIFM/09) a few days earlier. I refer here to Annex 38 of the Memorial. This decision was taken a few days earlier.

The letter stated that it had been decided to confiscate *ex officio* the *Virginia G* with her gear, equipment, and products on board for the repeated practice of fishing-related activities in the form of unauthorized sales of fuel in the exclusive economic zone of Guinea-Bissau.

I would point out, again, that the *Virginia G* is not a fishing vessel; hence she had no such gear or equipment or products on board.

The letter cited article 52 of the Guinea-Bissau Decree Law 6-A/2000 (amended in 2005). This is Guinea-Bissau's main fisheries resources law – which we will be going into later.

I would, however, like to highlight that article 52 provides, *inter alia*, that fishing vessels, national or foreign, which carry out fishing activities within the limits of national maritime waters, without having obtained the authorization, will be seized *ex officio*, along with gear, equipment and fisheries products in favour of the State.

This is the article of law that was applied to the *Virginia G* – she was being treated as a fishing vessel. We will be making important specific submissions on this point.

The owner of the *Virginia G* made all efforts to determine what had happened and to defend the vessel and her crew. Correspondence was sent to the Guinea-Bissau administration. Detailed information in this respect is provided in Panama's Memorial (Annexes 41-46). Since this is also a contentious point, I shall not comment on this for the time being.

It is not contested that up until this point Guinea-Bissau did not notify Panama, the flag State of the *Virginia G*, of the measures taken against her flag and the vessel. Guinea-Bissau's reasons for not notifying Panama are a point of contention, and I will, therefore, refrain from entering into further detail for now.

In September 2009 a condition survey of the *Virginia G* was carried out. The *Virginia G* was found to be in a seaworthy condition. This is provided for in the Reply of Panama, point 8 of Annex 4.2.

I refer now to Annex 47 of the Memorial, which shows a letter dated 23 September 2009 – hence 23 days after the notification of Decision 07/CIFM/09 – confiscating the *Virginia G*. The *Virginia G* received this letter from FISCAP on the same day, that is the 23rd.

It stated that since more than 30 days had passed since the notification of the CIFM decision without any claim from the representative of the *Virginia G*, FISCAP would then proceed to auction the products on board if no reaction is received from the vessel's representative within 72 hours, or three days later.

Two days later – 25 September – the owners of the *Virginia G* were notified with a letter declaring the confiscation of the cargo on board owing to the stated violation of the fisheries laws, and owing to the lack of reaction by the owner of the vessel (Annex 48). On 5 October, the vessel received a letter from FISCAP which, amongst other things, mentioned that the vessel's oil cargo would be auctioned and that the owners had the right of first refusal, should they wish to purchase the cargo (Annex 50).

Some days later, the *Virginia G* was boarded, unannounced, by Guinea-Bissau officials who again took soundings of the vessel's cargo tanks. The captain informed the owner that the officials pointed towards the eventual physical confiscation of the cargo.

The owner's lawyers were immediately instructed to seek a suspension order against the confiscation.

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The order was obtained on 5 November, by virtue of which FISCAP and CIFM were to refrain from confiscating the vessel, the equipment and the cargo, as well as to allow access to the *Virginia G*. This is set out in Annex 54.

The very next day, that is 6 November, Guinea-Bissau officials boarded, and the captain was ordered to dock at a fuel terminal. The captain quickly informed the owner who in turn instructed the vessel's P&I Club and lawyers to notify or otherwise invoke the injunction obtained the previous day. (That was the judgment on the screen.) The action was thus avoided.

On 20 November, however, the captain once again informed the owner that the *Virginia G* had been boarded by military personnel, this time in a highly threatening manner, and that the captain was ordered to berth the vessel.

The key section of the letter in Annex 56 of the Memorial, I think, would need to be kept in mind because the words are particularly poignant.

The captain was handed a letter, forward-dated by 10 days (i.e. 30 November) authorizing the discharge of the oil tanker. I refer now to Annex 56.

The key section of the letter that needs to be kept in mind is the second paragraph:

Notwithstanding the judicial order of suspension of the seizure, and not having the opposition of the Public Prosecutor, the Government Attorney and Supervisor of Legality, we order hereby that the oil tanker *Virginia G* be authorized to discharge its content estimated at 436 tonnes gas oil in your premises.

It is relevant to note – for reasons that will be explained later – that this letter was presented to the captain on a weekend, and one day after Guinea-Bissau appealed the suspension order previously obtained by the *Virginia G*'s owners.

We will visit the issue of Guinea-Bissau law and the effect that Guinea-Bissau's appeal might have had on the suspension order, but in any case, the letter in question made no reference to such appeal, but rather to a “no-objection” opinion by the Public Prosecutor.

I draw your attention to the stamp on the bottom right-hand side of the letter – that stamp says “Petromar” and is dated 20 November 2009. The letter is addressed, although vaguely, to CLC (top left-hand side) (*Compania de Lubricantes y Combustibles de Guinea Bissau*) which is an associated company of Petromar, and which has government links. This will be explained later.

This time round the captain complied with the orders. The circumstances as to why the captain ultimately complied with the orders are, again, the subject of contention and will be dealt with eventually.

The vessel was detained for a total of 14 months. Living conditions on board degenerated and the crew endured severe hardship. The *Virginia G*'s owner suffered greatly financially. The crew likewise suffered physically, mentally and financially. Details on these matters will also be provided during this hearing but, in summary, the crew's passports were held by the Guinea-Bissau authorities for months. The *Virginia G* was kept under constant military guard on board. The owners could not send wages and provisions on a frequent enough basis, as the company was facing serious financial difficulties. Provisions had to be heavily rationed and there were days when there was no food and potable water on board. Rainwater would be used as the only source of potable water. Rainwater was also used for washing, cleaning and even cooking. It was collected in plastic containers, previously used for waste. There was insufficient fuel for subsistence on board such that the crew was denied the basic amenities on board, including electricity. The lack of electricity meant that the crew could not use the air conditioning systems. Windows were kept open for ventilation or the crew slept outside, and some crew contracted malaria owing to the mosquitoes. The Master also suffered from

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illness. 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 might last.

On 18 October 2010 the vessel was notified of a decision taken almost a full month earlier to release the vessel without penalty and revoking the decision to seize and confiscate the vessel. This is Annex 58. No mention was made of the cargo. The release was unconditional yet without signature of a settlement. Unfortunately, but understandably, by now the *Virginia G* had deteriorated to such an extent that it was unseaworthy and unfit to sail and operate safely, and Panama would not re-certify the vessel.

Between 28 and 31 October 2010 another condition survey of the *Virginia G* was commissioned. This is provided in the Reply of Panama in Annex 4.2. The report set out the scope of repairs for re-classification. This was to be done in two phases, at considerable cost and over a number of months. The *Virginia G* returned to service in December 2010 but, as it turns out, it was too late for the owner to recover commercially.

That, I believe, your Honours, sets out the main factual framework, without entering too much into the merits of the contentious points. With your permission, I would like to spend a few more minutes, Mr President, on the contested authorization.

I mentioned earlier the correspondence that was exchanged between the agent of the *Amabal* fishing vessels and FISCAP, Mr Hugo Nosoliny Vieira in particular, in relation to the refuelling of the four fishing vessels by the *Virginia G*.

At the outset, Panama makes it quite clear that it rejects that there was a need for the *Virginia G* to be covered by any sort of authorization or fees for refuelling vessels in the EEZ of Guinea-Bissau. Panama considers that such a requirement is contrary to the freedoms set out in article 58 of UNCLOS, particularly the freedom of navigation and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships. Panama submits that Guinea-Bissau did not have due regard to the rights and duties of Panama and did not act in a manner compatible with the Convention. Guinea-Bissau was unjustified in arresting the *Virginia G* and in doing so violated several provisions of the Convention, including articles 56, paragraph 2, 58, 73 and 300, without limitation.

However, the questions raised on the authorization relating to the refuelling in August 2009 are at the centre of this case. If it were to be held that Guinea-Bissau did have the right within its EEZ to pre-authorize and impose fees for bunkering, as it in fact did, Panama claims that Guinea-Bissau none the less breached its duties under international law and under UNCLOS by acting in bad faith and abusively in direct reference to this authorization. I would therefore need to spend a few more minutes in order to highlight the main aspects of the correspondence relating to the authorization.

If I may refer the Tribunal to Annex 19 of Panama's Memorial, this sets out the letter in Portuguese and an English translation. This is a letter from FISCAP following a request by the fishing vessels for authorization to refuel. These fishing vessels already operated under a fishing licence by virtue of which they were permitted to fish in the EEZ of Guinea-Bissau. Therefore, we are faced with a particular request, that of refuelling. FISCAP says:

The content of your letter has been analyzed and in conclusion the FISCAP authorizes the supply of fuel to the respective vessels under the following conditions:

1. To indicate before the operation
 - (a) The co-ordinates of the operation of the supply of fuel
 - (b) Date, time and name of the ship with which the vessels, *Amabal I*, *Amabal II*, *Rimbal I* and *Rimbal 2* will perform the operation.

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Without any further issue, our best wishes.

This was therefore an authorization subject to a list of conditions, specified in advance and set out by FISCAP. There were no other conditions. Those conditions were fulfilled by a subsequent letter from the agent of the fishing vessels on 20 August. I refer now to Annex 20, the next annex of Panama’s Memorial, wherein the requested information was provided. The *Virginia G* and her expected position and arrival were now known to Guinea-Bissau, indeed, as requested.

1. The co-ordinates of fuel supply operations are 17, 35 and 12,00.
2. This operation should be realized at 1600 hours on 21 August 2009. Tanker’s name is *Virginia G*.

Thus, the conditions were fulfilled.

The captain of the *Virginia G* confirms that he received confirmation that authorization was issued, and this is set out in his witness statement in Annex 1 of Panama’s Memorial. The same also emerges from the correspondence between the owner of the fishing vessels and the fishing vessels themselves. I refer the Tribunal to the table setting out this correspondence, which is a consolidation of emails set out in Annex 42 but I shall consolidate in a table form here. The questions to the fishing vessels were: “Good morning. I need you to answer a few questions. First, did the agency inform you that we had the permission to refuel?”

The vessels answered: “Yes, we were informed by telephone.”

Next question: “The observers, were they aware that we were on our way to refuel?”

The fishing vessels answered: “Yes, we informed them when the oil tanker called us by phone and we headed towards the meeting point.”

The third and last question was: “Did the observer communicate the area of refuelling by radio to FISCAP?”

The replies were: “Yes, by radio.”

The fishing vessels, crucially, also had observers on board who, whilst unable to take enforcement measures, that is true, were there to observe and report the activities of the fishing vessels directly to Guinea-Bissau. Despite all of this, Guinea-Bissau states, and I quote paragraph 136 of Guinea-Bissau’s Counter-Memorial: “It is completely false that the oil tanker *Virginia G* ever had any authorization to perform the fishing-related operation that it did.” It calls the above mentioned documents, 19 and 20, which I have referred to, “incomplete” and “deceptive”.

Paragraph 138 of the Counter-Memorial of Guinea-Bissau states: “As set out in Panama’s Annex 19, this refuelling was authorized but conditional to the co-ordinates and the name of the supply vessel being advised, said vessel naturally requiring a licence to perform this activity.”

I would now refer to Annex 16 and 17 of Guinea-Bissau’s Counter-Memorial. Here Guinea-Bissau produces two strange documents, by which Guinea-Bissau suggests that the authorization that was already granted was to be granted again, as though the authorization to refuel excludes the fuel being provided. Comparing Annex 16 of Guinea-Bissau’s Counter-Memorial to Annex 20 of Panama’s Memorial, we are looking at what appear to be the same document. Indeed, both documents are dated 20 August 2009, both have identical signatures at the bottom, both have the identical “received” acknowledgement of FISCAP, signed, stamped and dated 20 August 2009, yet strangely, although stamped as received by FISCAP, FISCAP’s Annex 16 suggests a handwritten note bearing the same date of 20 August 2009.

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Yet this version of the document and its alleged follow-up, Annex 17, were never seen by the *Virginia G*, and were never presented by the Guinea-Bissau administration in reply to the many communications sent to the shipowners. These documents did not appear in the Guinea-Bissau court proceedings. They never featured in the discussions between Panama and Guinea-Bissau and were never received by the owner. They appeared for the very first time in the Counter-Memorial.

Your Honours, I propose to stop here for the time being and, with your permission, I would pass the word back to my colleague, Ramón García-Gallardo.

THE PRESIDENT: Thank you, Mr Mizzi.

I now give the floor again to the Agent of Panama, Mr García-Gallardo, to make a statement.

MR GARCÍA-GALLARDO: Your Honours, normally the coffee break takes place at 11.30. I will try to spend, if you agree, ten minutes more, and normally I would not request additional time for the introduction of 20 minutes of this morning.

THE PRESIDENT: How long will it take?

MR GARCÍA-GALLARDO: It will take 20 minutes from now.

THE PRESIDENT: Please go ahead.

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STATEMENT OF MR GARCÍA-GALLARDO
AGENT OF PANAMA
[ITLOS/PV.13/C19/1/Rev.1, p. 20-34]

MR GARCÍA-GALLARDO: With your permission, I will first need to address the core aspect of Guinea-Bissau’s objections to the admissibility of Panama’s claims as relates to the genuine link to nationality or diplomatic protection and to the local remedies rule. Your Honours, Guinea-Bissau’s objections to the admissibility of Panama’s claim aggrieve Panama, and not because it is forced to defend each of the three objections but simply because Guinea-Bissau is not entitled to raise such objections. It is our submission that Guinea-Bissau has acted in bad faith and in any case has not brought the objections within the prescribed time-limit. These last two points need to be addressed before turning to each of the three objections.

I would like to recall that this dispute was first referred to arbitration under Annex VII of UNCLOS in June 2011. Guinea-Bissau was officially notified, an arbitrator was appointed, and a statement of claim and legal bases were also presented by Panama. Guinea-Bissau was requested to also appoint its own arbitrator in terms of article 3 of Annex VII of UNCLOS. Subsequently Guinea-Bissau accepted Panama’s parallel proposal for both parties to submit the arbitration before the Tribunal. This took place in July 2011.

This is a critical distinction, your Honours. Guinea-Bissau was not unknowingly sued. Guinea-Bissau agreed to transfer the dispute to the Tribunal and I quote, “whose jurisdiction in this case Guinea-Bissau accepts fully”, adding “the aforementioned proposal and this letter constitute a special agreement between the two parties for the submission of the case to ITLOS.” I therefore find it very difficult to see why Guinea-Bissau is now raising objections that go to the very root of the special agreement, particularly so in respect of the objection that local remedies were not exhausted, as will also be discussed shortly.

For the reasons I will develop below, it is Panama’s submission that Guinea-Bissau is precluded from raising its objections and that the Tribunal should declare the objections as simply inadmissible.

Your Honours, Panama has already respectfully submitted in its Reply that there is a time-limit for bringing objections to admissibility, 90 days, and that Guinea-Bissau, despite many opportunities, has failed to respect this time-limit. A logical interpretation in good faith and based on the ordinary meaning to be given to the terms of article 97(1) of the Rules of this Tribunal, in the spirit of article 31(1) of the Vienna Convention on the Law of Treaties, would lead to the conclusion that the text of article 97(1) indicates and contemplates three distinct circumstances for each of which the 90-day limit applies:

Any objection to the jurisdiction of the Tribunal or to the admissibility of the application, or other objection to the decision which is requested before any proceedings on the merits shall be made in writing within 90 days from the institution of proceedings.

Guinea-Bissau’s objection is in relation to admissibility and an objection to the admissibility “shall be made in writing within 90 days from the institution of proceedings.” This reasoning is supported by the originator of article 97(1) of the Rules of the Tribunal, which is article 79(1) and the more recent article 79(2) and 79(3) of the Rules of the International Court of Justice. Article 79(1) of the Rules of the International Court of Justice also provides a time-limit for the submission of certain objections which certainly does not allow for such submission at the same time as, and as part of, the Counter-Memorial; indeed, a step further in favour of Guinea-Bissau.

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Article 79(1) of the ICJ Rules states that any such objection shall be made as soon as possible and not later than three months after delivery of the Memorial. Guinea-Bissau therefore even failed to submit its objections within this time-limit that appears to be considered reasonable by the ICJ Rules, in this case by 23 April 2012. The wording of article 79(1) was amended as of 1 February 2001 and therefore after the Judgment in the *M/V “SAIGA” (No. 2) Case*. The text read differently when the International Tribunal considered this point in this case. The text was changed from “within the time-limit fixed for the delivery of the Counter-Memorial” to “as soon as possible and not later than three months after the delivery of the Memorial.”

Your Honours, as I said, this point is set out in detail in Panama’s Reply and I have attempted to set out the main points which, on a logical interpretation, would lead to the conclusion that Guinea-Bissau failed to make its objection on admissibility within the time-limit stipulated.

I would now also like to briefly comment on a second point – estoppel. It is also suggested that Guinea-Bissau’s choice of timing for submitting its objections are also clearly in bad faith.

We have already stated that these proceedings were brought by special agreement between Panama and Guinea-Bissau; they did not come as a surprise to Guinea-Bissau. Guinea-Bissau was fully aware of the claims raised by Panama.

Specifically, Panama communicated its position and concerns to Guinea-Bissau by diplomatic letters dated 28 July 2010, one year in advance of the formal request for the institution of proceedings, on 15 September 2010, 4 October 2010 and 19 October 2010. However, Guinea-Bissau completely ignored Panama’s communications.

By letter dated 15 February 2011, Panama once again communicated its position to Guinea-Bissau and invited Guinea-Bissau to agree to submit the dispute to arbitration under Annex VII of the Convention. Panama informed Guinea-Bissau that, failing this, Panama would have no choice but to unilaterally institute compulsory arbitration proceedings under Annex VII.

Panama then attached a full statement of claim, nominating an arbitrator and indicating that Guinea-Bissau was to appoint a member of the arbitral tribunal within 30 days.

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

On 29 June 2011 the Ambassador and Permanent Representative of Guinea-Bissau to the United Nations replied to the Agent of Panama, conveying the agreement to “transfer the case to the International Tribunal for the Law of the Sea, whose jurisdiction in this case Guinea-Bissau accepts fully”.

At no point was there any express or implied objection to the admissibility of Panama’s claim or that the special agreement was subject to certain objections by Guinea-Bissau.

Moreover, the special agreement was for the Parties to “submit the dispute between them concerning the *Virginia G*” to the International Tribunal in order that the International Tribunal may deal “with all aspects of the merits (including damages and costs)”.

Indeed, if the International Tribunal is to give effect to any agreement between the Parties that an objection submitted under paragraph 1 be heard and determined within the framework of the merits (article 97(7) of the Rules), then the International Tribunal should not, in the absence of such agreement, accept too broad an interpretation of the terms of an agreement, such as a special agreement, which does not mention or allow for objections to admissibility.

During 12 months preceding the initiation of arbitration proceedings, Panama made its views and claims abundantly clear to Guinea-Bissau.

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Likewise, in February 2011, by way of exchange of views, Panama communicated its position and claims unequivocally and encouraged Guinea-Bissau to agree to arbitration proceedings.

Panama formally initiated arbitration proceedings. Guinea-Bissau agreed to submit the dispute to ITLOS with no reservation.

Indeed, Professor Hambro in his Hague Lectures on “The Jurisdiction of the International Court of Justice”, which have already been cited in Panama’s Reply, considers that “[i]t might indeed be considered bad faith and almost contempt of Court if the State waited until the very last moment and permitted the other party or parties to present the Memorial on the merits before it raised its preliminary objections”.

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

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

I will now turn to address the three objections on genuine link. Basically, it is not a very innovative point. It tries to test the clear-cut Judgment in the *M/V “SAIGA” Case* on this particular point – paragraphs 89 to 109. Guinea-Bissau’s first objection is that “Panama’s claims are not admissible because of the missing ‘genuine link’ (article 91(1) of the Convention) between the *Virginia G* and Panama.”

Paragraphs 82 and 83 are clear. In view of the short time that we have available, I will not repeat them but I will say simply that the Tribunal’s conclusion was that the need for a genuine link was not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States:

There is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State.

The concept of genuine link is complex and can have rather serious repercussions if upheld by this Tribunal. Yet Guinea-Bissau takes, with all due respect, a surprisingly simplistic approach.

We have here a situation where a sovereign State is questioning the reliability and effectiveness of the entire registry of another State and all 8,000 registered vessels; and yet it can produce no concrete proof for this serious allegation.

Guinea-Bissau calls the Panamanian flag a flag of convenience. As to the meaning of a flag of convenience, one might seek that in the 1960 consultative opinion of the Court of Justice (attached to the legal bundle) and more recently in the Judgment in the *M/V “SAIGA” Case*. In between, also, the Third Conference and the Special Conference of the United Nations addressed the matter. Not much needs to be added.

Panama is a member of a wide range of maritime conventions and others in the field of work, fisheries and marine environment, such as the IWO, ICCAT, MARPOL and ISM.

It is well known that Panama has an active merchant shipping fleet registered under its flag. The fleet is also engaged in bunkering and other lawful activities of the high seas and in the exclusive economic zones of other States.

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Panama's total registered vessels as at 2012 stood at just over 8,000, with a combined dead weight tonnage of just over 310 million tonnes, making her the largest shipping nation with 20 per cent of the world's dead weight tonnage. Panama is proud of its achievements, as these figures cannot be but a certification of the reliability and standing of the flag of Panama.

The Panama Directorate Merchant Marine Department ensures that Panamanian registered ships and their final beneficiaries comply with national legal provisions and that they are part of the international conventions ratified by the Republic of Panama. The witness evidence to be given this afternoon by Mr Pedro Olives will elaborate further on those points.

To shorten the debate, let me read paragraph 107 of the [Judgment in the] *M/V "SAIGA"* Case:

The Tribunal must also call attention to an aspect of the matter which is not without significance in that case. This relates to two basic characteristics of modern maritime transport – the transient and multinational composition of ships' crews and the multiplicity of interests that may involve in the cargo on board of single ship a container vessel carries a larger number of containers and the persons which interest in them may be of many different nationalities. This may also be true in relation to cargo on board a break-bulk carrier. Any of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue.

Last, but not least, our esteemed colleagues from Guinea-Bissau devoted some pages to a convention that is not in force. I refer to the United Nations Convention on Conditions for Registration of Ships 1986, article 19 of which states: "This convention shall enter into force 12 months after the date on which not less than 40 States, the combined tonnage of which amounts to at least 25 per cent of the world tonnage, have become Contracting Parties."

As of yesterday there were 15 Parties, only 14 of which had ratified the Convention. In the list of States having ratified the Convention I cannot find countries such as Portugal, Germany, France, Japan, Ukraine, Cap Verde or indeed Guinea-Bissau.

To finalize this point, Guinea-Bissau wrongly tries to apply the jurisprudence of the "*Grand Prince*" Case. This case has nothing to do with our case. The main problem of inadmissibility was due to the fact that the ship *Grand Prince* was not duly registered in Belize at the time of the application of an article 292 prompt release legal action.

Furthermore, the reference made to Separate Opinions of Judges in this case – Judge Treves is mentioned on page 19 of the Rejoinder – is not applicable to the facts and circumstances of the present case. The first main difference is that the *Virginia G* is a tanker, not a fishing vessel; the *Grand Prince* was a fishing vessel operating the southern seas of the CCMLAR sub-Antarctic region.

I will not elaborate further on the Paris MOU statistics, the position of Panama as a living place in the world ETC.

I turn to the second point – the nationality of the claimant or the so-called "diplomatic protection of foreigners". The test in the *M/V "SAIGA"* Case is pretty clear and I will not elaborate further on it. I have already read paragraph 109 and it is reflected very well there.

The International Tribunal in the *M/V "SAIGA"* Case did not accept Guinea's contention that Saint Vincent and the Grenadines was not entitled to present claims for damages in respect of natural and juridical persons who are not nationals of Saint Vincent and the Grenadines. Likewise, Guinea-Bissau's identical submissions should be rejected.

In the case of *Worth v United States*, which is in your legal tabs, the court recorded: "It was a great principle for which our government had contended from its origin – a principle identified with the freedom of the seas, viz., that the flag protected the ship and every person and thing thereon not contraband."

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In the well known *Rainbow Warrior* case, where damage was done in New Zealand to a vessel not flying her flag and deaths were caused to persons not having her nationality, that State claimed compensation in respect of the vessel and the deceased crew because the acts perpetrated by French agents amounted to a violation of New Zealand’s sovereignty and an affront and insult to her.

In our submission, there are enough arguments and references to case law and I will not repeat them.

The third and final point is exhaustion of local remedies. Guinea-Bissau has taken objection to only four of the 18 submissions set out in Panama’s Memorial made to this Tribunal. Guinea-Bissau states that these particular claims are being espoused by Panama in the interests of private individuals or entities who should first have exhausted local remedies in Guinea-Bissau – an interesting interpretation of article 295.

Panama submits that even if the Tribunal were to find that Guinea-Bissau is able to raise objections to admissibility at this stage, the rule on exhaustion of local remedies would not apply, first because the rule of exhaustion is superseded by the special agreement to which I referred earlier.

We have argued that this special agreement of itself precludes Guinea-Bissau from raising objections; and this would be particularly true in relation to the objection based on non-exhaustion of local remedies. Perhaps the most fundamental point to reiterate is that, of itself, the special agreement, intrinsically and by definition, is an agreement between Guinea-Bissau and Panama for this Tribunal to hear and determine the dispute. In his book *The Right to Hot Pursuit in International Law* (1969), Poulantzas seems to have foreseen this scenario when he expressly noted, in the context of article 23(7) of the then 1958 High Seas Convention, that “the rule of exhaustion of local remedies may be excluded by a contrary wish of the parties to an agreement since it is not an obligatory rule of international law”.

In paragraph 64 of its Counter-Memorial, Guinea-Bissau states: “As the parties to the dispute have not agreed to exclude the local remedies rules in their Special Agreement ...”. It is submitted that this statement is inherently contradictory.

The second argument concerns a breach against the flag State itself. The breaches or violations of the Convention carried out by Guinea-Bissau relate first and foremost to the flag State. Indeed, the damages caused by Guinea-Bissau and claimed by Panama are a consequence of Guinea-Bissau’s breach of international obligations towards Panama and stem as a direct consequence therefrom.

In this case the primary right that has been violated is the right of Panama to freedom of navigation. Another is related to lawful rights such as the operation of a ship. That is a right that belongs essentially to Panama – articles 56, 58, 73, and 90; there are so many. The right is exercised by private and other vessels in the name of the State. They exercise a right which, in essence, is the right of the State whose flag they fly.

It is also Panama’s submission that the local remedies rule does not apply to the violations committed by Guinea-Bissau whilst the *Virginia G* was detained in the Port of Bissau.

With particular regard to the confiscation of the oil cargo, Panama’s submission is supported by the rule that a person is not bound to exhaust local remedies when he has come to a State as a result of unlawful seizure made by its agents. This rule is stated by Dr Amerasinghe, a local judge, confirming the suspension of the confiscation. With the legal opinion of the prosecutor, they decided to interpret the role differently, and they did not mention that there was a subsequent rejection of the point raised by Guinea-Bissau rejecting the appeal because it was made in the wrong court and out of time. We will elaborate on this.

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The *Virginia G* was taken into port from a point beyond the territorial jurisdiction of Guinea-Bissau by force. The *Virginia G* cannot be deemed to have submitted voluntarily to the jurisdiction of that State.

This brings us again to the interconnected area of diplomatic protection. The fact that individuals have suffered injuries and that the State claims damages designed in part to provide compensation for them does not mean that the State is merely asserting diplomatic protection rather than accepting a claim in respect of its own injury. Professor Meron states: “Most cases of direct injury contain, in a certain degree, also elements of diplomatic protection. It may well be that at the bottom of almost every international claim there is the motivating factor of interests of individuals which need protection”.

The third argument is that there is no jurisdictional link.

Guinea-Bissau's statements in paragraphs 67 to 74 of the Counter-Memorial are, indeed, misguided. Guinea-Bissau has acted in breach of international law in relation to a vessel, a flag, and persons and property beyond its territorial jurisdiction.

That State cannot demand that the individuals who have suffered damage should exhaust local remedies.

Such a demand would only reinforce that State's wrongful assertion of jurisdiction; and it would be unjust to compel a person to submit to the jurisdiction of the court of a State where his complaint is that the State has acted without jurisdiction.

THE PRESIDENT: I am sorry, Mr García-Gallardo, we have already reached 11.40.

MR GARCÍA-GALLARDO: Two paragraphs?

THE PRESIDENT: All right.

MR GARCÍA-GALLARDO: Another argument is ineffectiveness of local remedies. There is wide jurisprudence and doctrine stating this interpretation.

It is firmly established that there is no duty to exhaust local remedies where the local remedy would be ineffective or not in accordance with due process of law. This was repeated by Judges Mensah and Wolfrum in their Separate Opinion in the “*Juno Trader*” Case.

The exhaustion of local remedies is a doctrine of international law. Where the complaint concerns what purport to be “legislative” acts enacted to entrench the situation brought about by the unlawful use of force, it would plainly be contrary to principle, and unfair and inappropriate, to require recourse to institutions that cannot or will not question the legality under international law.

Equally, it is well established that there is no duty to exhaust local remedies where the local remedies are obviously futile. That is the case wherever the body allegedly able to grant the remedy is in fact limited in its powers and not free to decide upon the question that lies at the heart of the complaint.

On a final note, Professor Meron states:

The rule must be applied with caution and only after all of the facts have been adequately considered. Not only is a rigid application of the rule to all cases of diplomatic protection not supported by either the reasons for the rule or by the practice, but it also does not serve the interests of justice.

Accordingly, Panama should be found to be entitled to bring proceedings directly against Guinea-Bissau under the Convention for “any loss or damage” caused by Guinea-Bissau’s

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seizure, including both in respect of its own interests and in respect of the damage to the vessel and her interests. I will further elaborate on day 5. Thank you.

THE PRESIDENT: Thank you, Mr García-Gallardo.

At this stage the Tribunal will withdraw for a break of thirty minutes and will continue the hearing at 12.15.

(Break)

THE PRESIDENT: We will continue the hearing.

Mr García-Gallardo, you have the floor. I would like to ask you once again to speak slowly so that our interpreters can follow you.

MR GARCÍA-GALLARDO: I sincerely apologize. I will try my best.

Your Honours, we must, I feel, focus for a moment on the relevant fisheries laws in Guinea-Bissau to set out the reasons for Panama’s contestations as to how the *Virginia G* ended up being classified as an “industrial or artisan fishing vessel” under article 52 of Guinea-Bissau’s fisheries resources law; how the bunkering services she provided, the provision of gas oil, were classified as fishing-related activities; how the oil cargo on board the *Virginia G* was classified as “fishery products” and how it ended up being confiscated as a “product”.

We have found a lot of inconsistencies in the different provisions of the law.

In short, how Guinea-Bissau law was misinterpreted and I would say manipulated – or indeed, purposely drafted – to suit the ends of the Guinea-Bissau authorities out of line with the provisions of the Convention on freedom of navigation, and to the detriment in this case of the Panamanian flag and her interests.

In accordance with the request of the Tribunal, I will also address the question as to what are the legal remedies available under the legal system of Guinea-Bissau against the confiscation. We will briefly elaborate because I will answer in writing the questions that have been raised by the owners in this respect.

We first need to look at the law by which Guinea-Bissau sets its maritime delimitations.

I refer the Tribunal to Annex 8 of the Memorial, specifically Act 3/85.

Article 3, as translated, states:

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].

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.

Next, article 4 states: “Fishing within the exclusive economic zone by any foreign vessel or ship not authorized by the Government of the Republic of Guinea-Bissau is expressly prohibited.”

I refer now to the highest form of national law, the Constitution of Guinea-Bissau, particularly articles 10 and 29.

Article 10 states: “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.”

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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.” I emphasize “the applicable rules of international law”.

Thus far, I would say that we are aligned, both parties.

The next set of provisions is taken from the Guinea-Bissau fisheries resources law, Decree Law 6-A/2000 (as amended in 2005). Translated extracts are found in Annex 9 of the Memorial.

The scope of the activities covered by the fisheries resources law is “traditional fishing activities”, which require a licence as well as “activities related to fishing”, which require an authorization. For traditional fishing activities – a licence; for activities related to fishing – authorization.

Transshipment, logistical support activities to fishing vessels at sea and the collection of fish from traditional fishermen are also considered fishing-related activities.

Article 3 of the law states:

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” - it provides the definition: “(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.

We immediately begin to see differences:

“Fishing” is one thing; “related fishing activities” is different; and “fishing vessel” is not the same as “logistic vessel”.

The main differences between a logistic vessel and a tanker, a tanker like the *Virginia*: a tanker is not a reefer cargo vessel; it does not supply fishing gear – nets, hoists and devices; it does not supply crew; it does not supply food, apart from Christmas presents, as I have been informed by the shipowner; it does not supply cartons for storage; it does not supply potable water; it does not take on cargo for cold storage of fish catches; tankers do not have fishing experts on board – they do not carry fishermen and they do not carry observers; tankers have no fishing equipment on board, such as sonar, a vessel monitoring system, VMS, and the like.

They are not even listed with ICCAT. We are talking about the Atlantic. Certainly we know that Guinea-Bissau is not a member of ICCAT but the ICCAT waters, the waters of the official organization, take into account all that area.

The ICCAT has definitions of fishing and types of vessels. If you look at the bundles and on the screen, we can read in the recommendation by ICCAT of 2003 that the general provisions define a fishing vessel as

- (a) Any powered vessel used or intended for use for the purposes of the commercial exploitation of bluefin tuna” – and the catch relates to tuna in this case – “including catching vessels, fish-processing vessels, support vessels, towing vessels, vessels engaged in transshipment and transport vessels equipped for the transportation of tuna products and auxiliary vessels, except container vessels.

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We can see a very wide and detailed definition on the type of vessels related to fishing operations. I can read “tankers”, whether small or large tankers. It has all the definitions.

- (b) ‘Catching vessel’ means a vessel used for the purposes of the commercial capture of bluefin tuna resources;
- (c) ‘Processing vessel’ means a vessel on board of which fisheries products are subject to one or more of the following operations, prior to their packaging: filleting or slicing, freezing and/or processing;
- (d) ‘Auxiliary vessel’ means any vessel used to transport dead bluefin tuna (not processed) from a cage or a tuna trap to a designated port and/or to a processing vessel.
- (e) ‘Towing vessel’ means any vessel used for towing cages. ‘Support vessel’ means any other fishing vessel referred to under 2(a).

“Fishing activity” means for any catching vessel the fact that it catches bluefin tuna during a given fishing season.

Transfer operations are related to the transfer of fish.

Trap means fishing gear and such. It does not relate to this case. As you can see, the definition is very detailed, but it does not cover the activity of refuelling a fishing vessel. This was definitely not the case with the *Virginia G*, which is a merchant shipping vessel that provides gas oil to merchant ships crossing from Africa to Europe, and from Europe to Africa. It is very simple, if you look at the chart provided by Guinea-Bissau, to calculate the 200 miles, to compare the traffic with neighbouring countries and to see, even on marinetraffic.com, the number of ships which, on any day, whether they be fishing vessels or merchant shipping, navigate within the EEZ of Guinea-Bissau.

There are more definitions of fishing and of logistic support. In the “*Juno Trader*” Case the lawyer Ricardo Alves defined, in relation to the *Juno Trader*, but making comparisons where there was a vessel related to fishing operations, the following – page 23, 6 December, verbatim –

However, the Tribunal must note that the use of this type of vessel, of reefer vessels, as fishing supply and support ships is widespread throughout the West African coast, and Guinea-Bissau’s authorities have arrested numerous such vessels performing illegal fishing and support activities off the country’s coast. These vessels normally lay anchor alongside other fishing vessels, authorized and unauthorized, in order to perform transshipping and refuelling operations. They are also known to carry aboard food stocks in order to supply other fishing vessels. The authorities from Bissau have also noticed that normally Russian-manned fishing vessels, fishing trawlers, unload their catch onto other Russian-manned vessels, receiving from the latter all the necessary provisions. What we have we can perhaps classify as a trade relationship in which the trawlers deposit their catch aboard the reefers; the reefers supply them with refuelling, with food and with all the necessary provisions.

Certainly this definition confirms that the activity, now well known by this Tribunal, of the tanker supplying gas oil sporadically to fishing vessels, whether in the waters of Guinea-Bissau, Senegal, Mauritania or on the high seas, has never been considered as a related fishing activity, except now, by the authorities of Guinea-Bissau.

Let us move to some other references in the jurisprudence of the international tribunals. Let us take in the legal bundle the case in 1986, the *La Bretagne* arbitration between Canada and France, which raised the issue of whether Canada could apply and enforce regulations concerning the filleting of fish on board vessels located in the Gulf of Saint Lawrence. The Arbitral Tribunal ruled that the term “fisheries regulations” was limited to

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designating the legislative or regulatory prescriptions...which fix the conditions under which all fish catching activities are subject and are generally designed to maintain order on fishing grounds as well as to protect and preserve resources.

The term “fisheries regulations” could not be applied to subject the vessels of the other State to unconnected regulations – this is a critical word, “unconnected”. Is the *Virginia G* a connected vessel exclusively to fishing-related activities of supply of fuel oil to exclusively fishing vessels in the area of Guinea-Bissau waters or in other EEZs? No. Does it provide the services that I have mentioned before, a pile of services, products, that can be provided by the so-called definition in Guinea-Bissau law, activities of logistic support to fishing vessels? It is the primary intention of the *Virginia G* to consider the supply to fishing vessels, whether in Guinea-Bissau waters, exclusively to fishing vessels within the EEZ of those countries and related fishing activities, taking into account that it does not provide one other single service or product as to the ones reflected and read by me before.

I would like to make this reflection. Article 13, issue of formalization of licence.

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...

2. The license will be issued to a vessel in favour of its owner and will be valid in relation to the fishing activities ...

Article 23 stipulates that an authorization is required for the carrying out of fishing-related operations or activities. Article 23 says “... the authorization mentioned above is subject to payments or compensation ...”. What is compensation? Do they need to pay it in kind? What type of services?

...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.

Do the regulations set out by Guinea-Bissau require the presence of an inspector or an official observer on board the tanker as part of the authorization? I do not think this is the case.

Article 52, mentioned by my colleague this morning: “All industrial or artisan fishing vessels, whether national or foreign, which carry out fishing activities ...” I have already defined fishing activities.

“... within the limits of national maritime waters ...” What is “national maritime waters”? What is this definition in international law? I would like to know what is the definition of national maritime waters.

“... without having obtained the authorization in terms of article 13 and 23 of this law, will be seized ex officio, with its gear ...” Does a tanker use gear, fishing gear? We may go to the Encyclopaedia Britannica to look up “gear”.

“... equipment and fishery products ...” Has a tanker the capacity for cold storage like fishing boats?

“... in favour of the State.”

Article 52 mentions only fishing vessels, not other types of vessels.

Let us have a look at the Order of 2001 that seems to develop the previous provisions. This is Annex 5 of Guinea-Bissau’s Rejoinder. This is an alleged Joint Order, which is the English translation, 2001, which was allegedly in force at the time the dispute arose. I have not seen any particular or single reference in all the letters exchanged with FISCAP this

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morning about this particular provision. Keeping in mind this, I only need to refer to paragraph 3 and to article 1 of this Order. I hope to illustrate two points. When you read recital 3, the third paragraph, it states:

Taking into account that the implementation of the said policy requires a reduction in the fees in force for fishing licences and the simplification of the conditions of access to fishing resources by national fishing companies which operate with their own or freighted vessels.

To approve – article 1(1) – to approve the fishing licence fees and other conditions of access to fishing resources set out in Annex I, II and III to this Order. Therefore Guinea-Bissau law defines the maritime waters of Guinea-Bissau to mean not only the territorial sea of Guinea-Bissau but also its exclusive economic zone. It does not make a distinction between fishing vessels and non-fishing vessels or related to fishing activities. It is interpreted to apply to logistic vessels in such a way as to oblige them to require prior authorization of national vessels only when exercising this freedom in the area. It is totally inconsistent.

To conclude this point, I think it is particularly relevant, if I am permitted, to quote the entire declaration of Judge Kolodkin in the “*Juno Trader*” Case, four succinct paragraphs which, I think, would apply in their entirety to the *Virginia G*.

1. Every year, the United Nations General Assembly in its annual resolutions on the oceans and the law of the sea appeals to all States to harmonize their legislation to bring it into compliance with the United Nations Convention on the Law of the Sea.
2. Unfortunately, not all Member States of the United Nations that are parties to the United Nations Convention on the Law of the Sea have heeded those appeals. In the “*Juno Trader*” Case it has been found that a coastal State, the Respondent, has used the expression “the maritime waters of Guinea-Bissau” to mean not only the territorial sea of Guinea-Bissau, but also its exclusive economic zone.
3. On 19 October 2004, the Interministerial Maritime Inspection Commission adopted the Minute in which was stated that the *Juno Trader* “... was seized ... within the maritime waters of Guinea-Bissau ...”. However, it is known that the *Juno Trader* was arrested in the exclusive economic zone of Guinea-Bissau and, under the United Nations Convention on the Law of the Sea, exclusive economic zones do not form part of the territorial sea or “maritime waters” of any State.
4. There is another trend in the application of the United Nations Convention on the Law of the Sea: some coastal States are demanding, in their domestic legislation, prior notification by vessels intending to enter their exclusive economic zones even if only for the purpose of transiting them in application of the freedom of navigation which is guaranteed by article 58, paragraph 1, of the United Nations Convention on the Law of the Sea.

It is relatively clear that the definition of logistic vessels found in the legislation does not cover the activity of a tanker, either with an annual authorization or with regular authorizations across the year to supply fuel to different shipowners in the area who hold fishing licences issued by the Government of Guinea-Bissau.

Thank you very much. We turn now to the witnesses, so I would like to start with our first witness.

THE PRESIDENT: Thank you, Mr García-Gallardo.

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The Tribunal will now proceed to hear the witness Mr Ocaña Cisneros. He may now be brought into the courtroom.

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Examination of Witnesses and Experts

MR OCAÑA CISNEROS
EXAMINED BY MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/1/Rev.1, p. 34-38]

THE PRESIDENT: I call upon the Registrar to administer the solemn declaration to be made by the witness.

(The witness made the solemn declaration)

THE PRESIDENT: Thank you, Mr Ocaña Cisneros.

Before I give the floor again to Mr García-Gallardo to start the examination of the witness, I wish to remind the representatives of the parties and you, Mr Ocaña Cisneros, of the following. The work of interpreters and verbatim reporters is a complex task. This is even more so when, as will be the case now, not only English and French are used but also a third language such as Spanish. Everything that you state in Spanish, Mr Ocaña Cisneros, will be interpreted first into English and then into French. Therefore, I must urge you to speak slowly, and please leave sufficient time after someone else has spoken to you before you answer. As I stated, the statement or question of someone else before you will be translated into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has been finished, I will give you a sign to this effect by a gesture like this. Only then will it be possible for the interpreters to follow.

Mr García-Gallardo, you have the floor.

MR GARCÍA-GALLARDO: Could you please introduce yourself.

MR OCAÑA CISNEROS *(Interpretation from Spanish):* Yes. I am Fausto Leono Ocaña Cisneros, Chief Mate, Merchant Marine. I had 26 years’ experience when the events occurred.

MR GARCÍA-GALLARDO: What was your rank on board the *Virginia G* around the time of the incident in question?

MR OCAÑA CISNEROS *(Interpretation from Spanish):* I was First Mate on the deck and First Mate on the bridge.

MR GARCÍA-GALLARDO: Were you in charge of the bunkering operations?

MR OCAÑA CISNEROS *(Interpretation from Spanish):* Yes, I was. It was one of my jobs as Chief Mate on the bridge. It is one of my responsibilities in such a job.

MR GARCÍA-GALLARDO: What type of oil did you, the *Virginia G*, supply to merchant and fishing vessels?

MR OCAÑA CISNEROS *(Interpretation from Spanish):* Gas oil.

MR GARCÍA-GALLARDO: Did you ever supply any other product or service to merchant shipping vessels or fishing vessels?

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MR OCAÑA CISNEROS (*Interpretation from Spanish*): No I did not, only gas oil. The vessel is not prepared to carry or to maintain or to supply other types of products, only gas oil.

MR GARCÍA-GALLARDO: In which geographic area was the *Virginia G* operating during the time you were on board?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): The vessel was 60 miles approximately from the coast of Guinea-Bissau's territory. It was outside the territorial waters. It was outside the adjoining waters. It was in the exclusive economic zone of the Guinea-Bissau territory.

MR GARCÍA-GALLARDO: Did you bunker vessels and what type of vessels did you bunker, if any?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): In general it was merchant vessels that did the voyage, that sailed in these waters outside territorial and adjoining waters. Mainly these were merchant vessels, as I say, coming from southern Africa or from South America, towards Europe, yes.

MR GARCÍA-GALLARDO: In all your experience on board the *Virginia G*, did you ever experience an issue with the Guinea-Bissau authorities in relation bunkering activities?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): No.

MR GARCÍA-GALLARDO: The two *Amabal* vessels, the two fishing vessels, how close were they to the *Virginia G* when refuelling was taking place?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I cannot remember now whether we were supplying number I or number II but they were about 100 metres from the bows of the vessels and the other one was standing by at two or three miles from the *Virginia G*'s position.

MR GARCÍA-GALLARDO: Do you know whether the fishing vessel had observers on board?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Fishing vessels always have observers on board.

MR GARCÍA-GALLARDO: Did you see them?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): No, I did not. It is impossible to see them.

MR GARCÍA-GALLARDO: Did you ascertain that there were observers on board?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): On the radio, yes, when we communicated with the captains of those fishing vessels we always asked them whether there are observers on board and whether those observers are authorized to be there, being an authorization for fishing and bunkering activities.

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MR GARCÍA-GALLARDO: I would now like to move to the events on and surrounding 21 August 2009. Were you outside the Guinea-Bissau territorial waters and outside its contiguous zone?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, at 60 miles from the coast of the Guinea-Bissau territory.

MR GARCÍA-GALLARDO: Did you ever approach or enter the territorial waters or contiguous zone of Guinea-Bissau on this particular mission?

THE PRESIDENT: Mr Gallardo, I am sorry to interrupt you but would you please wait until the interpretation into French has finished? I will give you a sign.

MR GARCÍA-GALLARDO: Did you ever approach or enter the territorial waters or the contiguous zone of Guinea-Bissau in this particular mission?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): No.

MR GARCÍA-GALLARDO: Were you near Captain Blanco Guerrero on the evening of 21 August 2009, on deck?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I was on deck supervising the bunkering operations.

MR GARCÍA-GALLARDO: What happened on board the *Virginia G*?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): The *Virginia G* was boarded around dusk by personnel that we did not recognize. They had not identified themselves previously either. Some of them were armed and wearing military fatigues.

MR GARCÍA-GALLARDO: Did you have any warning before they came on board?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): No. We only realized when they were already in the process of boarding the vessel. We only realized when they were just a few metres away from the edge of the boat.

MR GARCÍA-GALLARDO: Did they make any prior radio contact?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): No, they did not.

MR GARCÍA-GALLARDO: What did they look like?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): They looked as if they were pirates.

MR GARCÍA-GALLARDO: What was their external appearance?

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MR OCAÑA CISNEROS (*Interpretation from Spanish*): I repeat, they seemed to be pirates because some of them were wearing military uniform and they were armed, while others were wearing plain clothes but with no identification at all.

MR GARCÍA-GALLARDO: What sort of weapons did they have?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): AKM combat rifles.

MR GARCÍA-GALLARDO: What was Captain Guerrero's reaction?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): When I managed to get to the bridge I found the captain, who was being threatened with a gun by one of the armed military people. He was under stress and he looked powerless.

MR GARCÍA-GALLARDO: What was your opinion on the order given by the Guinea-Bissau officials?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): My opinion is that it was madness. It was madness because we did not have the means to be able to sail away from the point we were at to the Port of Guinea-Bissau, because of the very characteristics of the voyage that we would have to undertake in that area.

MR GARCÍA-GALLARDO: Were you allowed to communicate with the shipowner?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): No. It was impossible to undertake any type of communication because it was forbidden by the military.

MR GARCÍA-GALLARDO: Would you please describe the journey to the Port of Bissau?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): The voyage began, as I said, at dusk, at about 1900 or 2000 hours. From the geographical position we were at to the entrance of the channel, the Canal of Geba, sailing took about four hours. The strength of the wind increased and therefore the waves became stronger and stronger. When we were already inside the Canal of Geba close to the island of Kijoo[?], in *this* position first of all, in the lower area of the entrance to the channel there were a lot of fishing vessels, dug-outs or other boats, and it was difficult to see them, let alone be able to contact them. At that point a strong shower started falling on us, so it was impossible to even see the bows of the vessel, the fore of the vessel; you could not practically see it. It was impossible to see a distance of 30 to 50 metres ahead of the bows of the vessel. It was night-time.

MR GARCÍA-GALLARDO: Did you have a chart on board or a navigation system to come into the Port of Bissau?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, we did have a chart of the port to be able to sail into the port, but unfortunately the chart was not updated, so we had to use all our resources in order to be able to reach the port; and also the captain's experience was very important because the chart that the military brought, they eventually identified themselves as coming from the FISCAP Agency from Bissau, so the chart they brought with them was not really a chart but rather little bits of a chart, little bits and pieces of a chart put

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together with Scotch tape or some put together with Fed, so the latitudes or the longitudes did not really coincide, and with that chart it was impossible to reach our destination.

MR GARCÍA-GALLARDO: Do you think there was any risk of marine pollution?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I am sure there was. A large percentage of the load, the large percentage of a cargo was still on board, and this vessel does not have a double hull, because it was constructed many years ago, and the piping system is full of little stones, and then the current was very strong. These were areas that were really dangerous. There were practically no beacons along the channel, or, if there were, there were very few of them, so a collision or grounding could have taken place easily.

MR GARCÍA-GALLARDO: What happened over the next days and weeks in the -

THE PRESIDENT: Mr García-Gallardo, I am sorry to interrupt you but we have reached 1 p.m., so the Tribunal will withdraw at this stage for a lunch break and we will continue the hearing at 3 o'clock.

(The sitting is closed at 1 p.m.)

2 September 2014, p.m.

PUBLIC SITTING HELD ON 2 SEPTEMBER 2013, 3 P.M.

Tribunal

Present: President YANAI; Vice-President HOFFMANN; Judges MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judges ad hoc* SÉRVULO CORREIA, TREVES; *Registrar* GAUTIER.

For Panama: [See sitting of 2 September 2013, 10 a.m.]

For Guinea-Bissau: [See sitting of 2 September 2013, 10 a.m.]

AUDIENCE PUBLIQUE DU 2 SEPTEMBRE 2013, 15 H 00

Tribunal

Présents: M. YANAI, *Président*; M. HOFFMANN, *Vice-Président*; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK, *juges*; MM. SÉRVULO CORREIA, TREVES, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 2 septembre 2013, 10 h 00]

Pour la Guinée-Bissau : [Voir l'audience du 2 septembre 2013, 10 h 00]

THE PRESIDENT: The Tribunal will now continue the hearing in the case concerning the vessel *M/V Virginia G*.

Mr García-Gallardo, you may now continue the examination of the witness, Mr Ocaña Cisneros.

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Examination of Witnesses and Experts (continued)

MR OCAÑA CISNEROS

EXAMINED BY MR GARCÍA-GALLARDO (PANAMA) (CONTINUED)

[ITLOS/PV.13/C19/2/Rev.1, p. 1-3]

MR GARCÍA-GALLARDO: Thank you, Mr President. Members of the Tribunal, I will continue with the examination of the witness, Mr Ocaña Cisneros.

We were discussing the conditions. What happened over the next days following the detention in Bissau?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): In the days after the detention of the vessel when the vessel reached the port at Bissau our material conditions really decreased – drinking water, supplies, medicines. This is a rainy season of the year, so there are many more insects. Two crew members even contracted malaria. We felt as if we were in prison, and even worse than that, because we reached a moment when drinking water became exhausted and we had to look for ways of finding supplies, especially finding them on the ground, trying to find them by ourselves; and this, of course, largely affected the mindset, the behaviour I would say, of the crew, just to speak symbolically.

MR GARCÍA-GALLARDO: You had a particular need to reclaim your passport. Can you explain why?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I am Cuban, but I have a residence permit in Spain and my residence permit was on the verge of expiring. Therefore, in order to get back to Spain I had to have my passport together with the vessel documents, but those documents were at the prosecutor’s office. In the two-month period that I tried to get my passport back in order to be able to get my ticket and fly back to Spain I could not persuade the authorities to give me my passport back. They refused; they acted in bad faith. They did not want to give me my passport back.

MR GARCÍA-GALLARDO: Were you accused of any crime or any fault? What was the reason to retain your passport?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): No, no, no. I repeat that when the captors of the vessel disembarked on the 22nd they withdrew the vessel’s documents and took away all our crew passports. They sent me from pillar to post. They told me, “Well, your passport is at FISCAP but then you have to ask for an appointment with the authorities”, but they were never available, they were always in meetings with the Prime Minister or the Deputy Prime Minister or in some other government office. For example, they said “the official you need to meet with is in the Fisheries Ministry”, but I never managed to speak to the FISCAP commissioner, who was the one who had to give me authorization to be able to get my passport back.

MR GARCÍA-GALLARDO: Would you please explain the conditions surrounding the unloading of the cargo?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): The military – I want to underscore this – on several occasions asked us or ordered us to moor the vessel in order to take the fuel out of the vessel. The first time this happened the captain had to make an effort

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to prevent them from doing this, and of course we had to do these manoeuvres by ourselves because a pilot was never available. They threatened – and this time we thought that they would make the threat good – to abuse the captain and the other crew members. On that day, the second time, they said that the fuel had to be taken off the boat willy-nilly, come what may. Commander Mita used the following words: “Captain, you either give us the fuel today or somebody is going to suffer today. This is Bissau, this is Africa, and we are military, so the fuel is going to leave the boat today come what may”. The captain could not do anything else but acquiesce, because of course he had to try to avoid the worst consequences, so he had to authorize the disembarkment of the fuel without the military or the port authorities taking any of the usual, normal measures to avoid spills or accidents et cetera.

MR GARCÍA-GALLARDO: May I show you some pictures, please? Those pictures have been provided by the representatives of Guinea-Bissau. Do you have any particular comment on the first photo, please?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, indeed. This photograph, as the caption reads, was taken after the arrest. This photo does not correspond to what the caption says, because the weather conditions in the sea were not those at that time, the distance we were at from the coast, it was not at that time, because the arrest happened at dusk, at between 1900 and 2000 hours, and the light that you see in this photo, that brightness, does not correspond to that time.

MR GARCÍA-GALLARDO: I will show you a second one and please let me know if you have any particular comment.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): This photo reveals that the – so the personnel that came on board the boat – those people are not in this photo – well, the military person, yes, but the FISCAP people, when they identified themselves, were not wearing those clothes. They were wearing plain clothes with a kind of coat with the FISCAP logo on their backs. The military were armed and they didn’t have life vests.

MR GARCÍA-GALLARDO: I have just a couple of questions. How did the circumstances of the arrest that you have explained today in this room affect the captain?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): The captain, in spite of being a highly experienced and seasoned person – well, all of this affected him very negatively. In fact, on some occasion he told me that he couldn’t forget, he couldn’t erase from his mind all of these events. He really lost a little bit of his mind. All of this affected his state of mind and he rejected his food even. Nothing – he didn’t like anything – he couldn’t sleep well at night. The captain unfortunately died recently, not because of this incident but we, the crew members, believe that these events affected him very deeply, and the events might have had something to do with his death.

MR GARCÍA-GALLARDO: A final question: why did you decide to go back to the boat when awaiting your renewed passport or your residence permit in Spain?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I made this decision because I have sea legs. I am a person of the sea. I just took a few months’ holiday but I didn’t have any other job. I knew the shipowner; I had worked for him before, and I felt I was part, or I

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still feel I am part of that vessel, and I wanted to live, experience – especially I wanted to be there when the boat was released. I wanted to be there and take the boat to its next posting.

THE PRESIDENT: Thank you very much, Mr García-Gallardo.

Pursuant to article 80 of the Rules of the Tribunal a witness called by one party may also be examined by the other party. Therefore, I ask the Agent of Guinea-Bissau whether he wishes to cross-examine the witness.

MR OCAÑA CISNEROS

CROSS-EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)

[ITLOS/PV.13/C19/2/Rev.1, p. 3-8]

MR MENEZES LEITÃO: Thank you. Could I please ask my colleagues to put that photo again on the monitor – if you do not mind – the first one with the vessel.

I should point out that you mention in your deposition that you understand this photo was taken after the arrest of the *Virginia G*, but what is in the legend is that the photo was taken before the arrest of the *Virginia G*. So before six o'clock normally the weather could be like this way – isn't it so?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): At the distance we were from the coast, that condition of the sea is not possible.

MR MENEZES LEITÃO: So at the moment of the arrest of the *Virginia G* it is possible quite frankly that the boat came to the *Virginia G* and before the arrest this photo has been taken – or not? This photo was taken before the arrest is what we say, just before.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, it could have been before the arrest or it could have been two months before the arrest, or two days, but those were not the conditions that day because the sea--

MR MENEZES LEITÃO: This--

THE PRESIDENT: I am sorry to interrupt you, Mr Leitão. Would you please await the translation into French?

MR MENEZES LEITÃO: I am sorry.

THE PRESIDENT: Please proceed.

MR MENEZES LEITÃO: You also testified that, as I understand, it was a boat like this that came to the *Virginia G*. Do you confirm this, because it was this kind of vessel?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, I can confirm it.

MR MENEZES LEITÃO: Because it was in your statement that you were boarded by this boat. How was it possible from a boat like this to board a vessel like the *Virginia G* or an oil tanker? How did they manage to board the boat?

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MR OCAÑA CISNEROS (*Interpretation from Spanish*): *Virginia G* is 55 metres long and the boat was full, and so at that point I think we had 90% of our cargo on board, and when ---

MR MENEZES LEITÃO: I was asking how it is possible to enter the boat, for instance without the consent of the *Virginia G*? It is your testimony that they launched ropes against the boat and climbed through the ropes?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Well, I was trying to answer your question – when the boat is loaded the height is 1.5 metres from the water to the deck and you can jump on board; you don't need any type of ropes or anything. You can jump easily.

MR MENEZES LEITÃO: What you say.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, they jumped. They clambered onto the boat.

MR MENEZES LEITÃO: Do you confirm *these* were uniforms of the people that entered your boat?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, yes, the soldiers. The others I can't recall, but the soldiers, yes.

MR MENEZES LEITÃO: If you see people in these kinds of clothes, do you think they are pirates, as you say?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): The way they acted and the way they were dressed, yes – soldiers, armed soldiers, two or three civilians. That is my idea.

MR MENEZES LEITÃO: You find these kinds of persons were pirates. It was your testimony that there was violence in the entering of *Virginia G*. Do you confirm that?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, I do. They came on board. They acted violently.

MR MENEZES LEITÃO: Was anyone hit?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Not exactly.

MR MENEZES LEITÃO: Was there anyone injured?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): No.

MR MENEZES LEITÃO: It would be a short violence. Let me see something that you are saying, because you have a written statement annexed to the Memorial. First of all, where were you when the boarding took place?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I was on the deck supervising the operations of bunkering and refuelling.

MR MENEZES LEITÃO: Your statement that ---

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THE PRESIDENT: It seems that the interpreters cannot hear your statement. You may continue.

MR MENEZES LEITÃO: Immediately you also said: “I was on deck and took the opportunity to go to the bridge.” How was it possible, if anyone was ordered to stay in the places they were, that you took the opportunity to go to the bridge? How?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I was on the deck and the deck starts at the bow and goes to the stern and I was at the stern and saw the people come on board. I was on the left on the port side so I went to starboard and I went up to the bridge. When I got to the bridge the captain was being threatened with a gun by soldiers.

MR MENEZES LEITÃO: To move, as I understand it, it was possible to do that.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I moved because they didn’t see me and I got away quickly but if I had not done that they would have pointed the gun at me too.

MR MENEZES LEITÃO: So no communications at all with the owner of the ship because they were forbidden – do you confirm that?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, I do.

MR MENEZES LEITÃO: The statement presented as the next one of the Memorial of Panama is that of the captain Eduardo Blanco Guerrero – and he says he managed to do a communication with the owner of the ship some hours after the boarding. What would you say about this?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): After I went to the bridge I did not go down again until the ship arrived in Bissau. All the sailing was done by the captain and myself until we reached Bissau. I don’t know what moment that communication could have taken place or whether somebody might have got away and had a chance to make a phone call or communicate with ...

MR MENEZES LEITÃO: But let us say about another thing: the danger of the voyage. You stated that the weather was bad and the visibility was also not good. Do you confirm that?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, I do.

MR MENEZES LEITÃO: Because the captain signed an infringement notice stating that the weather was fine and the visibility was also good. Why did the captain accept to sign something like that if it was not true?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I doubt that the captain signed that if he was in full possession of his senses. Maybe stress, fear, led him to sign his death certificate or sentence had he been stressed or – but I don’t think he would have accepted that.

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MR MENEZES LEITÃO: But the testimony is that no one hit anybody or committed any kind of violence.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): That is an example. That is an example.

MR MENEZES LEITÃO: You said that the military pilot obtained a chart of Bissau but it was not up to date. You said that with this chart it was impossible to get to the destination. It was your words. Do you confirm that?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, I do.

MR MENEZES LEITÃO: They managed to get to the destination without any problem. I think it is a concept difference from anything impossible. It was impossible?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I can explain why it was possible, if I may.

MR MENEZES LEITÃO: I think we should say that it was possible. There is just one doubt. Do you still belong to the crew of the *Virginia G*?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): At this time, no, not at this time.

MR MENEZES LEITÃO: Because we have information that *Virginia G* is now sailing frequently to the port of Bissau. You stated that the characteristics of the ship did not permit such a trip. Do you confirm that?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): I do not understand the question.

MR MENEZES LEITÃO: You said that the characteristics of the tanker *Virginia G* make it not adequate to do a trip to the port of Bissau. It was from your statement. But we know that this ship is now making a lot of trips to the port of Bissau to transport fuel.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Well, maybe I was referring to the fact that it was impossible or it was not very likely that the ship would arrive at Bissau the day that it was arrested.

MR MENEZES LEITÃO: What is the question of the chart? Do the islands, the rocks, the waters, change with time in the sea? Why do you have to update a nautical chart of the sea so often?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): The water and rocks change over time, not in months or years but the charts have to be updated constantly because a lighthouse might suddenly stop functioning or there might be a ship that sinks, or the conditions might have changed. That is why they are updated, the charts.

MR MENEZES LEITÃO: I will just put to you a question about the conditions in the port of Bissau. It was also your statement that you intended to leave Bissau and informed the captain and the company that you had to renew your residence permit. Is that so?

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MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, that is so.

MR MENEZES LEITÃO: But what you stated, and it is a written statement, is: “I informed the captain and the company that my intentions were to return to the ship. I was told that the vessel would hopefully be released within a few days and that there were not ticket funds allocated for travelling for the time being.” So it was the company that did not have funds to permit you to do the journey.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): The shipowner at that time did not have resources, but I did. I was the person who wanted to travel and I got the money and the FISCAP agency did not want – I don’t know why they were violating the rules and regulations – they did not want to give me my passport.

THE PRESIDENT: Excuse me, would you please wait until the translation is finished.

MR MENEZES LEITÃO: You said that you asked FISCAP for the passports. How did you ask for them? Did you make a written request or only talk to the inspectors at FISCAP verbally?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Initially it was verbally. Then I had to write two or three letters of request. Yes, several letters. I do not know where they put them.

MR MENEZES LEITÃO: To FISCAP?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes, I did.

MR MENEZES LEITÃO: What we have in Bissau is a letter of the Ambassador of Cuba, in Guinea-Bissau, from 4 November 2009. It was the first letter and it makes no reference to previous requests for the passports. This letter was object of an official opinion, an affirmative opinion, and on the next day, the 5th, which is the Thursday, and the next Monday, the 9th, you signed the statement that you received your passport, so they have not retained the passport for as long as you say.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): For two months I was trying to get my passport back. I do not know where the letter was sent. I can tell you that I wrote them and I sent them in. I gave them in to the personnel of FISCAP.

MR MENEZES LEITÃO: You say that but it was not confirmed on our registers but let us see. You said that in the port of Bissau there was no potable water, no provisions of any kind, and you felt arrested, but could you not go out to the shops to buy provisions?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): The first few days, no, we were not. It was forbidden. The soldiers, the military, FISCAP, did not let us. When you are in prison you have water and you have electricity. We ran out of water, drinking water. We would shower with rainwater but there was no drinking water.

MR MENEZES LEITÃO: The provisions. I understand that you could go off the ship. It was not possible because there were no funds allocated by the owner of the ship, as there was not for the plane tickets.

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MR OCAÑA CISNEROS (*Interpretation from Spanish*): I repeat, at that time the ship was arrested, the shipowner was in a very bad situation. We, in general, do not have much money, much cash, on the ship. You go there to work and make money; you do not carry loads of money. That is not so.

MR MENEZES LEITÃO: I have no further questions, your Honours. Thank you very much.

THE PRESIDENT: Mr Menezes Leitão, thank you very much.

A witness who is cross-examined by the other party may be re-examined by the party who called the witness. Therefore I ask the Agent of Panama whether he wishes to re-examine the witness.

MR GARCÍA-GALLARDO: I have no further questions.

THE PRESIDENT: Thank you.

At this stage Judge Lucky would like to ask a question of Mr Ocaña Cisneros.

MR OCAÑA CISNEROS
QUESTION FROM JUDGE LUCKY
[ITLOS/PV.13/C19/2/Rev.1, p. 8-9]

JUDGE LUCKY: Good afternoon, Mr Ocaña Cisneros. My questions are very simple, so yes or no answers. You did say that the members of the crew were sick. Some had malaria. When you got into the port did any of you ask for medical help?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes.

JUDGE LUCKY: Was medical help provided? Did they see a doctor?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Yes.

JUDGE LUCKY: Do you know whether the doctor or doctors provided medical reports?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): No.

JUDGE LUCKY: So apart from what you are saying, that they had malaria, there is no documentary evidence from a medical person to support that?

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Can I explain?

JUDGE LUCKY: Yes, certainly.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): In Guinea-Bissau there is a commission or a delegation of Cuban doctors, physicians, who do humanitarian work. It was through them that we were able to get the medicines to treat the cases of malaria, and these crew members who had malaria were treated by these physicians where they are. These physicians are in the hospitals, the general hospital of Guinea-Bissau.

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JUDGE LUCKY: The Guinea-Bissau authorities permitted that? Put another way, you would not have had it if they were objecting.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): It is possible that they would not have allowed these people to go to the physicians, to the Cuban doctors.

JUDGE LUCKY: Thank you very much.

THE PRESIDENT: Thank you. Mr Ocaña Cisneros, thank you for your testimony. Your examination is now finished. You may withdraw.

MR OCAÑA CISNEROS (*Interpretation from Spanish*): Thank you very much for listening to my statement.

(The witness withdrew)

THE PRESIDENT: Mr García-Gallardo, how do you wish to continue?

MR GARCÍA-GALLARDO: Mr President, I would like to call the next witness, whose name is José Antonio Gamez Sanfiel, the shipowner of the tanker *Virginia G*.

THE PRESIDENT: Thank you.

The Tribunal will then proceed to hear the witness, Mr Gamez Sanfiel. He may now be brought to the courtroom.

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MR GAMEZ SANFIEL
EXAMINED BY GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/2/Rev.1, p. 9-15]

THE PRESIDENT: I now call upon the Registrar to administer the solemn declaration to be made by the witness.

(The witness made the solemn declaration)

THE PRESIDENT: Mr Gamez Sanfiel, I wish to remind you of the following: the work of interpreters and verbatim reporters is a complex task. This is even more so when, as will be the case now, not only English and French are used but also a third language such as Spanish. Everything that you state in Spanish, Mr Gamez Sanfiel, will be interpreted first into English and then into French. Therefore, I must urge you to speak slowly, and please leave sufficient time after someone else has spoken to you before you answer. As I stated, the statement or question of someone else before you will be translated into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has been finished, I will give you a sign to this effect by a gesture like this. Only then it will be possible that the interpreters can follow.

Mr García-Gallardo, you have the floor.

MR GARCÍA-GALLARDO: Mr Gamez, would you please introduce yourself.

MR GAMEZ SANFIEL *(Interpretation from Spanish):* My name is José Antonio Gamez and I am the shipowner of the *Virginia G*. I am a nautical engineer. That is my profession. I have been in this profession since 1964 and I am devoted to fuel since 1981.

MR GARCÍA-GALLARDO: Mr Gamez, why has the port of Las Palmas always been considered strategic for the supply of gas oil activities in the West African region?

MR GAMEZ SANFIEL *(Interpretation from Spanish):* The port of Las Palmas is the port in the area that guarantees quality in accordance with the current regulations that cannot be found in Dakar. Maybe sometimes they do meet those quality requirements but they do not meet them constantly like we do in Las Palmas, where the European rules and regulations are always complied with.

MR GARCÍA-GALLARDO *(Translation from the French interpretation):* What kind of customers did your company have?

MR GAMEZ SANFIEL *(Interpretation from Spanish):* Our customers were basically ships, merchant ships, that were going to ports in Europe and America, and occasionally we supplied other types of ship. Why? These ships required adequate certificates of quality and they could not be issued at ports other than the ports in the Canary Islands. My company supplied gas oil fuels, fuels we could not supply with *Virginia G* because that is something we had to do through a double-hull ship, which was the *Iballa*. At the time of the events we were operating *Virginia G* and *Iballa G*.

MR GARCÍA-GALLARDO: Did you provide any other services or products to your clients?

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MR GAMEZ SANFIEL (*Interpretation from Spanish*): No, none at all. Only fuels.

MR GARCÍA-GALLARDO: Do you consider your tankers to be reefer vessels?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): No, absolutely not. It is a ship for transporting fuel.

MR GARCÍA-GALLARDO: Do you consider your tankers to be logistic vessels?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Absolutely not. The ships are designed to carry fuel and that is our service. Our only service is to supply ships with fuel. Our ships are not logistic operation ships which can also supply other things apart from fuel.

MR GARCÍA-GALLARDO: What other types of activity?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Things like supplying food, water, supplying or carrying cargo, carrying fish. Our ships are not designed for those purposes and that is not what we did at all.

MR GARCÍA-GALLARDO: Do you often travel to West African countries?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Yes, quite frequently.

MR GARCÍA-GALLARDO: To Guinea-Bissau?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Yes. I live in Guinea-Bissau right now. I have my residence there. After what happened, after the ship was released, I tried to solve a very important problem which Guinea-Bissau has, which is the supply of fuel.

MR GARCÍA-GALLARDO (*Translation from the French interpretation*): What work do you do in Guinea-Bissau?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): My work is I advise them. I advise the advisor of the current President in terms of energy matters to try to get fuel at a reasonable price, to market it and to transport it.

MR GARCÍA-GALLARDO: Do you normally use the *Virginia G* tanker to conduct these services?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Yes, I do.

MR GARCÍA-GALLARDO: Can you elaborate more about these services?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Yes. I repeat, I give my knowledge, offer my knowledge in the field of fuels, because that is what I have done since 1981. I am an expert at that, and my maritime knowledge, because I have been in the business all these years, and in a country where their fuel needs are very high, and they are suffering tremendously in Guinea-Bissau because of the lack of fuel, I tried to share my knowledge with them, give them my knowledge so that they can have access to fuels at reasonable market prices, and so that, with the serious problem of supply they have, they can move

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ahead and solve it. The population suffers a lot as a result of this. They go for long periods of time with no waste, no electricity, and I try to do what I can, and start up my business again, and at the same time serve some purpose to their country.

MR GARCÍA-GALLARDO: Does *Virginia G* need any particular authorization to carry out these activities?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): No, not at all. We work from port to port. We load at one port and we unload at Bissau, so we need what any ship needs to operate: a load, a cargo. We have an agent who deals with all the documents, the licences, certificates, etc., and then at Bissau we have an agent who takes care of the customs requirements and relations with the authorities, like any other ship anywhere else in the world.

MR GARCÍA-GALLARDO: Coming back to the conditions of the arrest of the *Virginia G* in 2009, in your long experience in the supply of gas oil in the EEZ of different West African countries, have you ever had a similar experience to the one that occurred in Guinea-Bissau with this arrest?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Not exactly, no. I have had two events. One was in Senegal in about 2001 when we supplied a ship 40 miles off the coastline out of the territorial waters and the contiguous zone or area. We were intercepted by a patrol boat from Senegal. They took us to the port of Dakar. We were there for two days. Our lawyers did what they had to do and we were released with no charges and were given compensation of \$15,000 for the two days of arrest. Another case happened in Guinea-Conakry. If I am not mistaken, I am talking about 2004/2005. At that time the area was becoming very dangerous and we had stopped operating in Bissau and Guinea-Conakry. We were arrested by pirates. Well, we were seized by pirates. The captain called us and said that they were shooting into the air. We were stripped of our clothes, fully naked, and put on the deck, made to sit down on deck. The deck was at 40/45 degrees, the temperature on the deck, and in those conditions we got in touch with the P&I and the P&I recommended that the best thing to do would be to negotiate with the pirates. It was not necessary for the ship to go anywhere. First, they wanted €300,000 to release the ship, and then at the end the P&I paid a group of people in Guinea-Conakry \$30,000 and we were immediately released. We are talking about a dramatic situation but it was solved in about 24 hours.

MR GARCÍA-GALLARDO: Mr Gamez Sanfiel, were you informed by the shipowners of the vessels *Amabal I* and *Amabal II* of the reasons for the detention of those two vessels?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Yes. Once they arrested the ship in Guinea-Bissau I went from Seville to Las Palmas in the Canary Islands. We had talks with the agent of the ship and Mr Hamadi, who had been an honorary consul of Spain in Guinea-Bissau. The shipowner said, “Look, we have to solve this and pay in order to free the ship, to get the ship released”. He put me in touch with a civil servant at the Ministry for Agriculture and the Sea in Spain. I spoke to that civil servant, who said to me “Look, the best thing you can do to solve this quickly is to pay up and get out, because if not it is going to be worse”. The right person to manage all this situation is Mr Hamadi, who is a close friend of Cadogo. Cadogo is the name they give to the former Prime Minister of Guinea-Bissau who today is in exile in Portugal. I said to him, “No, we are not going to negotiate anything. We believe that

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we have done nothing wrong. Therefore, we are not going to negotiate with anybody because there is nothing to negotiate”.

MR GARCÍA-GALLARDO (*Translation from the French interpretation*): So you’re saying that someone from the Ministry of Finance in Guinea-Bissau was put forward to find a solution?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): No, no. We had to deposit an amount of €600,000 in an account in Lisbon.

MR GARCÍA-GALLARDO: Do you have any evidence of this?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): No. The only evidence I have is my conversation with the shipowner of the *Amabal* ships and Eduardo Blanco Guerrero, the former captain, who has since died, who came under tremendous pressure in Guinea-Bissau. There was a man – I do not know who, but he gave me his phone number even – whose name was Gomez Gau¹ or something like that, who would be very pleased if he could speak to me. I said, “he is not going to talk to me. We have our representatives in Bissau. Mr Alvarenga was our representative, the P&I’s agent in Bissau, and Mr Alvarenga went to talk not just to this Mr Gomez Gau but to somebody called Nosoliny Vieira. They made him wait for a long time before he could talk to them, and finally he was told that it was in the hands of the Interministerial Fisheries Commission and that they had nothing to talk to him about.

MR GARCÍA-GALLARDO: Do you consider this type of authorization for the supply of fuel oil in conformity with the international law of the sea? I mean the authorization to provide this service.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): When we send supplies within 24 miles, we have an agent on the ground who deals with all the paperwork to be able to supply the goods or the fuel with the permissions we need. If we are further away than 24 miles, the person who gets the permissions and certificates is the shipowner, through the agent for the ship that we have to supply. So, in accordance with that, when we supply fuel at a distance of more than 24 miles the only thing we do is to make sure, by using observers, captains of the ships that we supply, that they have all their documents and everything, all the permissions that they require, and this is usually not done directly but through an agent. We know from statements made by the people in charge of the ships we were supplying that the agents and everybody else involved gave their authorization for us to go to the meeting point and that they had spoken to everybody that they had to speak to.

MR GARCÍA-GALLARDO: Mr Gamez, did you initiate any legal proceedings before the courts of Guinea-Bissau – I am talking about interim relief measures or any other type of main proceeding – to challenge the decision to confiscate the ship, the equipment and the cargo?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Yes, indeed. We did all in our power before the prosecutor. We even asked for a prompt release in exchange for the payment of a reasonable bail, so that our ship and our crew did not have to be there any longer. In addition, since things did not get any better, we hired a lawyer from Lisbon, from

¹ This and a number of other proper names are unverified and unverifiable.

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the Miranda law firm, and they started different proceedings and even obtained a cautionary statement from the corresponding judge, which prohibited the seizure of the vessel and the cargo. On 24 September there was a letter from the Under-Secretary of the Treasury, which bore the date 30 September, so a date six days later, which says that regardless of what the judge may say, the government would seize both the vessel and the cargo. So they got the vessel to moor at the port and at gunpoint forced the captain to berth the vessel, and they confiscated the cargo. Once the vessel had been confiscated and the cargo had been offloaded, we just dropped anchor.

MR GARCÍA-GALLARDO: Can you please explain how your business was affected by the arrest and confiscation of the *Virginia G*?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): We live in a time of communications, so when the *Virginia G* was arrested on 21 August, an incredible hoo-ha was formed by radio and television and I was placed under enormous pressure, which resulted in the confiscation of our other vessel and the withdrawal of a launch by the oil companies, so in a two-week period I found myself without my two vessels and with a reputation that was horrible. I was being accused of being a pirate, and it is not just me saying this. I have a press clipping from a Bissau newspaper that said Mr Missilini says that a Panamanian ship has been arrested that was devoted to piracy on the shores of Guinea-Bissau. As you can imagine, this caused great harm to my reputation and I just had to roll up my sleeves and face up to the situation. Given that I am a very resilient person, I have managed to keep my head above water, but since 2009 until the present time my life has not been a bed of roses, as you can imagine, but this has made me stronger as a person.

MR GARCÍA-GALLARDO: Did you want to say that you were unable to finance to the crew on board the vessel *Virginia G* during the 14 months that it was arrested in the Port of Bissau? Can you please explain better these circumstances? Why you were not even able to pay a retainer or any cost to cover the minimum living conditions?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): As soon as I could, I did foot the bill. Of course, the situation was not the most wonderful of situations. Part of the crew started leaving and the other part decided to stay, in spite of all the odds, until they collected their salaries. This situation was difficult, and it was also difficult for me to face up to this situation because I even had problems to keep the pot boiling myself.

MR GARCÍA-GALLARDO: Did you receive any support from the flag State of the vessel, from Panama?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): The only support I was entitled to was just to come to this court. When I decided to come before this court they supported me, and here I am.

MR GARCÍA-GALLARDO: Thank you.

THE PRESIDENT: Thank you, Mr García-Gallardo.

Pursuant to article 80 of the Rules of the Tribunal, a witness called by one party may also be examined by the other party. Therefore, I ask the Agent of Guinea-Bissau whether he wishes to cross-examine the witness.

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MR MENEZES LEITÃO: Yes.

THE PRESIDENT: I then give the floor to the Agent of Guinea-Bissau to cross-examine the witness.

You have the floor, sir.

MR MENEZES LEITÃO: Thank you, Mr President.

MR GAMEZ SANFIEL
CROSS-EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/2/Rev.1, p. 15-20]

MR MENEZES LEITÃO: Mr Gamez, I would like you first to give me some information regarding the written statement that you have provided to this Tribunal. Your statement was that in January 1998 the company Penn Lilac Trading was created for the operation of the *Virginia G* and that you were appointed as their representative. Is that so?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Indeed, yes.

MR MENEZES LEITÃO: Then in September 2001 the company Penn World S.A. was created and you were appointed to operate its vessel *Iballa G*. Is that correct?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Yes.

MR MENEZES LEITÃO: So it is my understanding that the ships belonged to two different companies. The owner of the *Virginia G* has nothing to do with the owner of the *Iballa G*. Is that so?

MR GAMEZ SANFIEL: Common practice says that in the world of vessels each vessel sets up its own company, and this does not mean that companies are not related to each other.

MR MENEZES LEITÃO: Do you think that the *Iballa G* belonged to Penn Lilac?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): No.

MR MENEZES LEITÃO: Let me ask about another matter that was referred to in your deposition. You have reported that the *Virginia G* has had several problems on the shores of this region of Africa. The *Virginia G* was arrested in Senegal and paid some compensation to the State, and you also said that she had paid compensation in Guinea-Conakry. Is that so?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): No, what I said is that the State of Senegal compensated us US\$ 15,000 and what I am saying is that in Guinea-Conakry, through the P&I Club, we had to pay an organization devoted to piracy.

MR MENEZES LEITÃO: You mean to say, an organization with an open office with objectives of piracy?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): No, no, that is not what I am saying. What I am saying is that the P&I Club got in touch with a series of people in Guinea-

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Conakry. I am not talking about any office that is open to the public or anything but if you know this area you know that these things do happen.

MR MENEZES LEITÃO: But you do not report this kind of infraction to the authorities of Guinea-Conakry?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): No.

MR MENEZES LEITÃO: In your written statement you also said that you decided not to use the mechanism of prompt release in Guinea-Bissau under article 292 of UNCLOS because you had been led to believe that a solution to the matter was possible; so are you trying to get another solution such as when you talk about in Guinea-Conakry in Guinea-Bissau?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): What I am saying is, in Guinea-Bissau – and this is in writing – we asked the authorities for the possibility to give bail for the vessel's prompt release.

MR MENEZES LEITÃO: To pay what?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): No, they didn't allow me to pay the bond. They didn't even reply. This is a letter in writing, a letter that was sent to the prosecutor where we say that, you know, we want the amount to be paid to be established; but the prosecutor didn't even mention an amount. I received a communication from a local lawyer. I was invited to come to an agreement recognizing the offence committed, and paying €100,000 as a bill for that lawyer; and if the fine to be paid was less than €600,000, 10% of that should also be given to the lawyers – and this has nothing to do with the bond.

MR MENEZES LEITÃO: You had some conversations about an attempt of corruption, but you were only to report a declaration of third parties, as I understand. You did not talk to anyone that can be corrupted or anything at all.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Well, not only did I speak about this – well, I didn't speak to anybody. I didn't speak to anybody.

MR MENEZES LEITÃO: You did speak to the captain about the possibility of getting, as I think you said, an African solution to the problem? Is that so? It is the only evidence you have.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): If you allow me, Sir, I am going to answer your question. What I am saying is that I not only tried to look for a solution, look for a legal settlement to this issue, but there is also written evidence that this solution was sought. It is only that they were not interested in reaching a solution because they thought that everything would be settled, that it was settled historically, because it is not only us that were intercepted in Bissau and forced into the port – no, no, no. The Portuguese Government made a statement a few months before saying that if the Government of Guinea-Bissau persisted in systematically arresting Portuguese vessels they would provide a response, not only a political one, but other types of responses. This was Portugal.

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MR MENEZES LEITÃO: If the Government of Guinea-Bissau and if the State of Guinea-Bissau is as bad as you say, why do you presently reside in Guinea-Bissau?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Very well – because the rogue “Government” of Guinea-Bissau has been overthrown and so that Government is not in office any more. Now there is a new Government that is trying to do things differently. It is a Government that has called a general election for 23 November and so I can see a possibility that this country, which is subjected to terrible hardships – no drinking water, no light, etc. – I have the hope that this country may solve its economic situation happily.

MR MENEZES LEITÃO: It was your statement that due to the arrest of the *Virginia G* the other company Gebaspe lost the *Iballa G*. Do you confirm this statement?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): I am sorry, I didn’t explain things properly, or perhaps you didn’t understand what I said. What I said, Sir, is that the company and the way Penn Lilac managed its things, and the owner of *Iballa* were two different companies.

MR MENEZES LEITÃO: Yes, yes ---

THE PRESIDENT: Excuse me to interrupt you, Mr Leitão, would you wait for the completion of the interpretation into French? Thank you. You may continue.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): As I was saying, these are two companies with the same management. Sorry, if you allow me I will finish my explanation. This is not just something that happened with these companies. In general large companies had the same situation because this is the way in which the market works; each vessel has its own company, as an owner, and the management may be a single management for more than one vessel. I would like to remind you that in my statement I also speak about Penn Lilac and I also speak about Penn World and I also speak about another company called Gebaspe, which is the company that was managing these two companies. So it was the company that was in charge of the commercial activities of the company.

MR MENEZES LEITÃO: Do you agree that it is a Spanish company?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Very well, I agree; it is a Spanish company.

MR MENEZES LEITÃO: Can you confirm that the *Iballa G* was affected due to the arrest of *Virginia G*? I have information that *Iballa G* was not paying the wages to its crew since April 2009. Can you confirm anything like that?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Neither *Iballa G* or *Virginia G* were paying these wages. In 2010 when it went back into service we made a proposal.

MR MENEZES LEITÃO: The wages that were not being paid since April 2009 to the sailors of *Iballa G*.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): If you allow me ---

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MR MENEZES LEITÃO: (*In Spanish*) Please answer the question.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): I am not going to answer with “yes” and “no” unless Mr President forces me to do so.

MR MENEZES LEITÃO: A second question: on 24 August 2009, just three days after the arrest of *Virginia G*, *Iballa G* entered the port of Las Palmas. 21 August is Friday and 24 August is Monday. So it is your testimony that the fact that *Iballa G* was sent away to the port of Las Palmas is because of the arrest of the *Virginia G* and because of the declarations of Mr Hugo Nosoliny Vieira, which happened only in September 2009.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Well, I think I said this before but I will repeat it. Practically 15 days later, well, *Iballa G* went back to port.

MR MENEZES LEITÃO: On 24 August, to the port of Las Palmas. The ship workers were not getting paid, and I also have information that the ship owed a lot of money to CEPSA due to the invoice that was not paid. This has also anything to do with the arrest of *Virginia G*, the fact that the ship did not pay CEPSA for its invoice?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Well, I will repeat. It is difficult to understand that the vessel had legal problems with CEPSA when CEPSA was fuelling, was providing fuel to the ship.

MR MENEZES LEITÃO: Could you answer the question?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): I am saying that the vessel went to the port of Las Palmas because it had completed its bunkering activities and went back to get fuel again, and it had no problem getting fuel at all. The only problem was that given the rumours that spread like wildfire – and you are speaking about the 24th but normally the end of the month is the 30th and not the 24th – and so if what happened with the *Virginia G* had not happened and if these rumours had not spread so widely, that we were pirates, then business would have continued as usual.

THE PRESIDENT: I am sorry to interrupt you again but our interpreters have difficulties in following your statement or questions, so please wait until the completion of interpretation into French before you ask the next question; otherwise nobody understands the hearing.

MR MENEZES LEITÃO: Thank you so much.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): As I was saying, given the rumours that spread over the television, the radio, the written press, about the situation, and then the different statements by the Guinea-Bissau administration that the boat was involved in piracy activities, then the alarm was raised and the vessel was paralysed, because for just €20,000, which is a small amount, a first embargo was imposed and this led to a cascade of other embargoes or other attachments of assets, amongst them that of CEPSA. This made it difficult to continue; but if things had continued normally nothing of this would have happened. In fact CEPSA was the company that was providing fuel to us, so you can't really talk about a confrontation with CEPSA or debts with CEPSA when really there was a collaboration agreement between us and CEPSA.

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MR MENEZES LEITÃO: But *Iballa G* – there was not also news that the international organization Stella Maris was taking care of the case of the workers without wages being paid? Is that kind of news much more damaging than a local reference in a newspaper in Bissau?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Well, I am going to say something. When the *Virginia G* started operating, four crew members from the *Iballa* went over to the *Virginia G* to work on her.

MR MENEZES LEITÃO: I phrased a very concrete question. Was the news about the intervention of Stella Maris due to the wages of the crew that were not being paid not more important than a local newspaper of Bissau?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): You are asking a question that has a very subjective component.

MR MENEZES LEITÃO: It was about the cost of the *Virginia G* when she was bought by Penn Lilac?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Would you repeat your question, please?

MR MENEZES LEITÃO: What was the price of *Virginia G* when she was bought by Penn Lilac?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): *Virginia G* was bought in an auction in Malaga. I can't remember exactly the price paid, but it was around €600,000. I can't remember the exact figure.

MR MENEZES LEITÃO: It was sold in Malaga?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): I know that it was attached and it was bought in a public auction.

MR MENEZES LEITÃO: At a low price for an oil tanker, or not?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Well, in a public auction, it was a third round of auctions, and so it depends really on what the bidder offers.

MR MENEZES LEITÃO: The ship should not be very good if it cost only €600,000.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): The condition of the vessel – well, you shouldn't look at it at the time you buy it because of course, yes, it may have not been very good, but then we repaired it. We obtained all the certificates and then we had to do all that was necessary so that it was seaworthy because, as you must remember, this vessel was sailing in the European Union; it was not sailing in some dubious place – no, no, no. It was sailing in EU waters. So in a public tender and in the third round of bids the vessel's price is what the bidder offers.

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MR MENEZES LEITÃO (*Translation from the French interpretation*): At the end of that public tender, in the third round, it was ultimately the best bid that was accepted. That's what it was about.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Frankly, I am not really thinking of selling it.

MR MENEZES LEITÃO: The value would be €500,000? Is this correct, this figure?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): It could be, yes. There are no other elements that need to be considered.

THE PRESIDENT: We have reached almost four thirty. Mr García-Gallardo, would you wish to re-examine the witness? If you do, I think we have to withdraw for a break of thirty minutes so we will continue at five o'clock.

MR GARCÍA-GALLARDO: Thank you, Mr President. It will be just one question on an Annex of our Memorial.

MR GAMEZ SANFIEL
RE-EXAMINED BY GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/2/Rev.1, p. 20-21]

MR GARCÍA-GALLARDO: Would you please show Annex 41, the English translation of a letter sent by the owner of the vessel, Penn Lilac Trading, to the fisheries authority on 4 September 2009, where at the bottom – this is the Spanish version. Mr Gamez, this is the letter of authority that you mentioned before about the offer or the request for information on the potential settlement proposing the deposit of warranty. Would you please read this paragraph with me?

MR GAMEZ SANFIEL (*Interpretation from Spanish*):

So they should say something about this and they should inform us what is the way of settling this difficult and unpleasant situation as soon as possible, or for the procedures established in the law to be complied with, establishing the necessary bonds to release the vessel, the crew and the cargo.

THE PRESIDENT: Judge Bouguetaia would like to ask questions but perhaps he can do that after the break.

The Tribunal will withdraw for a break of thirty minutes and we will continue the hearing at five o'clock.

(Break)

THE PRESIDENT: We will continue the hearing and, as I announced before the break, Judge Bouguetaia has questions to ask of Mr Gamez Sanfiel.

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M. GAMEZ SANFIEL

QUESTION POSÉE PAR M. LE JUGE BOUGUETAIA

[TIDM/PV.13/A19/2/Rev.1, p. 23-26; ITLOS/PV.13/C19/2/Rev.1, p. 21-24]

M. LE JUGE BOUGUETAIA : Merci, Monsieur le Président.

Monsieur le Président, avec votre permission, je poserais deux questions au témoin. Monsieur Gamez Sanfiel, vous nous avez dit qu'en 2001, votre navire a été arraisonné au large du Sénégal. Cela se passait à peu près à 40 milles marins de la côte, c'est-à-dire en dehors des eaux territoriales mais dans la zone économique exclusive. C'est une situation quelque peu comparable à ce que vous avez connu en Guinée-Bissau.

Pourriez-vous nous dire avec précision, s'il vous plaît, pour quelle raison, ou du moins les raisons qui ont été invoquées par les autorités sénégalaises pour votre arraisonnement et sur la base de quelle décision juridique vous avez pu être libéré mais, surtout, bénéficier d'un dédommagement de l'ordre de 15 000 dollars ou 15 000 euros ?

Pouvez-vous nous dire si la raison pour laquelle vous avez été arraisonné était parce que vous effectuiez une opération de soutage, ou parce que vous n'aviez pas d'autorisation, comme celle qui était exigée par les autorités guinéennes pour le navire *Virginia G*?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): What the Senegal authorities claimed was that we were conducting bunkering operations without authorization, and when they made sure that we were 42 miles from the coast, I think, they released the vessel without further ado, for us and for the fishing vessel that was receiving the fuel.

M. LE JUGE BOUGUETAIA : Merci.

Deuxième question, Monsieur Gamez Sanfiel, vous avez évoqué le nom de l'ancien Premier ministre de Guinée-Bissau, M. Cadogo. Ce nom était un diminutif. De son vrai nom, le Premier ministre s'appelait Carlos Gomes Júnior. Vous étiez en train de négocier pour trouver un arrangement de type administratif, judiciaire ou à l'africaine, comme on a pu dire ici. Pourriez-vous nous dire exactement quel rôle a joué M. Cadogo dans ce type de transaction ? Il était à l'époque, naturellement, le chef de l'exécutif.

MR GAMEZ SANFIEL (*Interpretation from Spanish*): I have been in Africa for quite a bit and I am quite upset when people mention the expression “African solution” for a very simple reason. Africans are no different from us. Africans also have reasonable solutions themselves, and so this expression “African solution” is inappropriate, in my view, because Africa is a continent that deserves maximum respect. It is a continent that is undergoing an economic expansion. Not everybody in Africa resorts to that type of solution but what I can say is that Guinea-Bissau, in a repetitive way, we had even withdrawn from that area because the pirates acting in the area – and this is something that is common knowledge – of Guinea-Conakry, or who used to act or used to operate in that area, used to invade the waters of Guinea-Bissau to seize vessels and take them to Guinea-Conakry, so the situation in Guinea-Bissau was that every week seven, eight or ten vessels were arrested. So the situation is the following. A fishing vessel, if you are stranded for one day, loses €10,000, two days €20,000, so if a vessel is at a standstill for ten days, it loses about €50,000, so shipowners of fishing vessels prefer to pay €10,000 or €20,000 backhanders, because the longer a vessel remains in detention, the more money they lose, and this is not something unusual; this is something that is quite common in Africa.

This is a situation that happened at a certain point but I have maximum respect for Africans and for the situation in Africa in general. Of course, if you know Guinea-Bissau, the richest person in the country and the person that pays the least taxes was Mr Cadogo, and this

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is something that is common knowledge; everybody knows this in Guinea-Bissau, and that situation happened and it is undeniable, and I am very satisfied that I managed to put an end to a very important problem, because in the past if you spoke to owners of fishing vessels, they said, “Oh, Guinea-Bissau. No, I don’t want to know anything about Guinea-Bissau because it’s very dangerous,” but now things have changed because this situation has changed completely.

In Guinea-Bissau, of course, you can develop the country without having to resort to those shady tactics, so these things did happen, but I do not think that what happened in the past should affect the view you have of the country in the present. We need to be very careful. I would never, ever share this idea of calling things in Africa “an African situation” because they do not deserve this. Africa is a wonderful continent, and I am not trying to censure your Honour for this reason. Please do not take offence at what I am saying, but I find that way of expressing yourself is not really acceptable. I want to pay tribute to Africa. Africa is not what happened in Bissau. What happened in Bissau was a one-off thing. It used to happen in the past and now, fortunately, it does not happen any more. I am very happy about this. Nowadays I live in Guinea-Bissau and even if I am rather long in the tooth, I would still like to devote the rest of my life to helping this country to get out of the current trough it is in.

M. LE JUGE BOUGUETAIA : Ce n’est pas la question que je vous ai posée, M. Gamez. Je vous ai dit clairement : y a-t-il eu une relation directe entre les transactions que vous menez et le chef de l’exécutif de l’époque ?

Avec votre permission, Monsieur le Président, pour aller directement au but sans détours, y a-t-il eu une relation directe entre les 600 000 euros versés sur un compte au Portugal et le nom de M. Cadogo ou plutôt le nom du Premier ministre, du chef de l’exécutif ?

MR GAMEZ SANFIEL (*Interpretation from Spanish*): Really, I never saw the name of the account holder. I am just speaking on the basis of the information I got from the owner of *Amabal I* and *Amabal II*. He spoke of a very atypical situation, because the captain of the vessel phoned me, and I hope God keeps him in his glory. He said the two fishing vessels had already left. “They have paid €100,000, €50,000 each and they have left.” So I phoned the shipowner, Mr Valdo and I said, “Pepe, your two vessels have left. How did you settle this?” “Well,” he said, “I paid €100,000 into an account in Portugal.” This is what the shipowner said, and I said, “Fine. You paid the money into an account in Portugal,” and I said, “What about my ship?” and he said, “Well, that’s your problem. I am going to give you a contact for the person in the Ministry. You speak to him and he might give you a solution.” So I spoke to that person in the Ministry and that person said, “Look, here the solution is very simple. In the same way as Pepe paid, you should also pay, and you can leave, and then this will be the end of it.” I said, “No, I am not going to pay”. That is the situation that occurred.

So immediately I phoned the Spanish Consul in Bissau. Why did I not phone the Panamanian Consul? Because there is no Panamanian Consulate and, since I was Spanish, I phoned the Spanish Consul and I said to the Consul, “Look, this is what happened. The two fishing vessels have left and they paid €100,000 into a Portuguese account.” “What are you talking about?” they said. “I was just speaking to the Fishing Minister, Carlos Mussa Balde, and he said that he released the two vessels of his own accord as a gesture of goodwill.” I said, “Look, that’s not true,” so twenty minutes later my phone rang and the shipowner was on the phone and he said, “Look, you really overstepped the mark. What did you do? Don’t get me into your own problems. You are going to cause my downfall.” I asked him, “But how did you learn about this conversation I just had with the Spanish Consul?” He said, “That’s

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my problem. I'm not going to tell you what my sources are but please do not get me into your problems.”

So I phoned the Consul again and I said, “Look, Pablo. Look at what happened. The shipowner has just called me, so the person you phoned just got the ball back into my court,” and he said, “Look, I spoke to Hamadi.” That is what he said. That is what the Consul said: “I spoke to Hamadi and Hamadi spoke to the Minister and between them they had a conversation, and then one of the two phoned the shipowner and that is why he called you, and that is how things happened.”

It is my word but I feel that I should speak about these things. I feel the need to talk about these things. I am not saying that this is customary, but this is what happened and I have witnesses. Do I have witnesses? God is my witness. Perhaps that is not good enough for the court but this is what happened. I have to express my own experience because I think that is helpful. I think that enough documents have been submitted to show that we have tried to comply with the rules. We have obtained the permit, we have received unfair treatment, so I think that we have managed to resolve a problem in a country which needed solutions.

That is the only thing I can say. As I think I should express it, I do express it. Now I have a different relationship with Bissau and those of you who know Bissau will also know things that used to happen in that country. There was a person that was the richest person in Bissau who paid very little taxes, a person who had taken hostage the whole sector of fuel through Petromar, a person who had many interests in the banking sector through the BAO Bank, a person who had a lot of interest also in the primary sector and a person who, as a result of all that happened, also had something to do with this, and it was not only him. There were three people, and those three people went to jail immediately, but then they were released on bail, they were remanded on bail while waiting for the court case to begin. I am also waiting for the court case to begin but nobody gave me any solutions in Bissau, and this was not because I did not ask for a solution, because my intention from day one was either to get convicted or to get acquitted, and that is it.

M. LE JUGE BOUGUETAIA : Merci, Monsieur le Président.

THE PRESIDENT: Mr Gamez Sanfiel, thank you for your testimony. Your examination is now finished. You may withdraw. Thank you.

(The witness withdrew)

THE PRESIDENT: Mr García-Gallardo, how do you wish to continue? Are you ready to call another witness?

MR GARCÍA-GALLARDO: Yes, Mr President. It is 25 past five so we will try to conduct an examination of another witness, Mr Manuel Samper Pérez, the chief of operations of the company in 2009.

THE PRESIDENT: Mr Samper Pérez may now be brought into the courtroom.

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MR SAMPER PÉREZ
EXAMINED BY MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/2/Rev.1, p. 24-31]

(The witness made the solemn declaration)

THE PRESIDENT: Mr Samper, I wish to remind you of the following. The work of the interpreters and verbatim reporters is a complex task. This is even more so, as is now the case, when not only English and French are used but also a third language such as Spanish. Therefore, I must urge you to speak slowly and please leave sufficient time after someone else has spoken to you before you answer. The questions will be translated into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has finished I will give you a sign, and only then will it be possible for the interpreters to follow.

Mr García-Gallardo, you have the floor.

MR GARCÍA-GALLARDO: Thank you, Mr President. I will start with another witness, Mr Manuel Samper.

Mr Samper, good afternoon. Could you introduce yourself to the Tribunal, please?

MR SAMPER PÉREZ *(Interpretation from Spanish):* As you know, my name is Manuel Samper. I have been a captain of the merchant marine since 1983. I started my professional career from 1983. In 1985 I was an officer of the merchant marine and afterwards I was a captain of the merchant marine. I worked on different sorts of vessel – passenger, oil tankers, hospital vessels and Ro-Ro vessels. In 1995 I joined a shipping company where I was a captain. I joined as superintendent. At that company, apart from the task of superintendent, given that I was knowledgeable in all that was related to West Africa, I was put in charge of all the traffic between the Canaries and West Africa, and I stayed in that position in that company until 2003. I then joined the technical team of the Gebaspe company Hidrocasa, which was related to the Penn Lilac group, until 2009, when, for reasons that I shall mention later, I left the company because basically the company went bankrupt.

MR GARCÍA-GALLARDO: Mr Samper, could you please explain the structure of the companies? The shipowner mentioned that they were operating two vessels, the *Iballa G* and the *Virginia G*. There was a third company in Spain called Gebaspe. I think that is a management company?

MR SAMPER PÉREZ *(Interpretation from Spanish):* When I joined Gebaspe I entered the technical department of the company, which was made up of two captains. I was one of them, and then there was an engineer as well. Nowadays SOLAS requires that a company should identify an area where the management should be conducted, so the company decided that the management should be conducted from Seville, so the whole of the security management was conducted from Seville. Afterwards, when the ISPS Code came into force, the whole of the security business was managed from the Gebaspe office itself.

MR GARCÍA-GALLARDO: What were your responsibilities as being the person in charge of the administrative, technical and social conditions of the ships?

MR SAMPER PÉREZ *(Interpretation from Spanish):* There were three people in the technical department. My colleague was an engineer and he was in charge of the technical

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and operational area – the devices, the equipment. My other colleague was in charge of the ship operations. My own job was to oversee compliance of the vessels with international norms. I also had to advise the owner in terms of insurance and other things, and when the vessel entered a port in the European Union or in other countries in West Africa I was also in charge of contact with local agents to make sure that all the regulations were complied with, because, of course, when you enter territorial waters you need to comply with a certain set of regulations, so I had to be very attentive to complying with any requirements that were imposed on us. For example, in the case of the *Iballa G* I had to send the different countries different civil liability certificates in terms of the cargo, and in terms of pollution as well there was another specific certificate that used to be requested by the different authorities. There was also another certificate to do with waste. All this had to be done 72 hours before you entered the territorial waters of a certain country and my job was to prepare all these documents and give advice to my company so that everything was in order. I also had to help the company when, for example, taking out an insurance policy etc.

MR GARCÍA-GALLARDO: Did you have any expertise in relation to bunkering operations, responsible in the companies for the technical aspects related to these activities?

MR SAMPER PÉREZ (*Interpretation from Spanish*): My bunkering experience goes back to 1986, when I was chief mate on an oil tanker where we performed bunkering operations in the area of the Gulf of Guinea, that is from the professional point of view, sailing on board an oil tanker; and then I had an opportunity to learn about the different manoeuvres, what the physical operations are for bunkering, and this helped me very much when I went to work in an office as a white-collar worker because all that experience helped me to provide solutions. Also, when I was on land I furthered my theoretical knowledge in terms of MARPOL standards, in terms of single-hull vessels, double-hull vessels. So all my experience is really based on my experience as a chief mate in an oil tanker and then as a superintendent, of course, when I studied the MARPOL standards.

MR GARCÍA-GALLARDO: Is that experience useful in a company, and particularly in relation to the exploitation of the bunker *Virginia G*?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Yes. Of course, you need to take into account what ports we visited – European ports, for example, where we obtained our fuel, such as Las Palmas or Tenerife. A single-hull vessel such as the *Virginia G* can only carry gas oil. This is what the regulations stipulate. The *Virginia G* was not a double-hull vessel, so the vessel could only carry gas oil, and that is why the *Virginia G* was affected only by the MARPOL regulations, whereas the *Iballa G* was different because it was a double-hull vessel that carried different types of products, different types of fuel – 60, 30, 380 – and it also carried gas oil.

MR GARCÍA-GALLARDO: In relation to the potential risk to the marine environment by the activities of bunkering, I will answer the questions in writing but I would like the benefit of Mr Samper as a witness to give us some highlights in relation to the first question that the Tribunal raised a few days ago. Mr Samper, could you please throw some more light, if possible, on examples of relevant practice or specific cases of the risks posed to the marine environment by bunkering?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Before we speak about the bunkering operations, because of course one thing relates to another, the protection of the marine

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environment begins from the steam room of the oil tanker, because, for discharges to the sea, the oil tanker has an oil/water separator device which does not allow any discharge above 15 parts per million, any discharge of that kind to be discharged to the sea. Now if we talk about oil tankers, an oil tanker that carries out its duties has a special monitoring device that controls any discharge that goes from the slop tanks to the sea, so no discharge should contain more than 30 parts per million, which is what the MARPOL regulation establishes.

In terms of bunkering, the possibility for an oil spill is really minimal because in the specific case of our vessel we had a situation where we sometimes performed the operations from the back of the boat, and in those situations there was a large separation, but of course the hoses were standard hoses and in the internal procedures we had hydraulic tests for our piping and our hoses. The hoses are standard hoses that have been accredited by the European Union and where we gave the hose to the fishing vessel or where we received the fishing vessel and we received the hose back, no discharges could take place because there were special nozzles that prevented this. If any discharge occurred, the vessel, the oil tanker, had specific devices to prevent this problem – for example, emergency stoppage devices – and then the deck of the oil tanker is prepared because if there is any spill on the deck, it should [not] go to the sea because there are specific closing systems as well.

Also, all tankers, as SOLAS establishes, have other ways of avoiding over-pressure in the cargo deposits, and there are also other fallback devices to prevent over-pressure in the deposits. In addition, according to the SOLAS and MARPOL regulations, every man conducted different drills. We had oil spill drills. Every month we conducted these drills to try to rehearse what should be done if there was a spillage, so the crew was very carefully trained in this respect, and if a spill did occur the vessel had its own ways of preventing it, such as absorbing barriers, dispersing barriers.

To conclude this section of my statement, the vessel also has a procedure manual, based on the MARPOL standard, which is called SOPEP, which establishes a series of emergency procedures when a spillage occurs; and there is also an annex of SOPEP, which is Annex 3, which includes lists of the authorities and contact persons in different countries, and that annex is updated every three months. We obtain the information from the website of the IMO. With all of this, in its safety manual the ship-owning company also contemplates what should be done if an emergency occurs. I also have to say that in the years that I worked for Gebaspe we never had a case of an oil spill.

MR GARCÍA-GALLARDO: For Gebaspe as the management company of the *Virginia G*?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Yes.

MR GARCÍA-GALLARDO: I have a further question in relation to the spill and pollution risk. In relation to those risks to the marine environment, is there any particular difference between supply to a fishing vessel and supply to a merchant ship? Is the level of risk higher when supplying to a fishing vessel than to a merchant ship?

MR SAMPER PÉREZ (*Interpretation from Spanish*): No, because in the bunkering operation, the personnel of any vessel, a merchant vessel, a fishing vessel, a towing vessel, these are frequent operations which have been carefully studied and designed, and before anything happens, before any operation is conducted on the high seas or in a port, a series of procedures has to be complied with. There is a checklist of procedures. Before you start, a series of checks has to be conducted, and if those checks are not conducted and if any anomaly is detected, the operation is just not carried out. In addition, these people are very

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well trained in these endeavours, so there is no difference between the types of ships involved.

MR GARCÍA-GALLARDO: You have been familiar with the legislation of Guinea-Bissau in recent months and recent years. In relation to the definition of logistic support vessels, considering that by legislation those vessels made related fishing operations, do you have any particular comment on this?

MR SAMPER PÉREZ (*Interpretation from Spanish*): As you said, I do not know the legislation of Guinea; but, yes, I do know the legislation of Guinea-Bissau as a result of the arrest of the *Virginia G*, so I have become familiar with this legislation. As we started receiving information from the prosecutor about the reasons, through our agent I managed to get all the norms of Guinea-Bissau – the constitution of the country, its fishing laws etc. – and I was quite struck really that in an amendment that they made to the law in 2005 they defined transshipping of fish, transport of fish, to the ground, and I was quite struck by the mention of logistic support.

But what do they understand by logistic support? According to the international legislation logistic support should be just referred to fishing activities. There are shipping companies that have their own support vessels to their fleets, so when a fishing vessel finishes a fishing campaign this other fish (sic) gets all the fish and so the vessel can go on a new campaign; and in exchange the fishing vessel receives supplies, fresh water, etc., etc. So in my view Guinea-Bissau really overstepped the mark when they included logistics. I think it is excessive to include logistic operations in this respect because, for example, I operated Spanish hospital vessels in this area, where we assisted all sorts of vessels, especially Spanish fishing vessels in the area of the Sahara, but we also assisted merchant vessels of other nationalities too. So my question is, healthcare is also a logistic support? I don't think it is. So the question of bunkering – is bunkering logistic support? No, I don't think so. So the logistic support in the Guinea-Bissau law should only be construed as support to fishing activities only; but when they define associated fishing they, I think, contemplate three points that are related to fishing; but my opinion is, if there is anything else, well they just included logistic support, which would be a kind of cover-all category. So I think that this logistic support is not really in line with spirit of the international law of the sea. This is at least my opinion.

MR GARCÍA-GALLARDO: In your experience in West African countries, have you found similar provisions applicable in other hostile states in West Africa?

MR SAMPER PÉREZ (*Interpretation from Spanish*): No. I have only read the jurisprudence of the International Court about cases related to bunkering, and I know that this is used by some countries as a way of collecting money and bullying shipowners, but that's all.

MR GARCÍA-GALLARDO: Let's turn to the conditions of the *Virginia* before and after the arrest. I will show you some pictures of the ship's condition before the arrest and later the condition of the vessel after 14 months of detention in the hot waters of the Bay of Bissau. Will you please assist us and comment on those pictures, please, to let us know when the pictures took place and by whom [they were taken]?

MR SAMPER PÉREZ (*Interpretation from Spanish*): This photo was taken by me in the port of Las Palmas in the course of a bunkering operation. They were getting us all to take to the high seas, so there you can see the condition of the state of repair of the vessel. You have

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to take into account that Spain is part of the MOU countries where inspections are really exhaustive. They are really snap inspections; you don't know when they are going to be taking place. You can see the mint condition of this ship. As I say there were three of us, three professionals who were really in charge of keeping them in good condition, and then a lot of the money of the company was invested in keeping the vessel in mint shape. *This* is another view towards the back of the ship, and if you show the previous one I will be able to tell you something because, look, there in *this* picture you can see how, when the SOLAS regulation came into force, vessels, in addition to being identified by their flag in the back of the ship and starboard and port, also had to be identified by an IMO number. *There* you can see at the front of the bridge the IMO number of the vessel. Then in the steam room there was also an inscription with the IMO code of the vessel. *This* is the bridge; you can see the lifesaving boat; and this is another snapshot at a different time of the boat coming from the high seas. When the boat arrives into port after having performed bunkering operations – and this is a low freeboard vessel, so typically when a boat of this nature, when an oil tanker of this nature, arrives into port after navigation, you can see on the deck the ravages caused by the sea. So this is a time when we can maintain, when we can perform maintenance operation. This is the vessel in ballast position and you can see the ravages caused by the sea, and so if these vessels are not exhaustively maintained, then the boat will go to rack and ruin very quickly and the expense involved in getting them back into service would be enormous.

MR GARCÍA-GALLARDO: In relation to the conditions after 14 months of detention?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Before we look at these pictures I would like to specify something. As a result of the arrest of the vessel, normally when a vessel is paralyzed, in their procedure manuals companies have, you know, a maintenance programme. It is called a layout, which is prepared for the short, the medium and the long term. In the case of the arrest of the *Virginia G*, we could not institute this programme because of course we weren't sure about how long this detention would last and so we could not schedule this maintenance operation. So what we did in the first few stages was to use our own resources on board the vessel – paint, spare parts, etc. Once those were exhausted the vessel started deteriorating. Of course you have got to consider the structural elements. Those are the pipes, the vents for the cargo tanks – and that is one of the resources whereby the vessel prevents spillages. This is an operation whereby different piping systems were exchanged. What I wanted to say is that this deterioration occurred in two areas of the ship, first of all the structural elements, because the structural elements are not protected by paint and by maintenance operations, and so rust starts setting in. Corrosion, rust – and rust is not something that happens all at once; it sets in gradually and exponentially so; so everything becomes very, very rusty and very quickly. *These* are the different workers taking different remedies, replacing different elements, and the crew was also giving a hand. This is as regards the structural elements. In terms of the equipment, since the gas oil was exhausted and there was no money to activate the different equipment – well, the equipment of the machines and of the bridge started deteriorating. One of the engines, for example, its circuit – it was an electronic circuit and it couldn't be maintained. The radar is also electronic. The equipment on the bridge was not maintained either, and so this led to this appalling situation that the vessel was in.

MR GARCÍA-GALLARDO: Two further questions and I will complete the examination. In relation to the exchange with the shipowner of the two fishing vessels that were arrested before or just after the arrest of the *Virginia G* on 21 August, did you participate in the

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communications with the shipowner of those two vessels, the company Balmar? Do you have something to add in addition to what you have already drafted in your affidavit?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Well, I would like to add a few brushstrokes to my written statement because I got in touch with these people. I didn't know them before, just I had heard about them. The sales rep spoke about Balmar but that is all. So I got in touch with them when the incidents of the *Virginia G* arose to inform them about the situation. I asked about the permits from them. At the beginning they did cooperate. They gave us all the necessary permits. Well, first of all they gave us the telephone number of their representative in Guinea-Bissau, Mr Hamadi, who was in Spain at that time, and then this gentleman gave me the phone numbers of his employees in Guinea-Bissau, Mr Fifan and Mr Tino – and then I sent those telephone numbers to our P&I person in Guinea-Bissau and he got in touch with them, and then after a long wait, because these people, since it was a weekend, were not in Bissau, after that we managed to obtain the authorization for those permits to be issued. Afterwards in the daily communications I held with the late captain, Mr Guerrero, one of the days he called me to tell me that the two fishing vessels plus one other vessel that had been detained at the same time had been released. I was very surprised because in my communications with the Balmar shipowner – well, I had spoken to Mr Baldes to whom I had given some information so I was very surprised because Mr Baldes had not told me that he was negotiating for his fishing vessels to be released. When I asked him what had happened I was astonished because he didn't include us in the same bag so to speak, so he said: "Well, my problem is my problem; your problem is your problem". I am normally a very, you know, polite person, but given the situation we were in, in the family company and the crew members who were detained in Guinea-Bissau, I did exchange a few strong words with this person, and then he told me that the release of his vessels cost him €100,000 that he had to pay into an account in a Portuguese bank. He also said that at the time of the release the military stole or took ten tonnes of fish because he said they also wanted a booty. I was really shocked because I was unused to these types of things; and so since we exchanged these strong words I really hung up on him. This conversation was in the presence of the shipowner. We were using the hands-free telephone. And then he asked me at the end of the conversation: "Are you recording the conversation?" I said: "No". We are very serious people and we considered ourselves, you know, not to be back-stabbers, but we really exchanged very strong words with the owner of the fishing vessels.

MR GARCÍA-GALLARDO: A new question. Mr Samper, when did you leave the companies?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Well, when the *Virginia G* was arrested the companies started lacking funds to be able to pay the wages of the companies' staff. They did not have money to pay the crews, to pay maintenance operations, etc. So, confronted with this situation, in the end Mr Gamez and myself were the only people who stayed in the company. At the beginning I had my savings, and so I still stayed because I was still hopeful. I had read the laws of Guinea-Bissau, the Constitution of Guinea-Bissau, and then I also read the law of the sea, so I was quite confident that we would be able to solve the problem. Also we obtained a favourable ruling in Guinea-Bissau, a cautionary suspension; so I thought we were on the right track so I started using my savings to, you know, make ends meet, to pay my mortgage etc. But then in December 2009, November or December 2009, things really got very tight and so I had to leave the company. I asked the Spanish Government for an employment benefit and I started looking for a new job which was in line with my qualifications. In the meantime I advised the shipowner and the different people who

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were working to defend this case, trying to share with them my knowledge and my expertise because I was the one that was there at the beginning of this incident. So from that moment onward I started looking for a job, and finally I did find a job. It was not easy to find a new job and I had to go and live in another part of Spain. So my expenses really rose because I had to move to another place, etc.

MR GARCÍA-GALLARDO: Mr Samper, certainly the way to examine and cross-examine in this Tribunal due to the time constraints makes things difficult because normally, at least upon my modest experience in arbitration cases and in international cases, we take the cross-examination immediately after a witness or, like I said this morning, upon the condition to submit a proper written statement by either a witness or an expert. But I realize that we have other issues to take into account and if my colleague from Guinea-Bissau has any questions, or if they have to be raised tomorrow, I do not know if, which I said in the presence of Mr Samper today, he will stay tomorrow for your information and I am open for cross-examination either today or tomorrow morning.

THE PRESIDENT: Thank you, Mr García-Gallardo.

I would like to know if, Mr Leitão, you wish to cross-examine, but we have reached already six o'clock, so can you do that tomorrow morning?

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OBJECTION BY MR MENEZES LEITÃO
AGENT OF GUINEA-BISSAU
[ITLOS/PV.13/C19/2/Rev.1, p. 31]

MR MENEZES LEITÃO: I have no problem in cross-examining this witness tomorrow morning but I have a problem, and I must say so, with the exhibition of these pictures that were just made from my colleague from Panama, because according to article 71 of the Rules, no document can be submitted to this Tribunal after the closing of the written proceedings without hearing of the other party, and without, in this case, authorization, and if the Tribunal does so decide.

In this case Panama presented Annex 60 of its Memorial, pictures about the situation of the *Virginia G* that are completely different from the picture that was just presented before this Tribunal. So I must express now my objection to this situation and I would like also my colleague to explain where these pictures were obtained, why they were not presented with the written proceedings, and what the consequences of this situation are for the proceedings of this Tribunal. Besides that, I can cross-examine this witness tomorrow. Thank you very much.

THE PRESIDENT: Thank you very much.

This brings us to the end of today's hearing. The examination of the witness will have to be continued tomorrow morning. The hearing will be resumed at 10 a.m. The sitting is now closed.

(The sitting is closed at 6 p.m.)

3 September 2013, a.m.

PUBLIC SITTING HELD ON 3 SEPTEMBER 2013, 10 A.M.

Tribunal

Present: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judges ad hoc* SÉRVULO CORREIA, TREVES; *Registrar* GAUTIER.

For Panama: [See sitting of 2 September 2013, 10 a.m.]

For Guinea-Bissau: [See sitting of 2 September 2013, 10 a.m.]

AUDIENCE PUBLIQUE DU 3 SEPTEMBRE 2013, 10 H 00

Tribunal

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président*; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK, *juges*; MM. SÉRVULO CORREIA, TREVES, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 2 septembre 2013, 10 h 00]

Pour la Guinée-Bissau : [Voir l'audience du 2 septembre 2013, 10 h 00]

THE PRESIDENT: Good morning. The Tribunal will today continue the hearing in the case concerning the vessel *Virginia G*.

Before we continue, I wish to inform you that Judge Pawlak, for reasons duly explained to me, is unfortunately unable to sit today on the bench.

I also wish to inform the Parties of another issue. Yesterday evening the Agent of Guinea-Bissau, Mr Leitão, objected to the display of a number of pictures by Panama during the examination of a witness. The Tribunal will have to identify which of those pictures were already submitted during the written proceedings. Therefore, we have requested Panama to transmit copies of the pictures displayed yesterday. On this basis, the Tribunal will have to decide whether the reference to those pictures in the official records has to be deleted.

Having said that, yesterday Mr García-Gallardo concluded his examination of the witness Mr Samper Pérez and Mr Leitão indicated his intention to cross-examine the witness. Therefore, I now give the floor to Mr Leitão. You have the floor, sir.

MR MENEZES LEITÃO: Thank you very much, Mr President.

M/V “VIRGINIA G”

Examination of Witnesses and Experts (continued)

MR SAMPER PÉREZ

CROSS-EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)

[ITLOS/PV.13/C19/3/Rev.1, p. 1-5]

MR MENEZES LEITÃO: I would like to ask you some questions about the situations that you referred to yesterday. First of all, my question is that you worked with Gebaspe. Is that so?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Before I answer your question, Mr Agent, I would like to be allowed to clarify one thing that you said, Mr President, about the photographs that were shown yesterday. I presented them and I presented a statement saying that I was submitting those photos precisely to be able to be more specific in my statement. As far as the question is concerned, I was indeed hired by Gebaspe, a Spanish company in charge of the *Virginia G*.

THE PRESIDENT: Please continue the cross-examination. With regard to the pictures, as I explained to you, we will follow the procedure. We first have to identify the pictures.

Mr Leitão, you have the floor. Please proceed.

MR MENEZES LEITÃO: I would appreciate it if you would answer my questions and not introduce initial declarations that I did not ask about. You said that Gebaspe went bankrupt. Is that so?

MR SAMPER PÉREZ (*Interpretation from Spanish*): I worked for Gebaspe. The company had a contract with Penn Lilac Trading, which was the owner of the *Virginia G* vessel.

MR MENEZES LEITÃO: The company went bankrupt?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Gebaspe, the company I worked for, as a result of the events, went bankrupt and they left a lot of salaries pending, including my own salary and bills by suppliers.

MR MENEZES LEITÃO: It was Gebaspe that was paying the salaries of the crew of the *Virginia G*?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Gebaspe paid my salary. The crew salaries were paid by Penn Lilac through whoever made a response. I was paid my salary by Gebaspe and they paid the Spanish Government the social security and pension money.

MR MENEZES LEITÃO: So the crew of the *Virginia G* were being paid by Penn Lilac. Is that so? Is that your testimony?

MR SAMPER PÉREZ (*Interpretation from Spanish*): No. I said that Gebaspe paid me, because I was a Gebaspe employee. The *Virginia G* or the *Iballa G* got the money from their own company because the crew members were hired by the Penn Lilac company; and, as normally happens in international trade, companies paid either through their consignees or by transfers, but this is something which I did not know about, because that depended on another

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department. I can only tell you about what happened to me, and I got my salary through Gebaspe.

MR MENEZES LEITÃO: Would you inform us if Penn Lilac went bankrupt?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Yes, later I think it did, but I can only talk about the period during which I worked for the company. I have not been with the company for many years, so I have no reference and I have no objective information that I can contribute.

MR MENEZES LEITÃO: It was your testimony yesterday that there was no risk from bunkering activities by the *Virginia G*. Do you confirm this statement?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Yes, this is what I said yesterday, but we must clarify that in any operation the risks are minimal. If any risk arises, there are always ways to fight those risks, but not just for the *Virginia G*. For any other ship that conducts bunkering operations there are always minimal risks possible, and that is why MARPOL contemplates measures to minimize those risks. There are certain norms that exist in order to fight those risks inherent in all sorts of operations, not just bunkering but loading and unloading operations. There is always a risk but also there are always preventive measures to minimize those risks.

MR MENEZES LEITÃO: Does the bunker *Virginia G* have a double hull?

MR SAMPER PÉREZ (*Interpretation from Spanish*): As I said yesterday, the *Virginia G* is a single-hull vessel authorized only for non-persistent fuel transport less than 5,000 tonnes dead weight, and therefore the dual hull regulation is not applicable to that vessel. The dual hull regulation is applicable to vessels that are over 600 tonnes of dead weight that transport persistent fuel, and for any ship that weighs more than 5,000 tonnes, regardless of the type of fuel that is transported, so the norm for a double hull is not applicable to the *Virginia G*.

MR MENEZES LEITÃO: Do you recall that the accident to the *Prestige* in Spain also was not caused by a tanker without a double hull?

MR SAMPER PÉREZ (*Interpretation from Spanish*): As I said, and I repeat, the double hull regulation is crystal clear. In order to be able to answer the question put to me, I need to re-state what I said in the past, because he is questioning some issues regarding the MARPOL regulation.

MR MENEZES LEITÃO: Do you recall the accident to the *Prestige* in Spain – yes or no?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Of course I remember it, as anybody remembers, and I remind you that when the accident to the *Prestige* took place the double hull regulation was not in force.

MR MENEZES LEITÃO: But your tanker is not a double hull?

MR SAMPER PÉREZ (*Interpretation from Spanish*): No. The double hull regulation should be understood, and this is what MARPOL says. It is there to prevent spills, pollution

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caused by grounding or collision, but the *Prestige* accident was not caused by grounding or collision.

MR MENEZES LEITÃO: You stated yesterday that you received attempts of corruption in Guinea-Bissau according to reports from the captain and Mr José Maldush² of Balmar. Did you report these allegations to the authorities of Guinea-Bissau?

MR SAMPER PÉREZ (*Interpretation from Spanish*): I received information from the captain about a representative of FISCAP who addressed him so that the shipowner would communicate with him, because he would like this, and we told this to the representative in Guinea-Bissau.

MR MENEZES LEITÃO: Why not to the authorities?

MR SAMPER PÉREZ (*Interpretation from Spanish*): If you do not have evidence, if you just have words, there is not much you can do.

MR MENEZES LEITÃO: Yesterday you showed us a lot of pictures and you stated that some were taken in Las Palmas, in the Canaries, in 2009. Who took those pictures?

MR SAMPER PÉREZ (*Interpretation from Spanish*): The pictures that I showed were taken by me of the state of repair of the vessel, and those in Guinea-Bissau were also taken by me.

MR MENEZES LEITÃO: What is your rank position in the company?

MR SAMPER PÉREZ (*Interpretation from Spanish*): I joined the company to be part of the technical team. As I said yesterday, there were two captains and an engineer. My job was to make sure that the company complied with regulations and took out insurance policies, to advise the owners on matters to do with insurance policies and replace my colleagues if they were not present.

MR MENEZES LEITÃO: You travelled to Las Palmas, in the Canaries, in 2009 to a ship that you use normally?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Because my mission also within the company was that when the vessels came into port we had to conduct an audit in compliance with the ISM Code and the ISPS Code, so in the reports that I drew up for the company, apart from the written information, I have also attached photographs to those written documents so that the shipowner could see with his own eyes the condition that the ship was in so as to justify any maintenance work that had to be conducted. As an auditor, I had to justify why said maintenance work had to be conducted, because of course this maintenance work entailed spending money, so this had to be justified.

MR MENEZES LEITÃO: So a big deterioration, according to your statement, in one year to the boat when it was anchored in the port of Bissau without making any operations at all, and why did the crew ---

² This and a number of other proper names are unverified and unverifiable.

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MR SAMPER PÉREZ (*Interpretation from Spanish*): As I said yesterday, when a shipping company places a vessel in layout a series of maintenance policies is established and the company at that time did not know for how long the vessel would be detained. The studies that we conducted at a legal level indicated that the solution was not going to take too long, and therefore the means on board were the ones used for maintenance work; but when we saw that things protracted and everything started taking longer and longer, then all those internal means were exhausted. As I said yesterday, if you do not maintain steel as it should be maintained, corrosion sets in; and this is not a gradual process, no, it is exponential, everything starts getting rusty all of a sudden. You have to take into account that the vessel is in a saline environment, and in terms of the structural elements the vessel needs to be continually protected. It is obvious, of course, that if a machine does not work properly, it just breaks down.

MR MENEZES LEITÃO: Those are the necessary precautions for maintenance of the ship? Is that so? Is there anything efficient in that?

MR SAMPER PÉREZ (*Interpretation from Spanish*): If it had had economic resources, yes.

MR MENEZES LEITÃO: Lack of economic resources of the company. Now we are all clear. Let me ask one final question. The ship had an inspection in Las Palmas. As I understand it, that inspection was a port State control. Was that so?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Yes. On 5 August the vessel, before it left, was inspected by the Las Palmas control office.

MR MENEZES LEITÃO: That ship has a flag State control?

MR SAMPER PÉREZ (*Interpretation from Spanish*): I cannot recall, but these controls are performed annually.

MR MENEZES LEITÃO: Do you not remember?

MR SAMPER PÉREZ (*Interpretation from Spanish*): No, I cannot recall the exact dates but these are annual inspections and the vessel passed all of them, and this information was available to the authorities of Guinea-Bissau.

MR MENEZES LEITÃO: Annual inspections are taken in Panama?

MR SAMPER PÉREZ (*Interpretation from Spanish*): No, no, no. The inspections are carried out wherever the ship may be. Ships sail across the world. Ships of Panama or of Spain or of any other country do not have to go to the country of origin for the inspection. It is the inspectors that go to the ships, and very often inspections begin at one port and finish in another. So this is determined by the time that a vessel spends in a certain port.

THE PRESIDENT: May I ask the Agent of Panama whether he wishes to re-examine the witness?

MR GARCÍA-GALLARDO: Mr President, your Honours, I have to ask one question to the witness.

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MR SAMPER PÉREZ
RE-EXAMINED BY MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/3/Rev.1, p. 5-6]

MR GARCÍA-GALLARDO

Mr Samper, can you tell us, please, whether single-hull vessels like the *Virginia G* were allowed to operate as tankers of gas oil, for the supply of gas oil, in 2009?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Yes, and it is still allowed for them to do so.

MR GARCÍA-GALLARDO: Still allowed?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Yes, it is allowed for them to do so.

MR GARCÍA-GALLARDO: So it was allowed to transport heavy fuel in 2009, and still is today?

MR SAMPER PÉREZ (*Interpretation from Spanish*): No, not with fuel because the norm is very clear in this respect, and the vessel is not authorized for transportation of HFOs. For this you need boilers and heating in the tanks, which this kind of vessel doesn't have, so it cannot carry this type of fuel.

MR GARCÍA-GALLARDO: What usually was loaded in the tanker *Virginia G*?

MR SAMPER PÉREZ (*Interpretation from Spanish*): Gas oil with a low content of sulphur, which is what our customers requested, because when vessels come to European ports, to be able to comply with the MARPOL regulations in terms of pollution, they require this type of gas oil, and this is precisely what we supplied to our merchant vessels sailing from South Africa to Europe or from the Americas. This is what we supplied – low-sulphur-content gas oil.

MR GARCÍA-GALLARDO (*Translated from the French interpretation*): I do not know if the Tribunal will accept the information you provided yesterday on the condition of the vessel. In a very short comment, what is the impact of corrosion for a vessel staying 14 months in the hot water in the Bay of Bissau without maintenance?

MR SAMPER PÉREZ (*Interpretation from Spanish*): If there is no maintenance, the effects are tragic for the maintenance of the structure because it is a very humid environment with lots of rain. It rains very, very often and relative humidity is very high in addition to the saline environment, and if you do not have the appropriate means to protect the vessel the consequences are just the ones I showed in the pictures, which is what I wrote in my report.

THE PRESIDENT: Thank you very much, Mr García-Gallardo.

Mr Samper Pérez, thank you for your testimony. Your examination is now finished. You may withdraw.

Mr García-Gallardo, how do you wish to continue?

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MR GARCÍA-GALLARDO: Thank you, Mr President. I would like to call the witness Mr Pedro Olives, representative of the Panama Ship Registry in Las Palmas.

THE PRESIDENT: Thank you, Mr García-Gallardo.

The Tribunal will then proceed to hear the witness-expert, Mr Pedro Olives. He may now be brought into the courtroom.

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MR OLIVES SOCAS
EXAMINED MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/3/Rev.1, p. 6-12]

THE PRESIDENT: I call upon the Registrar to administer the solemn declaration to be made by the witness-expert.

THE REGISTRAR: Thank you, Mr President.

Good morning, Mr Olives. Mr Olives, a witness-expert, is required to make a solemn declaration provided for experts under article 79 of the Rules of the Tribunal before making any statement before the Tribunal. You have been provided with the text of the declaration. May I invite you to make now the solemn declaration?

(The witness-expert made the solemn declaration)

THE PRESIDENT: Thank you, Mr Olives. I wish to remind you of the following. The work of interpreters and verbatim reporters is a very complex one. This is even more so when, as will be the case now, not only English and French, which are our official languages, but also a third language such as Spanish is used. Therefore, I must urge you to speak slowly, and please leave sufficient time after someone else has spoken to you before you answer. As I stated, the statement or question of someone else before you will be translated first into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has been completed, I will give you a sign to this effect, by a small gesture like *this*. Only then it will be possible that the interpreters can follow.

Mr García-Gallardo, you have the floor, sir.

MR GARCÍA-GALLARDO: Mr President, your Honours.

Mr Pedro Olives, could you please introduce yourself?

MR OLIVES SOCAS *(Interpretation from Spanish):* Of course. I am Pedro Olives Socas. I am a captain of the merchant marine. I have got twenty years of experience in audits to do with safety and quality controls of vessels.

MR GARCÍA-GALLARDO: Which delegate powers and authority do you have from the Panamanian Ships Registry?

MR OLIVES SOCAS *(Interpretation from Spanish):* I am inspector appointed by the Panamanian Maritime Authority.

MR GARCÍA-GALLARDO: Are you the sole representative in Las Palmas port?

MR OLIVES SOCAS *(Interpretation from Spanish):* Yes, in the area of Las Palmas and West Africa I am an inspector who is located in that area, yes.

MR GARCÍA-GALLARDO: To whom do you report in Panama, which authority?

MR OLIVES SOCAS *(Interpretation from Spanish):* The Maritime Authority, at the main office in Panama.

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MR GARCÍA-GALLARDO: Do you have training sessions? Do you receive training sessions in international conventions, pollution and manning, technical condition of the vessels, regularly by Panama?

MR OLIVES SOCAS (*Interpretation from Spanish*): Of course. The last sessions were to do with the labour relations question and, well, in the last few years I received different training sessions, yes.

MR GARCÍA-GALLARDO: How often do you travel to Panama as surveyor of the Panama Ship Registry or to meet with the Panamanian authorities?

MR OLIVES SOCAS (*Interpretation from Spanish*): About once a year.

MR GARCÍA-GALLARDO: What type of services do you provide in the region of West Africa?

MR OLIVES SOCAS (*Interpretation from Spanish*): We carry out technical inspections, occupational inspections and safety-on-board inspections, and we also issue a positive or a negative report, which is sent to the authorities.

MR GARCÍA-GALLARDO: Is your work statutory work or purely commercial work?

MR OLIVES SOCAS (*Interpretation from Spanish*): Both. I would say both.

MR GARCÍA-GALLARDO: In the last two years you regularly travelled to different ports in the West African region to conduct inspections of Panamanian vessels?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, I travelled widely in Africa, the Canary Islands and also on the Spanish mainland.

MR GARCÍA-GALLARDO: Who is the owner of the vessel *Virginia G*?

MR OLIVES SOCAS (*Interpretation from Spanish*): Penn Lilac, I think.

MR GARCÍA-GALLARDO: A company active in Panama. It is registered and duly recorded in the commercial registry of companies of Panama.

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes. I saw that it is registered, but this is not my field of inquiry really.

MR GARCÍA-GALLARDO: Do you have enforcement powers on Panamanian ships? Do you have enforcement powers to effectively exercise technical jurisdiction on Panamanian ships when conducting your inspections?

MR OLIVES SOCAS (*Interpretation from Spanish*): Of course. Panamanian authorities, local authorities, can detain a vessel as a function of the report I draw up, so my reports are important in that sense.

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MR GARCÍA-GALLARDO: What type of power or mandated powers or actions are you able to take upon your authority delegated from the Panamanian Ships Registry on Panamanian ships, vessels?

MR OLIVES SOCAS (*Interpretation from Spanish*): Well, when I find a serious problem with the vessel I report it to my superiors and they tell me what to do. There is always some prior consultation before anything is done.

MR GARCÍA-GALLARDO: Are you able to issue certificates, statutory certificates, to Panamanian vessels, if they do not comply with Panamanian provisions and international conventions ratified by Panama?

MR OLIVES SOCAS (*Interpretation from Spanish*): Of course. I am able to do that and it is my job to issue or fail to issue the pertinent documentation.

MR GARCÍA-GALLARDO: Are you also a labour inspector or auditor?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, I am a labour inspector, yes.

MR GARCÍA-GALLARDO: Inspector from Panama or labour inspector in Spain under what category?

MR OLIVES SOCAS (*Interpretation from Spanish*): No, I am an international inspector. It is a code that goes back to 2006 and it is international for all sorts of flags.

MR GARCÍA-GALLARDO: What type of convention did you mention?

MR OLIVES SOCAS (*Interpretation from Spanish*): It is a labour maritime convention that goes back to 2006.

MR GARCÍA-GALLARDO: To issue the safe manning certificate, for example on a Panamanian vessel, what type of audit or survey do you conduct? Do you take and keep control about the titles of the seafarers? What type of international convention do you apply?

MR OLIVES SOCAS (*Interpretation from Spanish*): Well, the norms are international – it is SOLAS, MARPOL, the STWC, the Air Pollution Convention, so all the international conventions – but basically SOLAS and MARPOL.

MR GARCÍA-GALLARDO: So have you inspected a lot of tankers?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, yes, quite a bit.

MR GARCÍA-GALLARDO: Are there manuals for bunkering on tankers?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes. Of course, I know the international regulations because for each ship things are different – but I know the international context.

MR GARCÍA-GALLARDO: What type of international conventions do you apply when inspecting tankers conducting bunkering operations?

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MR OLIVES SOCAS (*Interpretation from Spanish*): Bunkering operations are not really the subject of much investigation. Of course there is SOLAS, there is MARPOL, there is Air Pollution and so forth, but there is no special inspection. As long as they keep their transshipment manuals in order, that's enough for us.

MR GARCÍA-GALLARDO: As surveyor of the vessel, the ship *Virginia G*, how many years have you been conducting inspections on this vessel prior to its arrest in Bissau?

MR OLIVES SOCAS (*Interpretation from Spanish*): Since 2006, when these vessels have come within my area of influence I have been called, but if they were not, some other inspector probably did the job.

MR GARCÍA-GALLARDO: You say that you were familiar with the vessel.

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, of course.

MR GARCÍA-GALLARDO: Can we say that this tanker in particular is a logistic support vessel? What do you understand that a logistic support vessel is?

MR OLIVES SOCAS (*Interpretation from Spanish*): Logistic for what – for fishing you mean – because a tanker is not really a logistic support vessel? A tanker supplies fuel in the high seas but it is not logistic work. Logistics entail movement of certain material by its own means. For example, in fishing vessels logistics is related to reefer vessels that transport fish or vessels that provide logistics support in fishing areas, but an oil tanker is just a cargo ship. I don't really see how it can be considered a logistic vessel.

MR GARCÍA-GALLARDO: I move to other types of questions. Do you consider Panama as a flag of convenience?

MR OLIVES SOCAS (*Interpretation from Spanish*): I never understood what really people refer to when they say “flag of convenience”. There are countries of convenience that have a generous fiscal system for shipowners, but technically no flags of convenience because international maritime law is applied across the board to all countries. There may be countries of convenience that apply a specific fiscal system, but technically there are no flags of convenience, as such.

MR GARCÍA-GALLARDO: Do you consider Panama as a maritime nation in comparison with other countries and the number of tonnage for it?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, Panama at present has 25 per cent of the world tonnage. Between Panama, Liberia and Bahamas they account for over 90 per cent, or 95 per cent, so most of the most important companies in the world are registered in one of these countries. There must be a reason for this.

MR GARCÍA-GALLARDO: Talking about the conditions surrounding the arrest of the vessel in Guinea-Bissau, were you aware of any communication made by the Guinea-Bissau authorities to the Panamanian authorities, directly or through you?

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MR OLIVES SOCAS (*Interpretation from Spanish*): No, I have no knowledge that Guinea-Bissau communicated anything. The knowledge I have came from Panama and from the shipowner but I am not aware that I received any communication from Guinea-Bissau.

MR GARCÍA-GALLARDO: Mr Olives Socas, you conducted two inspections of the *Virginia G* during the arrest. The first one took place in September, probably a month after the detention, and a second one some weeks after the release of the vessel by the Guinea-Bissau authorities. Will you please let us know why you conducted the first inspection and explain to this Tribunal the conditions of this inspection, your views, and what you reflected in writing?

MR OLIVES SOCAS (*Interpretation from Spanish*): The first inspection conducted in September was at the request of the shipowner, because the vessel had been detained and the documentation had been requisitioned and so an inspection on board was necessary. When I was there in September the vessel indeed was retained, there were soldiers on board, there was no documentation on board, and the ship was in normal navigation conditions and normal sanitation conditions. There was no objection to be raised. At first sight, at least, there was nothing special because, of course, this is normal, because a month before this vessel had gone through an inspection in Las Palmas, which was a very strict inspection. I think this happened 20 days before they left Las Palmas, and this was an independent inspection, independent from the flag and from the shipowner, and no significant deficiencies were raised. So 20 days later it was only normal that the ship would be in good condition. So there was nothing to note really, nothing special to note in that inspection, only that the vessel was without documents because the documents had been requisitioned, but that was not really a deficiency by itself.

MR GARCÍA-GALLARDO: How many days did you spend inspecting this vessel in Guinea-Bissau?

MR OLIVES SOCAS (*Interpretation from Spanish*): A day and a half, I think it was. A day and a half was enough. It is not a large vessel and I already knew the vessel and so, at a single glance, I could tell that the situation was normal. There was no need to go deeper into it. So I did the inspection, I checked the different equipment, and it was rather simple so there was no problem. The vessel was in the same condition it had been in a month before.

MR GARCÍA-GALLARDO: Coming to the second inspection, could you please explain to this Tribunal the conditions of this inspection, when it took place?

MR OLIVES SOCAS (*Interpretation from Spanish*): Really, this was in October 2010, when the shipowner communicated that the vessel had been released and that he wanted to keep the documents up to date because he wanted to use the vessel again, and I was surprised. It was difficult to do anything because the vessel was really completely turned off. All the machines were turned off and there was a small home-made engine on deck that was providing electricity to the vessel, so it was not really a vessel; it was just a piece of steel. So it was impossible for the vessel to sail. The equipment and the machinery had not been used for a year, the vessel had not received supplies or any economic help to buy those supplies, and the personnel had not received a sufficient number of spare parts to be able to do anything. So the vessel was cold and it was at a standstill, so to turn the vessel on again was going to be very difficult, and the electrical panels were very humid and the fuses kept blowing. So everything had to be redone again, the whole piping system had to be re-

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inspected and they had to do a complete overhaul of the vessel. When the overhaul was completed, we could give them a certificate but for the time being we could not, because that single engine on deck is not really enough for a vessel to be able to sail the seas.

MR GARCÍA-GALLARDO: Under delegated authority from the Panamanian marine authorities, you decided not to issue a statutory certificate before the shipowner repaired the vessel because of the shortcomings that you found and reflected in your second report. Do you agree with this?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes. We detected the minimum deficiencies that had to be repaired before any certificates could be issued.

MR GARCÍA-GALLARDO: I have no further questions, Mr President.

THE PRESIDENT: Thank you, Mr García-Gallardo.

Pursuant to article 80 of the Rules of the Tribunal, a witness-expert called by one party may also be examined by the other party, therefore I ask the Agent of Guinea-Bissau whether he wishes to cross-examine the witness-expert. I give the floor to Mr Menezes Leitão to cross-examine the witness.

MR OLIVES SOCAS

CROSS-EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/3/Rev.1, p. 12-15]

MR MENEZES LEITÃO: Mr Olives Socas, I would like to put to you some questions about your deposition. First of all, you are of Panamanian nationality?

MR OLIVES SOCAS (*Interpretation from Spanish*): No, Spanish.

MR MENEZES LEITÃO: Are you a public authority of Panama?

MR OLIVES SOCAS (*Interpretation from Spanish*): I represent an authority that is authorized to act on behalf of the Panamanian authorities, the Panama Shipping Registry.

MR MENEZES LEITÃO: Is that a public or a private company?

MR OLIVES SOCAS (*Interpretation from Spanish*): It is a recognized classification society and it has the same entity, for example, as Lloyd's. It is the same kind of company as Lloyd's.

MR MENEZES LEITÃO: A private entity, Panama Shipping Registry, as I understand.

MR OLIVES SOCAS (*Interpretation from Spanish*): I think it may be. I do not know exactly because I have never looked into its origins.

MR MENEZES LEITÃO: As an inspector of that entity, do you consider yourself as vested in authority powers from Panama?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, of course.

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MR MENEZES LEITÃO (*Translated from the French interpretation*): Are you familiar with the Cana S.A. transport company?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes.

MR MENEZES LEITÃO: Do you belong to the board of this company?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes.

MR MENEZES LEITÃO: What is the industry of this company?

MR OLIVES SOCAS (*Interpretation from Spanish*): Transport of containers, storage, customs clearance.

MR MENEZES LEITÃO: Do you not consider it to be a conflict of interests having simultaneously authority powers of Panama and being at the same time a member of the board of a company which does exactly the same industry of the entities you inspect?

MR OLIVES SOCAS (*Interpretation from Spanish*): No, it has nothing to do, because it is a maritime transport company, a containers company. It has nothing to do with inspections, and also, vessel inspections is a private activity I have. It has nothing to do with the company. There is no relationship whatsoever.

MR MENEZES LEITÃO: Penn Lilac is a Panamanian company and is active or operating in Panama. Do you confirm so?

MR OLIVES SOCAS (*Interpretation from Spanish*): I do not know where it operates. They have a delegation office in Spain and I think they also have a delegation office in Panama, but it is not my mission to know where the companies have their offices. My area is technical, not administrative.

MR MENEZES LEITÃO: Annex 1 of Panama is introduced by me at this point. It is in the Panama annexes of the Rejoinder, which I understand is signed by you. This is a certificate of the Registry of Panama. Is that so? Would you please look at the screen? It has your signature and stamp, Panama Shipping Registry Authority, auditor, Pedro Olives Socas. Is that so?

MR OLIVES SOCAS (*Interpretation from Spanish*): I cannot see what is on the screen but apparently, yes. I cannot really see what it is.

MR MENEZES LEITÃO: It has its headquarters in Seville, Spain? It was written in your certificate issued by Panama.

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, but I am talking about a certificate that explains that the company’s management was going to Seville, not that the shipowner was in Seville, because technically one thing is the owner and another thing is the manager, and what I am saying is that the management is in Seville.

MR MENEZES LEITÃO: What you say is that the management gives the nationality to the company, so it is not true, as you said, that it is considered to be a Panamanian company, not

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even to a Panama register, as you say that is a Panamanian company. You say that the management of the company is in Spain.

MR OLIVES SOCAS (*Interpretation from Spanish*): No, I did not say that. You do not understand the certificate. I will explain it to you. One thing is the shipowner and the company and another thing is the department in charge of the manning. The manning needs to be audited. Shipowners can have their offices to manage the vessel wherever they choose. It is not compulsory for them to have it in the country of registry. It is a technical thing. I certify that the office that is in Seville has the capacity, the administrative capacity and the technical capacity, to be in charge of the safety and the protection of the vessel. I am not saying that any mercantile operations are carried out from there, and it is different. You see, the document of compliance is the document that depends on the ISM Code, and this is a technical, not a mercantile document. So that is what I am saying, that this is where the technical procedures for the vessel are carried out, regardless of where the owner is located, but in this case the same shipowner is at the same time the manager, but this is not a compulsory thing.

MR MENEZES LEITÃO: You stated that there are no flags of convenience. It is an opinion. Do you know of a figure that 86 per cent of the ships registered in Panama belong to foreign companies? Can you confirm these numbers?

MR OLIVES SOCAS (*Interpretation from Spanish*): Panamanian flag vessels do not belong to foreign companies. The companies are Panamanian. The owner may be foreign but the companies themselves are Panamanian. The owners, yes, may be foreign and this is not illegal.

MR MENEZES LEITÃO: Let us see. You testified you did a lot of inspections in Africa, in Las Palmas and so on, and you did an inspection in 2010 stating the poor condition of the *Virginia G*. Did you perform another inspection after the report of 2010?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, but they were conducted later, when the vessel came into the repairs area of the port. This was a year later and it was performed in Cape Verde.

MR MENEZES LEITÃO: This certificate, it is issued by the services of Panama, and it is also in the Panama annexes, which refer to a certificate granted on 7 December 2010, based on the survey “performed by our surveyors at Guinea-Bissau”. Is that what we see in that certificate? Apparently the report said that the *Virginia G* was not in such bad condition as to pose a problem to Panama Shipping Registrar Incorporated, because the class machinery certificate, some months after the certificate was issued, if you can show it please - and this certificate has been surveyed in Guinea-Bissau - was considered on 7 December 2010.

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, that is when the vessel had already complied with all that we had asked it to do, and finally the certificate was issued after it had complied with all the recommendations.

MR MENEZES LEITÃO: Fine, now the second inspection was in Cape Verde, but what the shipping register says is that they are based, in your expression, in Guinea-Bissau, that second inspection.

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MR OLIVES SOCAS (*Interpretation from Spanish*): No, in that case I did not understand properly. I referred to another inspection, which was carried out later; a second inspection was performed after 2010 to grant a certification but I understood that you meant years later. So I did not understand what you were referring to.

MR MENEZES LEITÃO: So shortly after. Let us see.

MR OLIVES SOCAS (*Interpretation from Spanish*): It practically was the same inspection, 20 days more or 20 days less.

MR MENEZES LEITÃO: You came to Guinea-Bissau, it was your testimony, in September 2009. Is that so?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes.

MR MENEZES LEITÃO: Then you consider yourself an authority of Panama but you did not report the situation of the ship to the authorities of Panama, or did you?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, I reported it to my headquarters. I reported what the situation of the vessel was, that it was in perfect condition, it had no technical problems. In September when I went the ship was in mint condition. It had problems with the authorities but this was none of my business really. I just said that the boat was in good condition and that is it.

MR MENEZES LEITÃO: You said you made it in September 2009. It is not signed by you, nor the other one. Is it normal for an inspector to do a report and not to sign it, and give it away without signing or stamping it?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, it is signed but perhaps this is the copy I sent to the shipowner. This is not the copy I signed but there must be a signed copy somewhere.

MR MENEZES LEITÃO: It is not an official document. It is an internal document, as we say.

MR OLIVES SOCAS (*Interpretation from Spanish*): I do not know what you were given but I sent everything correctly.

MR MENEZES LEITÃO: No further questions.

THE PRESIDENT: I now ask the Agent of Panama whether he wishes to re-examine the witness-expert. I then give the floor to the Agent of Panama to re-examine the witness-expert. I wish to remind you that the re-examination shall not raise new issues but shall limit itself to the issues raised in cross-examination.

MR GARCÍA-GALLARDO: Thank you, Mr President. Of course not.

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MR OLIVES SOCAS
RE-EXAMINED BY MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/3/Rev.1, p. 16]

MR GARCÍA-GALLARDO: Mr Pedro Olives Socas, I have one question. With all due respect to the representatives of Guinea-Bissau, it seems that they have an incomplete knowledge of maritime law and business. This particular question is raised to you: it seems that they completely misunderstand that countries like France, Germany, the European Union, Brazil, Japan, Korea, China, South Africa, Canada – a huge list of countries – formally delegate a big part of their statutory powers over ships of their respective flags to classification societies as recognized organizations to supervise and conduct inspections of ships. Can we find you in the list of surveyors duly appointed by the recognized organization in the Panama list that appears in www.segumar.com of the Department of Marine Administration of Panama? Are you a surveyor with delegated authority to issue statutory certificates on Panamanian vessels as an individual, Mr Pedro Olives Socas, and not as a company?

MR OLIVES SOCAS (*Interpretation from Spanish*): Yes, of course. My authorization is just private and not to be transferred.

MR GARCÍA-GALLARDO: Thank you.

THE PRESIDENT: Thank you very much, Mr García-Gallardo. I would like to know how you wish to continue. Do you wish to call the next witness? We still have time.

MR GARCÍA-GALLARDO: I would like to call Mr Alfonso Moya Espinosa. My only question is that maybe I will be disrupted because I will not complete my questions in 20 minutes and then I will need to continue.

THE PRESIDENT: I would like to thank Mr Olives. Thank you for your testimony. You may withdraw.

Thank you, Mr García-Gallardo.

The Tribunal will proceed to hear the expert, Mr Moya Espinosa. He may be brought into the courtroom.

M/V "VIRGINIA G"

MR MOYA ESPINOSA
EXAMINED MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/3/Rev.1, p. 16-23]

THE PRESIDENT: I call upon the Registrar to administer the solemn declaration to be made by the expert.

(The expert made the solemn declaration)

THE PRESIDENT: Good morning, Mr Moya Espinosa. I wish to remind you of the following. The work of the interpreters and verbatim reporters is a complex task. This is even more so when, as will be the case now, not only English and French are used but also a third language, Spanish. Therefore, I must urge you to speak slowly and please leave sufficient time after someone else has spoken to you before you answer. As I have stated, questions will first be translated into English and then into French, so you will have to wait until the interpretation into French has been completed. When the interpretation into French has finished, I will give you a sign to that effect. Only then will it be possible for the interpreters to follow.

Mr García-Gallardo, you have the floor.

MR GARCÍA-GALLARDO: Thank you, Mr President.

Mr Alfonso Moya Espinosa, would you please introduce yourself?

MR MOYA ESPINOSA *(Interpretation from Spanish):* I am an economist. I am a controller and an auditor for the Spanish State, and then I set up my own company to carry out fiscal advice work.

MR GARCÍA-GALLARDO: Where are your offices located?

MR MOYA ESPINOSA *(Interpretation from Spanish):* In Seville.

MR GARCÍA-GALLARDO: Are you an auditor or an accountant?

MR MOYA ESPINOSA *(Interpretation from Spanish):* I am an auditor, an economist.

MR GARCÍA-GALLARDO: Do you have clients in the maritime sector?

MR MOYA ESPINOSA *(Interpretation from Spanish):* Yes, I have customers in Seville and in Huelva; both are ports – ship-owning companies.

MR GARCÍA-GALLARDO: Are you in charge of the preparation of the accounts of the companies we know with a family that is the shipowner and final beneficiary of the vessel *Virginia G*?

MR MOYA ESPINOSA *(Interpretation from Spanish):* Yes, I have a professional relationship with Mr Gamez. I have had this relationship since 1988, which was when I started providing advice to his companies.

MR GARCÍA-GALLARDO: Do you prepare annual accounts and tax forms, tax obligations and accounts obligations, of those companies?

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MR MOYA ESPINOSA (*Interpretation from Spanish*): Yes.

MR GARCÍA-GALLARDO: Would you please explain to us which companies were affected by the arrest of the *Virginia G* and the damages reflected in your report?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Mr Gamez is the chairman of a holding of family businesses which include a Spanish company, Gebaspe, a ship-owning company, Penn Lilac Trading, and the holding company is Penn World. The Spanish company was devoted to selling fuel to vessels in international waters. Afterwards, as the selling of fuel business was doing well, the company bought a vessel through a company called Penn Lilac Trading. They bought their first vessel, which was *Virginia G*. After this, through a different company, Penn World, which was the holding company, which held different properties, they bought a second vessel, which was the *Iballe G*. The three companies I mentioned had a turnover just through the Spanish company of about €8 million-odd. Penn Lilac Trading also had its own customers and it sold its customers fuel. A decision was made by him to sign a contract with an Irish company called Lotus Federation to unify and make the most of the fiscal incentives offered by Ireland for the sale of fuel in international waters.

MR GARCÍA-GALLARDO: What was the instruction given to you by Penn Lilac to prepare your report?

MR MOYA ESPINOSA (*Interpretation from Spanish*): They asked me to make a calculation of the cost involved in the arrest of the vessel just in terms of the contract that Penn Lilac had with Lotus Federation.

MR GARCÍA-GALLARDO: When did you prepare this economic report on damages?

MR MOYA ESPINOSA (*Interpretation from Spanish*): In 2011. I completed it on 16 March 2011.

MR GARCÍA-GALLARDO: Do you confirm before this Tribunal the content and conclusions of this report?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Yes.

MR GARCÍA-GALLARDO: What is the amount of the damages that you reflect in the report?

MR MOYA ESPINOSA (*Interpretation from Spanish*): €4,221,222.54.

MR GARCÍA-GALLARDO: Did you get access to bank statements and tax forms to prepare this report?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Yes, I had access to all documents, and I have them.

MR GARCÍA-GALLARDO: Would you describe the methodology that you followed for the preparation of this report? Which companies fall within the scope of your report?

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MR MOYA ESPINOSA (*Interpretation from Spanish*): In the study of the costs and economic damages I directly included only the *Virginia G* vessel. I did not include the other vessel that was under an embargo in the port of Las Palmas. The calculations that I made to determine this amount and to arrive at the amount that I mentioned just now comprised direct expenses to do with maintaining the *Virginia G* at the Guinea-Bissau port, the losses incurred during the arrest, because the vessel was not operating, and then the *manque à gagner* resulting from the losses in the contract between the family company and the Lotus Federation company. They controlled the trafficking of 18,000 tonnes at a price of €40 per tonne.

MR GARCÍA-GALLARDO: What was for you the period of inactivity of the ship *Virginia G* reflected in your report?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Four hundred and seventy four days.

MR GARCÍA-GALLARDO: How have you calculated that?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Mr Gamez gave me the dates.

MR GARCÍA-GALLARDO: The dates between the arrest ... or the date of the arrest?

MR MOYA ESPINOSA (*Interpretation from Spanish*): From the arrest to the release, then putting the vessel back into service.

MR GARCÍA-GALLARDO: To the date of the release, and then you added some extra days?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Yes, until the vessel was able to go back into operation.

MR GARCÍA-GALLARDO: Had you included the salaries of the crew?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Yes.

MR GARCÍA-GALLARDO: What other cost had you included as the main point?

MR MOYA ESPINOSA (*Interpretation from Spanish*): The costs included are as follows: the payroll of the crew; *per diems*; travelling costs; the cost involved in obtaining the seaworthiness certificates; the proportional costs of the grounding vessels and the periodical evaluations that have to be performed; the depreciation of the vessel; the proportional part of the salaries of the ground staff; P&I insurance policies for the hull; and the administration costs for the group.

MR GARCÍA-GALLARDO: How did you calculate the value of the cargo?

MR MOYA ESPINOSA (*Interpretation from Spanish*): On the basis of the invoice by Lotus Federation.

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MR GARCÍA-GALLARDO: Have you also added any indirect costs?

MR MOYA ESPINOSA (*Interpretation from Spanish*): When you say “indirect costs”, what exactly do you mean?

MR GARCÍA-GALLARDO: On the last page of your report, the English version, you express the amounts in four categories: direct costs, losses during retention, losses for termination of the chartered contract with the Lotus Federation, and an additional 10 per cent.

MR MOYA ESPINOSA (*Interpretation from Spanish*): This includes the direct costs as far as maintenance of the vessel in the port is concerned until it could go back to its bunkering operations. These are direct costs, costs that had to be incurred over the 474 days during which the vessel remained grounded. The rest corresponds to losses that were incurred as a result of the infringement of the contract with Lotus Federation, and the losses incurred during the detention are a *manque à gagner* because, of course, the ship could not be used during those days.

MR GARCÍA-GALLARDO: What was the duration of this contract with Lotus Federation?

MR MOYA ESPINOSA (*Interpretation from Spanish*): The contract was signed for four years and it included maximum supply of 90,000 tonnes a year. This 90,000 tonnes had to be supplied to both vessels so it included both vessels until the arrest in 2009. Until the arrest in 2009 the *Virginia G* had been supplied 34,000 tonnes, which may indicate that it would supply between 40-50,000 tonnes in 2009. So this calculation of €1.3 million corresponds to the supplies that were not performed by the vessel from August to December 2009 in accordance with the evolution of supplies recorded from January to the time the vessel was arrested.

MR GARCÍA-GALLARDO: At point 14 of the report you mentioned repayment of the vessel, €1 million, purchase price, amortization rate 5 per cent annually. Why did you take this amount to calculate the amortization rates, and why did you apply this rate of 5 per cent annually?

MR MOYA ESPINOSA (*Interpretation from Spanish*): I consider that a steel structure, even if it is not operating, should be amortised because a ship is always in a very hostile environment. Salt water is extremely hostile. This was a vessel that was bought second hand and so the lifespan is estimated at 20 years, so the annual amortization is 5 per cent.

MR GARCÍA-GALLARDO: And the price of €1 million? What was the reference to put this price in the report?

MR MOYA ESPINOSA (*Interpretation from Spanish*): The acquisition price of the vessel was €600,000. Penn Lilac introduced improvements to the vessel for a value in excess of €1.5 million, and the value assigned by the insurance company was €1.1 million so I took the figure of €1 million because it was a conservative figure so as not to damage either of the two parties.

MR GARCÍA-GALLARDO: €1 million ---

MR MOYA ESPINOSA (*Interpretation from Spanish*): €1.1 million approximately.

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MR GARCÍA-GALLARDO: This price, the market price?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Not at this point in time, no, because of the situation in the market; there has been a reduction in prices of all kinds of vessels.

MR GARCÍA-GALLARDO: In relation to the cost related to the ground staff, what did you calculate the cost?

MR MOYA ESPINOSA (*Interpretation from Spanish*): On the basis of the payroll.

MR GARCÍA-GALLARDO: Fifty per cent ground staff. Does it mean that you cut the cost – it is like a fixed cost between the two vessels owned by the family group, the vessels *Iballa G* and *Virginia G*?

MR MOYA ESPINOSA (*Interpretation from Spanish*): No, no. The personnel that the vessel had when it was arrested, which was the full crew – as time went by the number of crew members became smaller and smaller because the company was going through very difficult financial times and at the end only two people remained practically. Afterwards when the vessel was released the full crew was hired again so that the vessel could go back into operation, and that is why there is a variation in personnel costs across the different months. But the crew of the *Iballa* was not taken into account in any way whatsoever.

MR GARCÍA-GALLARDO: Mr President, to try to respect the schedule I would like to suspend the examination and to continue after the break.

THE PRESIDENT: Thank you very much. We have reached almost 11.30 so the Tribunal will withdraw for a break of thirty minutes. We will continue the hearing at 11.55. Thank you.

(Break)

THE PRESIDENT: We will continue the examination of the [expert].

Mr García-Gallardo, you have the floor.

MR GARCÍA-GALLARDO: Thank you, Mr President, your Honours.

Mr Moya, I still have some questions. Could you please confirm to me that the companies - not just simply Penn Lilac but the other company that owned the second vessel of the family interests, Gamez - comply fully with the accounts and tax obligations of the respective jurisdictions of Panama or other country? The other company was Gebaspe in Spain. Could you please elaborate a little bit to this Tribunal, please?

MR MOYA ESPINOSA (*Interpretation from Spanish*): The holding of companies was made up by three companies. There were three companies and two of them were domiciled in Panama and the other one was domiciled in Spain, which was the first company that was set up. The Spanish company declares its taxes in Spain. One of the two Panamanian companies has a permanent establishment in Spain called Penn World, which was the owner of the *Iballa G* vessel – and she was also the owner of the premises in Seville and some other premises in the Canary Islands – and the other company was just the owner of the *Virginia G*

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vessel, which only declared its taxes with Panama because it had no other obligations. The fiscal statements – we never had any problems to do with taxes or anything, and no amounts were claimed from us either by Spain or by Panama.

MR GARCÍA-GALLARDO: You mentioned before that you are a tax expert. Do you know if Panama is in the list of tax havens of the OECD – the Spanish...

MR MOYA ESPINOSA (*Interpretation from Spanish*): No. Panama is not a tax haven where you can conduct money-laundering activities or anything of that sort. Panama is subject to the obligation of conveying information about money-laundering transactions and about currency movements, and so it is not classified as a tax haven. Panama has its vessels that carry its flag, and for those services vessels have to pay every year and that is it; there is no other obligation.

MR GARCÍA-GALLARDO: Did the arrest and long detention of the *Virginia G* directly affect the operations of the second Panamanian company that owned the second vessel of the family Gamez, called *Iballa G*?

MR MOYA ESPINOSA (*Interpretation from Spanish*): In this group of family companies the different companies were closely linked with one another. When I was asked to draw up the report I was talking with Mr Gamez and I thought it was a little bit reckless to include all of the collateral financial damage that this arrest caused because Mr Gamez became ill as a result of this and he had to take retirement in order to be able to support his family. If you contemplate all of these situations, then moral damage is very difficult to quantify economically – or at least moral damage is very difficult to quantify. In a family company normally it is very difficult to establish a limit as to how far you can go when you assess damages, but we knew that this is happening and that we were going to have to defend it in court at one point. We wanted to be prudent and we decided to present figures that were conservative and that we could of course support on hard evidence. Of course, there are many people in this company who are hoping for Mr Gamez to re-float his economic situation, to be able to get the money that is owed to them. Of course this compensation is going to be very useful to pay creditors, but some other things are irreversible. For example the seeds of mistrust have already been sown in the shipping sector and in the fuel sector against Mr Gamez because as a result of the news that this company was devoted to smuggling fuel and things like that his credibility really suffered greatly. As a result of this, creditors were relentless in demanding their payments and demanding the money that was owed to them; so it was a real disaster for the company. But it is very difficult at least for me to evaluate damage of that nature. However, I can defend and I can argue, although I don't have any other reports, in favour of the figures I have presented to this Tribunal. That's what I can say.

MR GARCÍA-GALLARDO: Can we say that the arrest by the Guinea-Bissau authorities of the *Virginia G* did not make to sink the *Virginia G* but really sank Mr Gamez's interests?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Well, I think, yes.

MR GARCÍA-GALLARDO: I have no further questions, Mr President.

THE PRESIDENT: Thank you, Mr García-Gallardo. I would like to know whether Mr Leitão wishes to cross-examine the expert.

You have the floor, sir.

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MR MOYA ESPINOSA
CROSS-EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/3/Rev.1, p. 23-30]

MR MENEZES LEITÃO: Thank you, Mr President.

First, I would like to ask Mr Alfonso Moya: do you consider yourself to be an independent expert to these proceedings of the Parties?

MR MOYA ESPINOSA (*Interpretation from Spanish*): In terms of the drawing up of the report, yes.

MR MENEZES LEITÃO: My question of you was, are you independent of this group of companies?

MR MOYA ESPINOSA (*Interpretation from Spanish*): I have been paid by them for many years.

MR MENEZES LEITÃO: I do not know if you have the report with you but I will draw your attention to point 17 of the report. In this report you talk about the “no fault” losses of the company. The expression you use is very curious: “Losses...”

MR MOYA ESPINOSA (*Interpretation from Spanish*): This is funny, isn't it?

MR MENEZES LEITÃO: You are not fluent in English?

MR MOYA ESPINOSA (*Interpretation from Spanish*): No.

MR MENEZES LEITÃO: You did not supervise the translation of this report?

MR MOYA ESPINOSA (*Interpretation from Spanish*): I could not do that, no.

MR MENEZES LEITÃO: I was asking because of the sales figure you said of €8,411,000 in the year 2008. You stated this is the sales figure of the group of companies. It was in your report but in the translation in the beginning of the report, they say it is the sales figures of “the company”. If I am correct to understand this translation, the sales figure of €8 million is not of the company Penn Lilac; it is of the group of companies you talked about. Is that so?

MR MOYA ESPINOSA (*Interpretation from Spanish*): The €8.4 million is the turnover for the whole group.

MR MENEZES LEITÃO: Can you tell the Tribunal the sales figures of just Penn Lilac in 2008?

MR MOYA ESPINOSA (*Interpretation from Spanish*): In 2008 the sales of Penn Lilac I do not really know. No, I do not have them in front of me.

MR MENEZES LEITÃO: What is the sales figure of Penn Lilac?

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MR MOYA ESPINOSA (*Interpretation from Spanish*): Yes.

MR MENEZES LEITÃO: The amount? Zero?

MR MOYA ESPINOSA (*Interpretation from Spanish*): I do not have them here.

MR MENEZES LEITÃO: You stated to the Tribunal that this report was based on a lot of invoices and you at any time say “attached are copies of the invoices”. Were these invoices, or any one of them, paid by Penn Lilac?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Yes.

MR MENEZES LEITÃO: This is an invoice, for instance, Penn Lilac Trading, a stamp. Do you consider this a tax invoice?

MR MOYA ESPINOSA (*Interpretation from Spanish*): This is a list of invoices. This is a list of invoices. The holding of companies has a single cash pooling system.

MR MENEZES LEITÃO: It is the stamp of Penn Lilac but it was Gebaspe who paid these invoices. I notice this is an invoice for legal services, and do you consider it correct? It is legal defence and expert reports. The amount is €151,000. Do you consider it normal that the case of the *Virginia G* in Guinea-Bissau cost €151,000? There was only an interim measure and an action brought before the courts of Bissau. Do you consider this figure to be correct? €151,000 for legal services?

MR MOYA ESPINOSA (*Interpretation from Spanish*): If you allow me, I will answer. Otherwise I cannot. So here, the same as you, I can read “SJ Berwin €50,000”. I do not know how much you are going to get out of this. This is SJ Berwin and it says how much it is going to get.

MR MENEZES LEITÃO: €50,000?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Yes.

MR MENEZES LEITÃO: What does this relate to?

MR MOYA ESPINOSA (*Interpretation from Spanish*): It is the legal services of SJ Berwin. So when the whole process finishes, Mr Gamez will see how he can pay all of these bills, but this is my own work, coming all the way to Hamburg, and all the people that have come here, and the different people that have had to participate in a process that has been going on for many years. So how much is all of this worth? Do you think €151,000 is too much? It is a matter of opinion.

MR MENEZES LEITÃO: You are claiming as damages the costs of these proceedings before the International Tribunal and the Tribunal has to make an award on the legal costs. So, according to your report, in these proceedings you are doubling the petition to the Tribunal because you pretend that the Tribunal considers damages as the set costs for the legal costs of the lawyers before this Tribunal.

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MR MOYA ESPINOSA (*Interpretation from Spanish*): No, I am sorry. I do not know whether the Tribunal will order the other party to pay the costs. This is up to the Tribunal to decide. I am just giving you the facts as a Roman principle – as a lawyer, I am sure you are aware of it – give me the facts and I will give you the law. So I have to say these are the facts, these facts have been proven, and everything is justified. Will Mr Gamez have to pay this? Yes, obviously. With what money? Well, he will see to that. If we are not condemned but are asked to pay the lawyers’ costs, we shall see, but these are the expenses that will have to be paid throughout the process, and many of them have been quantified. My bills have been quantified, Mr Gulias’s bill has been quantified, SJ Berwin has been quantified, Miranda has been quantified. This is an estimation. It may be 55 or 42 but this is a ballpark figure coming all the way to Hamburg, different people. So all of this is not contemplated but this is going to cost a lot of money.

MR MENEZES LEITÃO: It says here a payment to “análisis tributario”, I understand a tax audit. What has a tax audit to do with the arrest of the *Virginia G*?

MR MOYA ESPINOSA (*Interpretation from Spanish*): This €4,500 is for the drawing up of the report and the different tax advisory work conducted since the arrest took place, submittal of declarations of companies that have remained inactive as a result of this process, companies for which we have had to present annual accounts because they are no longer operational in Spain, and the drawing up of this report, is this too much money, €4,500 to draw up this report? Is it too much?

MR MENEZES LEITÃO: I am not contesting the amount. I am contesting the connection with the case.

MR MOYA ESPINOSA (*Interpretation from Spanish*): Well, I am telling you that these are the costs that we think are going to be incurred throughout the process. I cannot say more than this.

MR MENEZES LEITÃO: You have already said something about it to my colleague. You said that Penn Lilac is for tax purposes sitting in Panama, or taxed in Panama. Do you know the amount of tax paid by Penn Lilac to the Panamanian authorities?

MR MOYA ESPINOSA (*Interpretation from Spanish*): When we set up the company – I cannot remember. It was a long time ago but an amount was paid in Panama and then, through the Consulate, annual amounts were also paid. I do not know how much, because for this report it is not really relevant how much we paid or how much we failed to pay.

MR MENEZES LEITÃO: So that’s the company in Panama, but let me ask you another question. It was your testimony that--

MR MOYA ESPINOSA (*Interpretation from Spanish*): The company has a vessel with a Panamanian flag.

MR MENEZES LEITÃO: The contract with Lotus Federation of Ireland was signed by Penn Lilac. We have here a copy of this contract, which says that it was signed by Gebaspe. Has Penn Lilac signed any charter at all?

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MR MOYA ESPINOSA (*Interpretation from Spanish*): I can imagine it has an invoice from Lotus, otherwise who is going to pay the crews and who is going to pay all the expenses?

MR MENEZES LEITÃO: Penn Lilac or Gebaspe?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Penn Lilac.

MR MENEZES LEITÃO: With what earnings?

MR MOYA ESPINOSA (*Interpretation from Spanish*): What do you mean, with what earnings? With the money that it receives from Gebaspe.

MR MENEZES LEITÃO: In order to put Penn Lilac in condition to pay the workers?

MR MOYA ESPINOSA (*Interpretation from Spanish*): This case, normally in all companies if the supplier does not pay the customer, the customer cannot pay its personnel, and here you have the same situation.

MR MENEZES LEITÃO: Penn Lilac is only a body interposed in this relation to avoid liability in case of, for instance, disasters with an oil tanker.

MR MOYA ESPINOSA (*Interpretation from Spanish*): If it did not pay its insurance and if it did not carry out inspections and if it did not comply with its maritime obligations, you could say that, but a company that has all its insurance policies and that pays all its taxes, why should I presume that it wants to avoid its responsibilities?

MR MENEZES LEITÃO: If there were a big disaster at sea caused by the *Virginia G*, the damaged person has only Penn Lilac to claim this possibility, who has only this ship, and cannot go to Gebaspe because it would say, “We are not the owners of the ship. We are only a bareboat charter.”

MR MOYA ESPINOSA (*Interpretation from Spanish*): In the case of the arrest of this vessel, we paid with all of the estate of Mr Gamez, we paid all the debts.

MR MENEZES LEITÃO: What do you feel to be the actual value of the vessel?

MR MOYA ESPINOSA (*Interpretation from Spanish*): I cannot answer that question. I am not an expert in the field. It would be reckless of me to answer your question. It would be reckless to give you a figure now. How much is this pen worth? I do not know.

MR MENEZES LEITÃO: Because I read on the internet that this ship actually has only a value of €500,000. Do you think this is correct or not?

MR MOYA ESPINOSA (*Interpretation from Spanish*): If you read this and if you say so, I am not going to contradict what you are saying. Vessels are worth depending on the work they do.

MR MENEZES LEITÃO: How can you manage to get a report saying that the immobilization of a vessel which has a value of €500,000 for a period that is not more than

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one year can cause €4,221,000? How is that possible according to the good principles of economic evaluation?

MR MOYA ESPINOSA (*Interpretation from Spanish*): I am not saying that it is €4 million.

MR MENEZES LEITÃO: It’s just on the first page.

MR MOYA ESPINOSA (*Interpretation from Spanish*): One moment please. On page 9 of my report I say that the direct expenses that have been incurred for the vessel were €1.28 million, and then you showed me an invoice which you think is excessive, and then losses during the detention period – this was 474 days the ship could not operate. Taking into account that from 1 January to its arrest it had moved 24,000 tonnes at €40 per tonne, then there was a contract with Lotus Federation for 90,000 tonnes a year, which cannot be complied with, so there is a breach of contract, but the contract had been complied with the previous two years, and there are two more years in the future in the contract. There is a whole figure of €3.6 million a year, and so you are saying that €1.2 million for 484 days is madness. If I told you how much money we have lost as a result of all these things, somebody in this Tribunal might even start laughing.

MR MENEZES LEITÃO: So you are saying that the detention of a vessel which has a value of €500,000 can cause damage, in a little more than one year, that is almost ten times the value of the ship. Do you consider it in any situation even possible to consider in this case the ship value much more?

MR MOYA ESPINOSA (*Interpretation from Spanish*): The vessel is not just the vessel itself. You have to consider the activity that the vessel carries out. There is a whole set of companies involved. It is not just the vessel; it is also the cargo that was seized. It is not just the vessel; it is having to keep up a crew that is not working. It is not just a vessel; it is also a series of expenses that have to be incurred, and this led to financial expenses that had to be paid. In addition, there is a breach of contract with a *manque à gagner*. These are companies that were driving a roaring trade and now everything went to pot. We do not even know whether we are going to be able to get our money back. Those of us here do not even know whether we are going to be paid for coming here. So these are concrete figures that appear in documents.

MR MENEZES LEITÃO: This is not the damage to this ship but the damage caused to Gebaspe, which is a third party to the owner of the ship, because it has only a charter contract and is not the owner of the ship. Is that so?

MR MOYA ESPINOSA (*Interpretation from Spanish*): I did not understand your question. What did you say?

MR MENEZES LEITÃO: Penn Lilac.

MR MOYA ESPINOSA (*Interpretation from Spanish*): Penn Lilac is not the owner of the vessel.

MR MENEZES LEITÃO: I said Penn Lilac is the owner of the vessel but Gebaspe, which contract you say Gebaspe lost, is not the owner of the ship. So it is a third party to the situation of the arrest of the ship.

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MR MOYA ESPINOSA (*Interpretation from Spanish*): I have not included any of the damage caused to Gebaspe. Within the expenses I included financial expenses. The fuel, sir, was invoiced by Lotus to Gebaspe because Gebaspe was a company that was financially sounder than Penn Lilac and that is why Lotus Federation preferred to send its invoice to Gebaspe, because the contract was a three-party contract. The company, as I said, is a family company and it is evident that the vessels bear the names of the daughters of the owner, so you cannot really separate the vessel from the cargo as you want to. It is the vessel plus the cargo. How much is the cargo worth? This is something that we can quantify. The cargo was worth almost half the value of the vessel, if we consider the value that you gave us.

MR MENEZES LEITÃO: The ship is considered to be over €1 million – point 14. Is that correct?

MR MOYA ESPINOSA (*Interpretation from Spanish*): No, I did not assign that value. The insurance company assigned a value of 1.1 million. I took as a conservative figure the figure of 1 million. I did not want to take the historical value of this vessel from the time it was bought to when it was placed into service to be able to do bunkering operations; I did not take that into account. I just took a figure, which is in my report, and the insurance clause says that the value can never be higher than the actual price of the object that is being insured. This is mercantile law.

THE PRESIDENT: Mr Leitão, our interpreters are having difficulty following your questions. Please wait until the interpretation into French has been completed.

MR MENEZES LEITÃO: You have testified and produced a report before this Tribunal which is supposed to be the truth. Do you consider it true to say that €1 million was the purchase price of the ship when actually it was €600,000?

MR MOYA ESPINOSA (*Interpretation from Spanish*): The price of acquisition of the vessel is €600,000. The price of the vessel when it started to operate with Penn Lilac was not €600,000. It was more than this because we had to put in new machines and the engines had to be overhauled, so a lot of money was spent. In addition, since this vessel came from an auction, it had to be subjected to a series of upgrades to be able to obtain seaworthiness certificates, and all of that was done when it had to be done. So I just took a figure that is here in a document published or issued by an insurance company.

MR MENEZES LEITÃO: In that case you should write the insurance value of the vessel. Do you agree with me?

MR MOYA ESPINOSA (*Interpretation from Spanish*): I took a figure that I thought was as conservative as possible. I did not come here to say that the boat cost 600,000 and then we spent 800,000, so the value should be 1.4 thousand; I said 1 million, which is a conservative figure.

MR MENEZES LEITÃO: So you have invented this figure which does not correspond to any value at all, and it is almost twice the value of the purchase price?

MR MOYA ESPINOSA (*Interpretation from Spanish*): That is your subjective opinion, sir.

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MR MENEZES LEITÃO: Let me ask you another question. Why from your perspective should a State that has arrested a vessel for no more than one year and has returned it back pay 50 per cent for the year of the price of the acquisition of the vessel? What kind of damage is that?

MR MOYA ESPINOSA (*Interpretation from Spanish*): A State that arrests a vessel should only pay 50 per cent of the acquisition value – 5 per cent a year? Well, that is the impairment that the vessel suffered while it was stranded in a port. If you place steel in contact with a hostile environment such as salty water, it undergoes deterioration, and that is why fiscal norms throughout the world make it possible for expenses involved in correcting this deterioration from being taken away from the total value from a fiscal perspective.

MR MENEZES LEITÃO: But you have also claimed for the loss of benefits during this period at the same time. It is in your point 16. Should you not have deducted this amount from the loss of the benefits? It is above the point about losses during the period – €83,000 per month – so simultaneously you are charging the payment of the ship and at the same time the loss of benefits. According to my account, you are doubling it and, on the contrary, you should have deducted it?

MR MOYA ESPINOSA (*Interpretation from Spanish*): No, I did not double anything in the report. If you read my report carefully, sir, not from a legal perspective but from an economic perspective, the vessel was arrested and there was a four-year contract, one year and a little of which had elapsed, and there had been 474 days of inactivity. As a reference I took an operational figure for those 474 days, which was the same as the profits shared from 1 January to the day of the arrest, where it had already transported 24,412 tonnes of fuel, which is not to be scoffed at; it is quite a bit of fuel, so we are talking about a lot of fuel. Then the contract with the supplying company was still in force, so the vessel could have sold much more fuel if it had not been arrested, and this is what we call *manque à gagner*. Then there is the two-year period, the 474 days plus the day on which it had operated from January, but the contract was a four-year contract, so there were two more years to go and in that two-year period the vessel would have made a lot more money.

I did not estimate the losses as high as I could have estimated them. I just reduced it to slightly more than 2 million. I have been very prudent, very cautious, when calculating this. I have been extremely meticulous and careful, and there is no duplicity at all. There is a period of operation, a period of arrest and a contract that was not complied with. Therefore, the turnover figure of these companies of Mr Gamez was €3.6 million, a turnover at €40 per tonne. You may like this or not; you may think this too much or not depending on how you look at it, but that is the figure and that is the contract, and the breach took place not through our own fault but through the fault of some other people.

MR MENEZES LEITÃO: Let me ask you another question. Is amortization of the ship a benefit or a cost to a company?

MR MOYA ESPINOSA (*Interpretation from Spanish*): When the tax authorities allow you to get tax relief for an amortization in your income statement it is because the tax authority wants to compensate you for a loss that you are incurring. It is not a fiscal holiday that you are getting; no, no, no. You have a car and the Portuguese tax authorities will allow you, in your tax statement when you declare your tax, to deduct the depreciation of your vehicle because your vehicle is subject to the rigours of weather conditions, so you will include the amortization of the depreciation of your vehicle in your tax statement. This is not something

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that has benefited you. What the tax authorities are doing is compensating you for the loss that your vehicle is suffering, and the same thing goes for this ship.

THE PRESIDENT: Mr Leitão, I would like to draw your attention to the fact that you have four more minutes for your cross-examination. If you spend all the remaining time on this cross-examination we will have no time for the next expert.

MR MENEZES LEITÃO: Very well. I will close at this point. Thank you.

THE PRESIDENT: I will therefore ask Mr García-Gallardo whether he wishes to re-examine the [expert].

MR MOYA ESPINOSA
RE-EXAMINED BY MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/3/Rev.1, p. 30-31]

MR GARCÍA-GALLARDO: Mr Moya Espinosa, I am sorry for disturbing you again. I will ask you just one question. Would you please read the first line following “Reunidos”, the name of the individual?

MR MOYA ESPINOSA (*Interpretation from Spanish*): One part was Antonio Gamez Sanfiel.

MR GARCÍA-GALLARDO: Can you move to the line following “Attuando”?

MR MOYA ESPINOSA (*Interpretation from Spanish*): The first one in the name of the Gebaspe company SL, henceforth the freighter.

MR GARCÍA-GALLARDO: The freighter means the owner?

MR MOYA ESPINOSA (*Interpretation from Spanish*): Not necessarily.

MR GARCÍA-GALLARDO: The Spanish version, please. I am afraid, Mr President – and this is the reason I read the English translation for the record – it is my fault and I apologize. You can see very easily that at no point is *fletante* mentioned in Spanish. I will change it and send in another. I apologize that, unfortunately, in that case the representative of Guinea-Bissau has been using and spending time before this Tribunal. Thank you very much.

THE PRESIDENT: Thank you for the correction.

Mr Moya Espinosa, I thank you for your testimony. Your examination is now finished and you may withdraw.

Mr García-Gallardo, are you ready to call the final expert?

MR GARCÍA-GALLARDO: Yes, Mr President. I would like to call Mr Kenneth Arnott.

THE PRESIDENT: Thank you. The Tribunal will then proceed to hear the expert Mr Arnott. He may now be brought into the courtroom.

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MR KENNETH ARNOTT
EXAMINED BY MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/3/Rev.1, p. 31-34]

THE PRESIDENT: I call upon the Registrar to administer the solemn declaration to be made by the expert.

(The expert made the solemn declaration)

THE PRESIDENT: Thank you, Mr Registrar.
Mr García-Gallardo, you have the floor, sir.

MR GARCÍA-GALLARDO: I will try to be very brief, Mr President.
Mr Arnott, I will ask very quick questions because we are short of time and I would like to allow some time for my colleague to cross-examine you.

MR ARNOTT: I understand.

MR GARCÍA-GALLARDO: Could you please first introduce yourself?

MR ARNOTT: I am Kenneth Arnott. I am the technical director of a company Braemar, which is a UK company based in London. The consultancy has been in operation a long time. It forms part of the old Salvage Association, which is a global organization going back to 1860.

MR GARCÍA-GALLARDO: Are you an expert on maritime damages investigations?

MR ARNOTT: I am classed as an expert on marine casualty accidents and have been instrumental in giving evidence in the High Court in London and in arbitrations for the London Marine Arbitrations Association.

MR GARCÍA-GALLARDO: Could you give us just one example of an arresting case where you have intervened as an expert?

MR ARNOTT: I have been an expert, as I say, on many cases, but some of the more important ones are involving loss of life. I was instrumental in investigating a casualty called *Alexandros T* which was a sinking of a bulk carrier vessel where there was 26 lives lost on that occasion.

MR GARCÍA-GALLARDO: Have you made any particular report in relation to longstanding arrest of vessels?

MR ARNOTT: I have. In fact I am currently involved in three cases where these vessels have actually been arrested for a considerable period of time. I am looking at reactivation of these vessels.

MR GARCÍA-GALLARDO: In which place?

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MR ARNOTT: These vessels have been arrested in Somalia and they have been released into Oman where I am looking at the reaction and the reactivation of these vessels so that they can be seaworthy and resume trading.

MR GARCÍA-GALLARDO: What was the instruction given to you by the Agents of Panama to prepare this report?

MR ARNOTT: The instructions were to examine the very high volume of documentation, which involved the invoices, the contracts.

MR GARCÍA-GALLARDO: Had you been given access to other materials to prepare this report?

MR ARNOTT: I had access to all the reports that had been issued by the Panama inspectorate, which is Captain Socas. I have read and examined his reports at the beginning and at the end of the detention period and I have also, as I say, looked at all the technical damages which reported on that occasion.

MR GARCÍA-GALLARDO: Your report is a confirmatory report. Had you been able to talk to Mr Moya to have any supporting material – bank statements, tax forms, contracts, invoices – anything?

MR ARNOTT: Yes, since I was instructed by the Panama agents I have subsequently during my review of the documentation been in correspondence and communication with the technical superintendent of the owners, with Mr Moya and with the owners and also with the Panama agents, in order to achieve and obtain more information, which was necessary for me to form an opinion on this particular case.

MR GARCÍA-GALLARDO: Can you confirm that you have been able to have a look through the list in appendix 1 of your report?

MR ARNOTT: Yes, I have. I have looked at all of the docs that are in appendix 1 of this report.

MR GARCÍA-GALLARDO: Will you confirm before this Tribunal the content and conclusions of this report?

MR ARNOTT: After careful and forensic examination of this very large amount of documents, I conclude that the damages and costs which owners were faced with this vessel was as a direct result of the 14 months' detention whilst she was at Guinea-Bissau.

MR GARCÍA-GALLARDO: Do you confirm before this Tribunal that the owner of the *Virginia G* suffered substantial costs and damages as a direct result of the actions of the Guinea-Bissau authorities on 21 August and in the 14 months of detention?

MR ARNOTT: Yes, I have concluded through these examinations that the owner did in fact suffer substantial costs and damages as a direct result of this detention over the 14 months' period.

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MR GARCÍA-GALLARDO: Do you consider that the damages claimed and subsequently audited are considered fair and reasonable in respect to the owner’s efforts to reactivate the vessel at the time?

MR ARNOTT: Yes, I believe that the audited calculation carried out by Mr Moya was correct and reasonable and fair in his approach to the costs and the damages which have been reported.

MR GARCÍA-GALLARDO: Could you just briefly explain the methodology that you followed for the preparation of this report, in particular and just to provide an example to this Tribunal on the calculation of the value of the cargo that was unloaded by the Guinea-Bissau authorities, please?

MR ARNOTT: Yes, the methodology was of course to forensically review all of the documentation, looking at the invoices, looking at the technical aspects of the damage which was reported, to see whether technically it was viable that such machinery had deteriorated over the 14 months without any maintenance; so that was one of the aspects of the methodology of coming to my view and opinion. With Panama – as I say, I have had meetings with all interested parties in terms of the owners, the charterers, the Panama inspectorate; so these are all elements that have contributed to my views on this case.

MR GARCÍA-GALLARDO: Do you think it is normal in this type of damages report in the shipping sector to consider not just the cost or the damages related to the company that come with the vessel, or do you think it is normal to consider in the damages whatever other costs related, strictly linked to the activity of the vessel, such as charterers’ costs, fuel costs, maintenance costs, management costs by the management company – whatever the related cost – and, in the case of Panama, moral cost?

MR ARNOTT: Yes, I believe that one has to look at the complete picture of loss or damage which owners were faced with, and that is contributed to not just by, shall we say, the mechanical damage to the vessel but also considerable losses on the operational side. The owners would not be able to trade this vessel for 14 months and also it actually had its overheads to consider. It was important that the vessel had to have a minimum number of crew members on board and so they incurred a cost to the owner. There were also contractual obligations to Lotus and also to the charterers, and so those contracts were probably in breach because of the fact that the owner could not actually comply with the contractual terms after the vessel was detained.

MR GARCÍA-GALLARDO: I do not have further questions.

THE PRESIDENT: Thank you very much.

I wish to ask Mr Leitão if you want to cross-examine the expert. You have four minutes.

MR MENEZES LEITÃO: I will be very brief.

MR KENNETH ARNOTT

CROSS-EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/3/Rev.1, p. 34-35]

EXAMINATION OF WITNESSES AND EXPERTS – 3 September 2013, a.m.

MR MENEZES LEITÃO

I would like to ask what kind of invoices have you seen? You attached a lot of invoices to the report and all are like this. Is this an invoice for you?

MR ARNOTT: Yes, this is the invoices for the cost of legal and expertise.

MR MENEZES LEITÃO: You consider this an invoice, with a stamp and a reference to cover these two actual invoices, 160, which are not presented?

MR ARNOTT: Yes, I looked at a lot of invoices from the suppliers, the service suppliers, spare parts. I looked at invoices---

MR MENEZES LEITÃO: Do you consider fair and reasonable to claim €150,000 for legal services due to the arrest of the ship in Bissau?

MR ARNOTT: There is lots of work entailed regarding this case, a lot of legal input, a lot of legal investigation, a lot of investigation and communication from myself as a consultant, so I think to actually produce a case which can be considered by the Tribunal it needs to have a very good forensic input, and of course this forensic input from the interested parties in support of the Panama case is relevant, and I think it is acceptable and it is fair and reasonable to the Tribunal. I am an independent surveyor; I have got no allegiance to the Panama Government. I am independent, and I work to see the facts. I look at the facts of the case and I present them accordingly to the Tribunal.

MR MENEZES LEITÃO: So, as it results on page 26 of your report, these costs refer to these actual proceedings which we are in, to the proceedings before this Tribunal. Is this correct?

MR ARNOTT: I am sorry, sir, could you repeat that, please?

MR MENEZES LEITÃO: Yes. Let me read page 26 of your report: “As a consequence of the vessel’s detention by Guinea-Bissau the owner Penn Lilac suffered significant losses and in order to legally claim for such losses the owners were required to instruct legal counsel and other technical consultants and financial analysts...to assist the Court in their judgment of the claim from Panama.” So you are claiming as damages the legal costs of this case. You consider this sound and reasonable?

MR ARNOTT: I think it is sound and reasonable. I think it is very important that the Tribunal can make a judgment on this case, and it was fair and reasonable to have legal counsel to present a case and to collate the case on behalf of Panama and on behalf of the owner, a member of the Panama registration.

MR MENEZES LEITÃO: But it was also, as a separate request, asked that the Tribunal do an award of legal costs; so these are doubling costs. Is that so?

MR ARNOTT: I think in the cases in which I have been involved as an expert witness in 18 to 20 years, counsel and legal representation has always been part of the award in terms of whatever the award is and where the costs have been awarded to whichever case has come to be a reasonable award to the Tribunal.

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MR MENEZES LEITÃO: I have no more time.

THE PRESIDENT: Your time is up. Thank you very much.

Mr García-Gallardo may I understand that you do not wish to re-examine? Thank you very much.

Mr Arnott, thank you very much for your testimony. Your examination is now finished. You may withdraw.

MR ARNOTT: Thank you, Mr President, thank you, Tribunal.

THE PRESIDENT: We have reached 1.04 p.m. This brings us to the end of this morning's sitting and concludes the first round of pleadings by Panama. The hearing will continue tomorrow at 10 a.m. with the first round of pleadings by Guinea-Bissau. Have a good afternoon. The sitting is now closed.

(The sitting was closed at 1.04 p.m.)

4 September 2013, a.m.

PUBLIC SITTING HELD ON 4 SEPTEMBER 2013, 10 A.M.

Tribunal

Present: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judges ad hoc* SÉRVULO CORREIA, TREVES; *Registrar* GAUTIER.

For Panama: [See sitting of 2 September 2013, 10 a.m.]

For Guinea-Bissau: [See sitting of 2 September 2013, 10 a.m.]

AUDIENCE PUBLIQUE DU 4 SEPTEMBRE 2013, 10 H 00

Tribunal

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président*; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK, *juges*; MM. SÉRVULO CORREIA, TREVES, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 2 septembre 2013, 10 h 00]

Pour la Guinée-Bissau : [Voir l'audience du 2 septembre 2013, 10 h 00]

THE PRESIDENT: Good morning. The Tribunal will continue the hearing in the case concerning the vessel *M/V Virginia G*. Today, Guinea-Bissau will begin with its first round of pleadings.

I wish to inform you that Judge Pawlak, for reasons duly explained to me, continues to be unable to sit on the Bench.

Before we proceed to the first statement of Guinea-Bissau, two further interpreters will have to make their solemn declaration. As did Panama, Guinea-Bissau will call witnesses and experts to testify before the Tribunal in another language than the official languages of the Tribunal, this time in Portuguese. These statements will be interpreted from Portuguese to English by interpreters who are made available to the Tribunal by Guinea-Bissau. The interpreters, Ms Wendy Graça and Ms Ana David Diwiz, are present with us today and I would like to welcome them.

The Rules of the Tribunal require that interpreters made available by a party must make a solemn declaration. I therefore ask the Registrar to invite Ms Graça and Ms Diwiz to make the solemn declaration.

THE REGISTRAR: Thank you, Mr President.

M/V "VIRGINIA G"

Good morning Mrs Graça and Ms Diwiz. The interpreters provided by one of the parties are required to make the solemn declaration under article 85 of the Rules of the Tribunal before entering upon their duties.

(The interpreters made the solemn declaration)

THE REGISTRAR: Thank you, Ms Diwiz and Ms Graça. You can now both go to the interpretation booth.

Mr President.

THE PRESIDENT: Thank you, Mr Registrar.

I now give the floor to the Agent of Guinea-Bissau, Mr Leitão.

STATEMENT OF MR MENEZES LEITÃO – 4 September 2013, a.m.

First Round: Guinea-Bissau

STATEMENT OF MR MENEZES LEITÃO
AGENT AND COUNSEL OF GUINEA-BISSAU
[ITLOS/PV.13/C19/4/Rev.1, p. 1-11]

MR MENEZES LEITÃO: Mr President, distinguished Members of the International Tribunal for the Law of the Sea, before starting my initial statement in defence of the Republic of Guinea-Bissau, I must express my personal satisfaction in being present at this International Tribunal and before the learned Judges that compose it.

The case before this International Tribunal is a simple one. Panama claimed that Guinea-Bissau violated the UNCLOS Convention and wishes to receive damages in consequence of the alleged violations. Guinea-Bissau affirms that it did not violate any disposition of the UNCLOS Convention, but only exercised its rights as a coastal State in its exclusive economic zone.

Before the appreciation of the merits of the case, Guinea-Bissau raised objections about the admissibility of the submissions of Panama. Contrary to what Panama asserts, Guinea-Bissau submits that is not precluded from raising objections to the admissibility of the claims of Panama by article 97, paragraph 1, of the Rules. As the Tribunal decided in the *M/V "SAIGA" (No. 2) Case*:

the article applies to an objection ‘the decision upon which is requested before any further proceedings on the merits’. Accordingly, the time-limit in the article does not apply to objections to jurisdiction or admissibility which are not requested to be considered before any further proceedings on the merits.

It was also clear that, in the Special Agreement concluded by the exchange of letters, Guinea-Bissau did not waive any objections as to the admissibility of the claims, neither was there any reason for any such waiver. Therefore Guinea-Bissau is entitled to these objections.

The first objection concerns the jurisdiction of the Tribunal about the vessel *Iballa G*. Guinea-Bissau considers that, as this vessel belongs to another company, Penn World Inc., and was seized in Las Palmas, in the Canaries, due to non-payment of wages and products acquired, it has nothing to do with these proceedings. It was therefore not included in the Special Agreement, so the Tribunal has no jurisdiction about claims related to it.

The second objection relates to the nationality of the *Virginia G*. Guinea-Bissau alleges that Panama’s claims are not admissible because of the missing "genuine link" (article 91, para. 1, of the Convention) between the *Virginia G* and Panama. This provision proceeds in its third sentence: “There must exist a genuine link between the State and the ship”.

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

From the conception of the “genuine link” it follows that a flag State can only then effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag, as required under article 94, paragraph 1, of the Convention, when it can exercise appropriate jurisdiction and control also over the *owners* of the ships.

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THE PRESIDENT: I am sorry to interrupt you but can you slow down a bit for the benefit of our interpreters? Thank you very much.

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

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

Every shipping register has to conform with certain basic conditions of the genuine link. According to what has been mentioned before with respect to the legal obligations of the flag State under articles 94 and 217 of the Convention, a basic condition for the registration of a ship is that also the owner or operator of the ship is under the jurisdiction of the flag State. Nevertheless, international law no doubt leaves it to the flag State to determine the basis of this jurisdiction, which can be, for example, the nationality or residence or domicile of the owner or operator of the ship. But it is not possible for no link to exist between the ship and the flag State.

The necessity of these requirements is confirmed by the 1986 United Nations Convention on Conditions for Registration of Ships, which was adopted under the auspices of UNCTAD in order to ensure or strengthen the genuine link and in order to exercise effective jurisdiction over ships. Although not yet in force, this UN Convention is an important example for the general view that the flag State must exercise effective jurisdiction and control not only over the ship, but also over its owner or operator. Only for this reason, it was referred to in Guinea-Bissau's Counter-Memorial.

Neither of the conditions necessary to establish a genuine link in Panama was met by the *Virginia G*. In fact this vessel belongs to Penn Lilac. This company, although incorporated in Panama, has to be considered as a Spanish company, as its head office and effective place of management is in Seville, Spain, as it is related by the Instituto Marítimo Español, and in the maritime websites. As said, even Panama, in its registry certificates, refers that the company is based in Seville, Spain. (See Annex 2(2) of Panama's Reply.)

All that Panama does in relation to the *Virginia G* is to charge an annual fee, as Panama acknowledges that the ship audits that it says it performs took place in Las Palmas, Spain, and never in its territory.

In fact, in paragraph 115 of its Reply, Panama recognises that contrary to the provisions of article 94, paragraph 3, of the Convention, instead of taking the measures necessary to

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ensure safety at sea, it delegates them to a company, Panama Shipping Registrar, Inc., which is not an organ of the State of Panama.

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

As Judge Treves writes in his Separate Opinion in *The “Grand Prince” Case*:

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

Judge Wolfrum also says the same in his Declaration in the same case:

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

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

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

The presence of Panama in this white list occurs only after 2011. In fact, as referred by the UNCTAD Review of Maritime Transport, 2011, between 1999 and 2005 and also in 2008 and 2009 Panama was on the black list of the Paris MOU, which represents a high risk of non-fulfillment of the flag criteria. It was therefore the situation at the time of the arrest of the *Virginia G*.

Guinea-Bissau also objects to the invocation by Panama of a right of diplomatic protection concerning foreigners. In fact, it says that the framework of diplomatic protection does not give Panama *locus standi* with reference to claims of persons or entities that are not nationals of Panama.

Contrary to what happened in the *M/V “SAIGA” (No. 2) Case*, quoted by Panama, this is not a case involving vessels where a number of nationalities and interests are concerned. Neither the owner, Penn Lilac, S.A., nor even a single member of the crew of the *Virginia G* is of Panamanian nationality. Penn Lilac has its headquarters in Seville, Spain.

As Penn Lilac entered into an agency commission agreement with Gebaspe SL, a Seville-based Spanish Company (as Penn Lilac), and Gebaspe SL chartered the ship to Lotus Federation, an Irish company, no Panamanian interest is involved in this situation.

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

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

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

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

It is clear that the submissions 4, 10, 14 and 15 presented by Panama in the interest of individuals or private entities are inadmissible, because these individuals or private entities have not exhausted the local remedies available to them in Guinea-Bissau.

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

The same happens to the cargo, which does not have the same owner as the *Virginia G*. The administrative order to discharge the gas oil in Bissau was issued under the territorial jurisdiction of Guinea-Bissau and could be impeached there, as it was a previous court order against that discharge.

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

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

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

Panama claims – and I exhibit this document for your Honours – that the owner made a reservation to use this jurisdiction but this reservation is not credible. You see the document. It is a document written in Portuguese, where the name has to be filled in, but it appears miraculously, as a version in English, a language that is not spoken at all in Guinea-Bissau, in an official document in Portuguese, to say the owner has received the ship. It is unbelievable that this kind of document can be issued at Bissau.

It is therefore clear that this is a case in which the local remedies rule must be applied. In fact, Panama has several times demanded that the Tribunal interprets the General Fisheries Law of Guinea-Bissau as not applicable to bunkering. This is naturally a question to be put before the courts of Guinea-Bissau, as Panama has asked the Tribunal to interpret the law of Guinea-Bissau, which is a local question to the courts of Guinea-Bissau.

I now turn to the possibility of the legislation of Guinea-Bissau regulating bunkering activity in its exclusive economic zone.

Bunkering is an economic activity which has numerous environmental costs for the coastal State, dramatically affecting the marine environment, the quality of the air and the quality of life of the coastal populations, who are affected by the resulting pollution.

Inasmuch as bunkering may endanger the right of a coastal State over the existing living resources in its exclusive economic zone, it must be regulated by the State. The coastal State naturally has the right to adopt measures necessary for the protection and conservation of its resources, even having an obligation to protect the environment according to article 56, paragraph 1, and article 192 and following of the Convention.

For this reason, the maritime freedoms benefitting other States in the EEZ may be restricted as far as necessary to ensure the rights of the coastal State (article 58, para. 3, of the Convention).

But besides this, the practice of bunkering allows much more intensive fishing than normal. In fact, as David Anderson writes:

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...bunkering and supply on the fishing grounds increases the catching efficiency of fishing vessels. In a typical situation a fishing vessel breaks off from fishing for a short time, receives bunkers and other supplies and immediately resumes fishing in the same EEZ. The fishing vessel is relieved of the need to make a voyage to and from port, e.g. in the coastal State. It avoids the need for navigation and intensifies its fishing effort. In that sense, from the perspective of the coastal State, bunkering has a closer connection with fishing and the overall management of the fishery than with navigation.

The regulation of bunkering activity is also included in the right of the coastal State to regulate the capture of biological resources in its EEZ, according to article 61 of the Convention.

It is therefore normal for the coastal State to demand that bunkering in its exclusive economic zone implies payment for the appropriate licence, pursuant to article 62 of the Convention, a practice which is common to the whole of the African sub-region in which Guinea-Bissau is located, the international practice of States being an important element in interpreting the Convention.

The qualification of the fuelling of fishing vessels as a fishing-related operation is indeed to be found in article 3(c) of the *Code de la Pêche Maritime* of Guinea-Conakry, article 5(c) of the *Code de la Pêche Maritime* of Senegal, and article 4(c) of the *Code des Pêches* of Mauritania.

Precisely for this reason, Guinea-Bissau, in article 3, paragraphs 1 and 2 and paragraph 3(b) and (c), as well as article 23 of Decree-Law No. 6-A/2000, established the qualification of bunkering as a fishing-related operation, a situation which is entirely in conformity with the legislative practice of the region.

This practice is also fully recognised by scholars of International Law, who expressly reject that a flag State may dispute this qualification.

In fact, as David Anderson writes:

...a support vessel which is fulfilling its purpose of supporting another vessel is impressed *pro tanto* with the characteristics of the supported vessel's activity at the material time. In this perspective, a tanker whilst it is bunkering a fishing vessel engaged in fishing in the EEZ is impressed with the recipient vessel's piscatorial characteristics.

The author adds that:

...in the light of recent trends it appears unlikely, in all the circumstances, that legislation requiring the prior consent of the coastal State for the bunkering of fishing vessels engaged in fishing in the EEZ would be found *a priori* to go beyond the scope of the sovereign rights and jurisdiction of the coastal State recognized in articles 56, 61, 62 and 73 of the Convention. The ordinary meaning of the term 'sovereign rights' in its immediate context is wide. There exists a body of State practice, in the forms of legislation and the absence of protest against the application of such laws, which supports the interpretation.

As mentioned above, the fuelling of fishing vessels is considered in the whole region in which Guinea-Bissau is included to be a fishing-related operation, thereby subject to prior authorization of the authorities, and the national authority of Guinea-Bissau is the member of Government responsible for fisheries (article 23, paragraph 1 of Decree-Law No. 6-A/2000, and article 39, paragraph 1, of Decree-Law No. 4/96.

This authorization has to be issued in a formal document. You have an example of the formal document on your screens, which was previously obtained by the *Virginia G* in June 2009 to make the fishing-related operation but she did not have the same document in

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August, and this document expired. So the *Virginia G* was perfectly aware of the authorizations that it should have, so much so that it requested these authorizations on two occasions and operated under them in May and June of 2009, to the benefit of the vessels of the company *Afripêche*, but did not, however, obtain the same authorization in August to fuel the *Iballa G*. This is in Annexes 42 and 43 of the Memorial of Panama.

Panama claims that it was the practice of the *Virginia G* to only obtain an authorization by phone. This is totally against this document you have just seen. It does not make any sense to obtain an authorization by phone, as the *Virginia G* obtained and conserved the written authorization on two previous occasions.

It is because of the lack of authorization that the ship was arrested. The arrest was conducted in a very proper manner. You can see uniformed inspectors and military personnel, and no violence was used at any time. You can see this in the photo which relates to the *Virginia G*. You can see it is uniformed personnel, totally identified, and they do not look like pirates at all.

Panama cannot claim that in an enforcement operation on the high seas the inspectors should not resort to military personnel armed with AK-47s, insofar as they perform risky enforcement operations on foreign vessels conducting illegal activities and, at times, even criminal ones, in the EEZ, which can threaten the physical integrity of the inspectors. There have been cases in Guinea-Bissau of enforcement inspectors who boarded a vessel unarmed, and were attacked by the crew and thrown overboard.

The conditions of the journey are disputed by the parties. You can see in the photos how calm the sea is at this time. Therefore these conditions were considered to be adequate by the specialised sailing crew who accompanied the enforcement officials, there never being any danger for them, for their crew and much less for the environment, as is clearly seen from the statement of the naval pilot Djata Janga, who will be giving evidence today, and the official notice, signed by the captain, states that the sea was calm, as you can see, and visibility was good, as you can also see.

After coming to the port of Bissau, the crew was not arrested and they were free to leave the country whenever they wanted. They could buy food, water, fuel and whatever was necessary for them in Bissau. If they did not do so, this was due to the financial problems of the owner of the ship.

According to the decision of the Interministerial Maritime Commission, the vessel and its cargo were seized, and the owner, although notified, chose not to take any measures against this seizure such as the payment of a bond. In fact, he had no financial capacity to do so. He only requested and obtained the suspension of the unloading of the diesel oil ordered by the Secretary of State of Fisheries after the seizure of the ship.

The fact that this unloading was later undertaken was due to a decision by the Minister of Finance, based on an opinion of the Public Prosecutor of the Republic of Guinea-Bissau. This did not violate the decision of the court of Bissau, insofar as this decision was appealed by the Public Prosecution Service, an appeal which has the effect of legally suspending enforcement of the said decision.

Panama makes a lot of accusations of corruption against the Guinea-Bissau authorities, but it has not presented any complaint or provided a single piece of evidence of the - and I quote from the Memorial of Panama - “African-style solutions” that it claims were proposed in this case. For instance, Inspector João Nunes Cá will be presented by us today and can be questioned about it.

It is true that Guinea-Bissau decided to release the vessel on 20 September 2010, which was due to the fact that the authorities found out that the safety conditions of the vessel were appalling, and that it was at risk of sinking in the port of Bissau, together with the persistent requests by the Embassy of Spain for its release.

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The shipwrecking risk of the vessel was naturally due to the terrible conditions in which the vessel was operating and to the carelessness with which Panama granted its navigation certificate, probably without having made a single inspection of the vessel, which always operated between Las Palmas and the West African coast, having probably never gone to Panama. This is a circular from Panama, Circular No. 5, which has very low requests for the registration of the ship.

No Guinea-Bissau official ever operated the vessel, so that it has no responsibility for the extremely deficient safety conditions that it was in, this responsibility being totally up to the maritime authorities of Panama, who did not ensure proper inspection of the vessel.

Panama is very well known for accepting the registration of any ship without asserting the existence of a link between the ship and the State, as we have already seen in Merchant Marine Circular No. 5. But now this is a reference on the website to the Panama Register of Ships, which gives a lot of information, and I quote:

The Panama register of ships will also allow ships to operate international trade without taxation as it's only territorial and will not tax the income of ships involved in international navigation or trade. The Panama ship register will not discriminate the citizenship or nationality of anyone willing to register a vessel under the Panama flag.

Once a shipowner uses the Panama register of ships, it will be able to use a mechanism called dual Panama ship register. This ship register method will allow a foreign ship that has a previous registration of two years in a foreign country to register in the Panama ship register at the same time without a cancellation of the registration of the previous country. This Panama ship register system is also possible to be applied in the opposite way. This is only allowed with a certification of consent that originally had the register of ship or ships.

The Panama ship register dual system can be of great advantage for shipping companies, shipowners and merchant shipping companies who have no ship register under the open registry.

It is important to mention other great advantages of the Panama register:

- a) there is no minimum tonnage requirement for vessel registration allowing any type of vessel to use the Panama register of ships;
- b) the Panama ship register allows the registration under a Panamanian corporation. This will give protection to the vessel and anonymous ownership. You will be able to use a bulletproof asset protection structure (corporation + foundation) to register and ensure that your vessel's income and ownership will always be safe and anonymously protected;
- c) Panama register of ships done by the use of a Panamanian corporation will allow changing ownership with ease and will not pay taxes on the sale! This will basically be the sale, trespass of the shares and name of the corporation to a new owner and can be done in a few hours.

Therefore the Panama Register of Ships is a typical case of "flag of convenience" whose practice and dangerous effects to the economy of coastal States, environment and maritime resources, are very well known and reported by several international entities, such as FAO, WWF, and ITF.

Especially this practice has very pernicious environmental effects, as stated by Franz Fischler, former European Union Fisheries Commissioner: "The practice of flags of convenience, where owners register vessels in countries other than their own in order to avoid binding regulations or controls, is a serious menace to today's maritime world."

As reported by independent sources, 86 per cent of the ships with Panamanian flag belong to foreign companies.

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In this case, it was the lack of control of the flag State which caused the condition of the ship and its risk of sinking in the port of Bissau, so this situation is totally due to Panama.

Guinea-Bissau therefore considers that Panama is not entitled to present claims for damages in respect of anyone involved in this case, as there is not a single person or entity related to the vessel *Virginia G* which is of Panamanian nationality. The *Virginia G* has a flag of convenience and its owner, Penn Lilac Trading, has its headquarters in Spain, which makes it of Spanish nationality.

As previously stated, no State may claim protection of persons in international law who are not its own nationals. In the case pending on the merits before the Tribunal, it is undisputed that none of the persons here are nationals of Panama.

Besides that, the claims for damages are based on reports which do not deserve any credibility. How is it possible to affirm that the seizure of a vessel with the value of €500,000 caused damages of almost €6 million? There was no such damage caused by the arrest of the vessel, as it could be liberated only with the payment of a bond, which the owner rejected, due to his financial problems.

In fact, it is clear that any losses suffered by the owner are due to his financial problems, having, therefore, nothing to do with the arrest of the *Virginia G*, which was legally ordered by Guinea-Bissau because she was illegally performing a fishing-related operation in the EEZ of Guinea-Bissau.

Therefore Panama is not entitled to claim damages. On the contrary, it is Guinea-Bissau that is entitled to them. In fact, by granting a flag of convenience to the *Virginia G*, without there being the least connection between this vessel and Panama, Panama facilitated the fact that an unseaworthy vessel could conduct fishing-related operations in Guinea-Bissau's waters.

When Guinea-Bissau decided to arrest the vessel in conformity with its laws it was obliged to keep the vessel under surveillance in the port of Bissau, which had high occupation costs, both of the berth and of its official and military personnel, and the ship was in such a poor condition that the risk of it sinking in the port of Bissau arose.

Guinea-Bissau was therefore prevented from auctioning the ship, as was its right, due to the poor condition it was in, caused by the inefficient supervision by Panama of the vessels to which it grants flags of convenience, having been obliged to release it without obtaining the adequate revenue as payment against the plundering of its marine resources which the operation of the *Virginia G* led to, its high environmental costs and loss of fishing resources.

That is why Guinea-Bissau presented a counter-claim before this Tribunal in relation to these damages.

Mr President, learned Members of the International Tribunal, thank you very much for your attention.

THE PRESIDENT: Thank you very much, Mr Leitão, for your statement. I understand that you wish to call the witness Mr João Nunes Cá.

MR MENEZES LEITÃO: Yes.

THE PRESIDENT: Thank you very much.

The Tribunal will then proceed to hear the witness Mr João Nunes Cá. He may now be brought into the courtroom.

EXAMINATION OF WITNESSES AND EXPERTS – 4 September 2013, a.m.

Examination of Witnesses and Experts

MR NUNES CÁ
EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/4/Rev.1, p. 11-14]

THE PRESIDENT: I now call upon the Registrar to administer the solemn declaration to be made by the witness.

(The witness made the solemn declaration)

THE PRESIDENT: Good morning, Mr Nunes Cá. I wish to remind you of the following. The work of the interpreters and the verbatim reporters is a complex task. This is even more so where, as will be the case now, not only English and French are used but also a third language such as Portuguese. Therefore, I must urge you to speak slowly and please leave sufficient time after someone else has spoken to you before you answer. The statements and questions of someone else before you will be translated into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has finished I will give you a sign to that effect, by a gesture like *this*, for instance. Only then will the interpreters be able to follow you.

Mr Leitão, you have the floor, sir.

MR MENEZES LEITÃO: Thank you, Mr President.

Mr Nunes Cá, could you tell the court what your profession is?

MR NUNES CÁ *(Interpretation from Portuguese):* My occupation is a fishing observer and then a fishing inspector.

MR MENEZES LEITÃO: *(In Portuguese)* Did you participate in the *Virginia G* operation?

MR NUNES CÁ *(Interpretation from Portuguese):* Yes, I participated in the operation.

MR MENEZES LEITÃO *(Interpretation from Portuguese):* Did you arrest the ship before -
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THE PRESIDENT: I am sorry, the question was not translated. Could you repeat the question, please?

MR MENEZES LEITÃO *(Interpretation from Portuguese):* Was this the ship that you used?

MR NUNES CÁ *(Interpretation from Portuguese):* Yes, this was the boat.

MR MENEZES LEITÃO *(Interpretation from Portuguese):* How did you get onto the tanker?

MR NUNES CÁ *(Interpretation from Portuguese):* We got onto the tanker after the tanker was seen. I asked the captain to lower the boarding ladder that was on the tanker and we went onto the tanker.

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MR MENEZES LEITÃO (*Interpretation from Portuguese*): Were you wearing uniforms when you performed this operation?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, we were. The people of the inspection were wearing their uniforms. "Supervision" was written on it and the members of the naval force who accompanied the operations were in naval uniform and even the pilot was also in a uniform.

THE PRESIDENT: I am sorry to interrupt you, Mr Nunes Cá. Would you please wait until the interpretation has been completed before you answer?

MR MENEZES LEITÃO (*Interpretation from Portuguese*): Did you identify yourself with a document when you got on the boat?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes. In addition to the uniforms we were wearing, we identified ourselves to the captains, and the captains identified themselves to each other.

MR MENEZES LEITÃO (*Interpretation from Portuguese*): What conversation did you have with the captain at that time?

MR NUNES CÁ (*Interpretation from Portuguese*): When we arrived on the ship I asked the captain whether he was doing a fishing-related operation by bunkering: "Do you have authorization?" and he said that he did not.

MR MENEZES LEITÃO (*Interpretation from Portuguese*): Was there any other conversation with the captain?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, there was. After I asked the captain if he had authorization to refuel the fishing boat, I decided to tell him "As the ship does not have authorization issued by a competent authority, then I have to arrest this ship right now".

THE PRESIDENT: Excuse me, Mr Leitão. If you ask your questions in English the question of time will be resolved.

MR MENEZES LEITÃO: So I am asking questions in English, sir?

THE PRESIDENT: Yes.

MR MENEZES LEITÃO: Okay. Was there during the boarding of the ship any torture or threat of use of force to the members of the crew?

MR NUNES CÁ (*Interpretation from Portuguese*): No, there was no threat against the crew members of the ship, because at the time of the arrest there was good cooperation from the captain and his crew. There was nothing.

MR MENEZES LEITÃO (*Interpretation from Portuguese*): When the ship was in the port of Bissau you visited it with the Cuban Ambassador. Why was that?

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MR NUNES CÁ (*Interpretation from Portuguese*): Yes, when the ship was berthed in Bissau the Cuban Ambassador was in Bissau at the time and he asked FISCAP to be allowed to visit the Cubans who were on board the ship. As I was a man belonging to the operation, I was asked to accompany him when the Ambassador visited the crew of the ship.

MR MENEZES LEITÃO (*Interpretation from Portuguese*): The people on board the ship said that you proposed an African-style solution for the arrest of the ship. What do you have to say about that?

MR NUNES CÁ (*Interpretation from Portuguese*): No, that was not the case, because I have no powers over any kind of African-style solution, and I wonder why I did not offer this solution when the ship was on the high seas. I had nothing to ask and I have nothing to say about this so-called African solution.

MR MENEZES LEITÃO (*Interpretation from Portuguese*): Did you have any influence or power to release the ship in any way?

MR NUNES CÁ (*Interpretation from Portuguese*): No, I had not. That is up to the Interministerial Fishing Commission.

MR MENEZES LEITÃO (*Interpretation from Portuguese*): Do you know Mr Manuel Samper?

MR NUNES CÁ: (*In Portuguese*) I do not know Manuel Samper.

MR MENEZES LEITÃO (*Interpretation from Portuguese*): Do you remember ---

THE PRESIDENT: Could you repeat the answer, please?

MR NUNES CÁ (*Interpretation from Portuguese*): No, I do not know Manuel Samper.

MR MENEZES LEITÃO: Do you recall giving your telephone number to the captain?

MR NUNES CÁ (*Interpretation from Portuguese*): I do not remember doing it but I may have done. The captain who was on the ship at the time said that he was in contact with FISCAP. As I was the person who took the ship to Bissau, I may have given him my number so that he could contact me. It is possible.

MR MENEZES LEITÃO (*Interpretation from Portuguese*): Did you have any meeting with Mr Domingos de Alvarenga about deliberation of the release of the ship?

MR NUNES CÁ (*Interpretation from Portuguese*): No, I had no contact with Alvarenga. The release of the ship is the responsibility of the Interministerial Commission. I do not belong to it. All I have to do is inspect. I do not have anything to do with releasing ships and I had no contact with Alvarenga.

MR MENEZES LEITÃO: No further questions, your Honour.

THE PRESIDENT: Thank you very much, Mr Leitão.

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I would like to ask the Agent of Panama whether he wishes to cross-examine the witness. I then give the floor to the Agent of Panama, Mr García-Gallardo, to cross-examine the witness.

MR GARCÍA-GALLARDO: Thank you, Mr President.

MR NUNES CÁ
CROSS-EXAMINED MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/4/Rev.1, p. 14-21]

MR GARCÍA-GALLARDO: Mr João Nunes Cáã, you are said to have 13 years’ service as a fishing observer and 12 years’ service as an inspector. With so many years, do you confirm to this Tribunal that you are familiar with the fisheries legislation applicable in Guinea-Bissau?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, I confirm that.

MR GARCÍA-GALLARDO: That you were in routine operations on the evening of 21 August?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes.

MR GARCÍA-GALLARDO: How many days did you spend in routine operations in that mission?

MR NUNES CÁ (*Interpretation from Portuguese*): From the 20th to the 21st at 18.30 I was there.

MR GARCÍA-GALLARDO: I have not received the answer in English; it was silent.

THE PRESIDENT: Mr Nunes Cá, would you repeat your answer?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, I was saying we left on 20th from Bissau to 21st at 18.30 hours. We were on the *Virginia G* on operations.

MR GARCÍA-GALLARDO: How many hours did you navigate it from the port of Bissau until the moment that you boarded the *Virginia*?

MR NUNES CÁ (*Interpretation from Portuguese*): We sailed about eleven hours and forty minutes.

MR GARCÍA-GALLARDO: How many vedettes or any other type of vessel were in routine operations with the one you were in?

MR NUNES CÁ (*Interpretation from Portuguese*): There were two vessels, *Baleia II* and *Baleia V*.

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MR GARCÍA-GALLARDO: Please explain why the colleague, if I can use this word, of the navy, that has been called as a witness, Mr Janga, explained that he was not on board these two vedettes, that he was on board - I am textually reading his statement in English:

I took part in the enforcement mission which ended with the arrest of the *Virginia G*, in the capacity of pilot, as can be seen from the official fishing violation notice...which I signed as one of the witnesses. At that time I held the position of commander of the vessel *LF/01, CACINE*.

MR NUNES CÁ (*Interpretation from Portuguese*): I can explain. The pilot in the navy is always the job of the inspection. He is always with us, and when any cargo ship or fishing boat is arrested he is the only one who knows the channel and will always be there with the captain when they enter the port of Bissau, because he is very familiar with the channel and he enters with the ship.

MR GARCÍA-GALLARDO: You are not answering my question, Mr Cá. You mentioned there were only two vessels and now I have found out there were three.

MR NUNES CÁ (*Interpretation from Portuguese*): No. He was with me on the *Baleia II*. He was there.

MR GARCÍA-GALLARDO: His statement is misleading because he is mentioning that he was the commander. I will repeat again. He was there.

MR NUNES CÁ (*In Portuguese*): No.

MR GARCÍA-GALLARDO: In the same paragraph: “At that time I held the position of commander of the vessel *LF/01 Cacine*.”

MR NUNES CÁ (*Interpretation from Portuguese*): No. At the time that we went the *Cacine* didn't take part in the mission. He was with me on the *Baleia II* and he was the one who went with us. He wasn't with us on the *01*; the *01* remained in the port.

MR GARCÍA-GALLARDO: In the statement made by your colleague from the navy, he does not say so. Just listen to another question, please. In relation to the conditions of boarding the vessel, the Master of the *Virginia*, Mr Fausto Ocaña Cisneros, states that they were boarded suddenly and unannounced by a group of people, some dressed in military uniforms – must be ones of the navy – and others in civilian clothing. Do you have any particular comment on this point?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, I have. I have already explained that we went onto the ship when we asked the captain to lower the ladder, and we entered the boat quietly. We were all in uniform. There was no threat to the crew. We went to the bridge and there was no aggression. We spoke to him calmly. There was no aggression and we were properly identified and wearing our uniforms.

MR GARCÍA-GALLARDO: This picture – do you recognize the *Virginia G*?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, I do.

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MR GARCÍA-GALLARDO: It was completely in ballast, in ballast conditions with no oil on board. When this vessel is partially full, as was the case at the moment of the arrest, with the cargo that you later on decided to unload unlawfully and contrary to the provisions of the order of a judge from Guinea-Bissau, can you let me know – you are an expert in maritime matters – the *franc-bord* is the line that goes above the water. The distance that my experts have confirmed is that the distance to come on board was less than one metre. Do you agree with this or not?

MR NUNES CÁ (*Interpretation from Portuguese*): No. I cannot comment on this question.

MR GARCÍA-GALLARDO: Do you know that the tropic, the *franc-bord*, in the summer period is less than 034 centimetres? The master denies that a ladder was given to you. I cannot understand who was giving this – he was on the deck – who allowed a ladder to allow your team to come aboard.

MR NUNES CÁ (*Interpretation from Portuguese*): No. At the time we arrived at the *Virginia G* the ladder allowed us to get up onto the ship. It allowed us to go up and get onto the ship while we were at sea.

MR GARCÍA-GALLARDO: Mr Cá, in the proceedings set up by the Guinea-Bissau fisheries law in relation to the inspections, as stated in article 45(4), it is possible to use any type of recorder, instruments to record visual – video cameras, electronic and any other means – to record or to register images, screen or noises. Did you use any materials to give support to the *Anuncio de Noticia* which will come in later?

MR NUNES CÁ (*Interpretation from Portuguese*): When the ship was arrested and taken to Bissau we inspected the ship to see how it was equipped, what was inside, what wasn't inside. It is what we usually do in an inspection, and then we write a report. That report was always accompanied by the inspection. If there was any problem which was against the law we always photographed, as proof of what was there.

MR GARCÍA-GALLARDO: Is that the *Anuncio de Noticia* that you pushed, you obliged, the master to sign?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, the report.

MR GARCÍA-GALLARDO: Following the provisions of article 49, your own individual report, meaning the report of the mission of each of the officers that came on board.

MR NUNES CÁ (*Interpretation from Portuguese*): No, the person who writes the report is me; I am the only one.

MR GARCÍA-GALLARDO: Do others write reports in accordance with article 49?

MR NUNES CÁ (*Interpretation from Portuguese*): No, I would write the report. They sign as part of the mission. That report – and only the inspector on board is responsible for that report and then it is signed.

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MR GARCÍA-GALLARDO: So the agent who has participated in the recovery of evidence or these inspections and other elements on board of a vessel must write a report. Can we now move, please, to Annex 18. Can you put up for Mr Cá the Portuguese version?

This is the *Anuncio de Noticia*. It is Annex 18 of the respondent of Guinea-Bissau. Would you please let me know what it says in the fifth and sixth lines? Mr Cá, could you read these two lines, please?

THE PRESIDENT: Would you read the document?

MR NUNES CÁ (*Interpretation from Portuguese*): Ah, yes.

MR GARCÍA-GALLARDO: Excuse me, Mr Cá, it is just the two lines in blue colour.

MR NUNES CÁ (*Interpretation from Portuguese*): Report of a severe fishing infraction defined in article 54 of the General Fisheries Law.

MR GARCÍA-GALLARDO: Could you please just read the last line?

MR NUNES CÁ (*Interpretation from Portuguese*): Which constitutes a severe fishing infraction under current law.

MR GARCÍA-GALLARDO: This is one of the main provisions of the fisheries legislation of Guinea-Bissau that relate to “*infracções de pesca graves*”, in other words serious offences, serious shortcomings. So article 52 contains the provisions on confiscation *ex-officio*, that is, automatic confiscation, in the case of failure to hold one of the permits or authorizations provided for in articles 13 and 23. The *Anuncio de Noticia* relates not to this provision but to article 54, “*infracções de pesca graves*”. Would you take your time and tell me which provision applies to the supply of fuel oil like the alleged supply of fuel oil in contravention of the provisions of Guinea-Bissau law relied on? If you want, we can move – do you want the paper version?

MR NUNES CÁ (*Interpretation from Portuguese*): The law of Guinea, as far as I know, says that any ship that is in our EEZ must have fishing authorization issued by a competent authority. If that ship does not have that authorization, which has often occurred, it must be arrested and taken to the port of Bissau; and if the situation continues it will be confiscated.

MR GARCÍA-GALLARDO: You are a fishing observer and inspector. You have said before this Tribunal that you were familiar with the meaning of the provisions that an inspector must apply under your legislation. We have all seen that the form used to carry out this arrest or apprehension, because they mix the wording from time to time, relates to article 54; and article 54 relates purely to serious infringements of purely fishing activities, activities related to catching of fish and not related to logistics or to supply or to any other related activities under the wording under the definition of your own law. Do you agree with this or not?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, I agree.

MR GARCÍA-GALLARDO: Put up the *Anuncio de Noticia*, the Portuguese version, please.

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Then we can see in the middle and coming down what is stated, that the vessel has a flag of Panama. Mr Cá, do you read the name of the ship and its nationality, IMO number and other data related to the ship? Yes or not?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes.

MR GARCÍA-GALLARDO: Do you read now that you were able (*words read in Portuguese*) that you verified the documents of the vessel and in terms of documentation all was in order. Do you agree with this – yes or no?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes.

MR GARCÍA-GALLARDO: Now let us move to the second page, please. You mentioned that you attach the annex with the evidence supporting this *Anuncio de Noticia*. Will you please let me know where you mentioned the *Relatórios* or any other type of supporting evidence in conformity with your provisions of the law, particularly article 45, paragraph 4, in this *Anuncio de Noticia*.

MR NUNES CÁ (*Interpretation from Portuguese*): Yes.

MR GARCÍA-GALLARDO: “Si” means “yes” in this case?

MR NUNES CÁ (*Interpretation from Portuguese*): I am sorry. I do not understand.

MR GARCÍA-GALLARDO: I am asking you if you attach any *Relatório*, the *Noticia*, or minutes of your own affidavit in conformity with the law of the officers that came on board.

MR NUNES CÁ (*Interpretation from Portuguese*): Yes.

MR GARCÍA-GALLARDO: Can you see the surname, handwritten, as “*Testemunhas*” – that must be witness – of the events drafted? The name and the position, where it is stated. Could you confirm if I am reading well? J Naval – João Naval probably – and the name of the officer of the navy, Mr Djata Janga.

MR NUNES CÁ (*Interpretation from Portuguese*): Yes.

MR GARCÍA-GALLARDO: In conformity with the *agentes de fiscalização* that can be found in article 40 of the law, do you consider as *agente de fiscalização* – tax or control officer inspector – that appears in article 40, paragraph 1(c), *os comandantes e oficiais de navios, e aviones, de fiscalização das actividades de pescas* - commanders or officers of ships or aircraft of fiscal control on fisheries activities. Does Mr Janga relate to this category?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes.

MR GARCÍA-GALLARDO: Just one more question. Excuse me for repeating it but you mentioned that you were very familiar with the provisions of fisheries, particularly the ones of Guinea-Bissau.

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, I am.

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MR GARCÍA-GALLARDO: Will you please now move to article 110 and 111 of UNCLOS. Those provisions that are found in the chapter on the high seas are also applicable to the exclusive economic zone in accordance with article 56, paragraph 2, in so far as they are not incompatible within this part. Would you please read the point number 2? Maybe I will read and the interpreter can translate. That may be easier.

In the cases provided [in this paragraph] 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.

Do you agree with this, yes or no?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, I agree.

MR GARCÍA-GALLARDO: I will now read paragraph 5.

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

I will end by asking if you agree with article 111 on page 64. I will start reading at the top.

As the case may be within the contiguous zone or the exclusive economic zone...

The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

Mr Cá, did you or the other vedette you mentioned, the chief officer, Mr Carlos, in charge of the mission, who has signed the *Anuncio de Noticia*, before boarding the vessel with armed guards from the Navy, send any radio message, visual message, or auditory signal to stop the vessel?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, we sent a message.

MR GARCÍA-GALLARDO: With radio? Which channel? With any other electronic system?

MR NUNES CÁ (*Interpretation from Portuguese*): VHF. I had my VHF in my hand.

MR GARCÍA-GALLARDO: Not one single witness, of all the ones who have drafted affidavits from the Guinea-Bissau officers' team that participated in the boarding, has reflected that they conducted this radio message before coming on board unexpectedly – excuse me, I will use the words of the master – “suddenly and unannounced by a group of people, some dressed in military uniforms and others in civilian clothing.”

MR NUNES CÁ (*Interpretation from Portuguese*): Yes. After we arrived and got on board the ship, after the conversation, the ship must not be stopped, we have to make sure that there was no communication between the ship, but after the ship was arrested we went back to allowing communication as before. At the time we cut off communication, for our own safety in the operation.

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MR GARCÍA-GALLARDO: That was not the answer I was expecting to my question but I take note. Thank you very much. I have no further questions.

THE PRESIDENT: Thank you very much. We have reached 11.30. I would like to know if you would like to re-examine, Mr Menezes Leitão.

MR MENEZES LEITÃO: Yes, I would like to, but I have only two very short questions, if it would be possible to do that before the break.

THE PRESIDENT: I think we should withdraw at this stage and we will continue the hearing at noon after a break of 30 minutes. Thank you very much.

(Break)

THE PRESIDENT: We will now continue the examination of the witness.

I give the floor to the Agent of Guinea-Bissau to re-examine the witness, and I wish to emphasize that no new issues should be raised during the re-examination.

MR NUNES CÁ
RE-EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/4/Rev.1, p. 21]

MR MENEZES LEITÃO: Mr Nunes Cá, I have only two questions for you. The first one is about your background. Do you have a law degree?

MR NUNES CÁ *(Interpretation from Portuguese):* No, I do not.

MR MENEZES LEITÃO: The second one is about the infringement notice my colleague showed you. Could you read the last sentence in the infringement notice beginning “...”

MR NUNES CÁ *(Interpretation from Portuguese):*

This notice is due to the fact that when it was inspected by the inspection team the ship was not in possession of an authorization from the competent authorities for bunkering fishing boats with fuel, diesel oil, in the waters of Guinea-Bissau.

MR MENEZES LEITÃO: And the last sentence, please.

MR NUNES CÁ *(Interpretation from Portuguese):* “Because it is a severe fishing offence under current legislation.”

MR MENEZES LEITÃO: No further questions, Mr President.

THE PRESIDENT: Thank you, Mr Menezes Leitão. At this stage Judge Treves has two questions to ask of the witness.

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MR NUNES CÁ
QUESTION FROM JUDGE *AD HOC* TREVES
[ITLOS/PV.13/C19/4/Rev.1, p. 22]

JUDGE TREVES: I would like to put two questions. The first is as follows. You have declared that the operation in which the *Virginia G* was stopped was a routine operation. My question is as follows. When you started the operation or at any time during the operation did you have any knowledge of the position of the *Virginia G* for its bunkering activity?

MR NUNES CÁ (*Interpretation from Portuguese*): I did not have the position before, although our observers always inform us of the position of refuelling of the *Virginia G*. In our mission, as we always know where they are out fishing, we sailed north and then came back south, and it was in that position that we found the ship the *Amabal* that was receiving fuel during the inspection, saw the position inside the EEZ.

JUDGE TREVES: I have a second question, which refers to point 16 of your written statement, which appears as Annex 1 to the Counter-Memorial. In this paragraph you say, “The captain asked us if he should stop the operation, to which we answered that he could continue until it ended. And that is what he did, supplying the *Amabal II* with 110 tons of diesel oil.” My question is as follows. Is it the current practice of Guinea-Bissau officials to authorize the continuation of what is qualified by them as a grave fishing infringement?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, it is our common practice.

THE PRESIDENT: Thank you, Judge Treves, for your questions.

At this stage Judge Lucky also would like to ask questions of the witness. Judge Lucky, you have the floor.

MR NUNES CÁ
QUESTION FROM JUDGE LUCKY
[ITLOS/PV.13/C19/4/Rev.1, p. 22-23]

JUDGE LUCKY: Mr Cá, good afternoon. I have just two questions and I refer specifically to paragraph 18, where you said the captain was very helpful and voluntarily signed the official fishing violation notice. My question is, as we saw, this notice was in Portuguese. Is that correct?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes.

JUDGE LUCKY: As an inspector in fishing and with your vast experience, do you have the powers of a police officer, powers of arrest?

MR NUNES CÁ (*Interpretation from Portuguese*): I am not allowed to arrest anyone.

JUDGE LUCKY: My next question is: when the captain voluntarily signed it, as you say, was the fishing violation notice explained to him? In other words did you explain to him what in fact he was signing, clause by clause?

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MR NUNES CÁ (*Interpretation from Portuguese*): Yes, I gave the notice to the captain and he read it. It was all written in Spanish.

JUDGE LUCKY: Apparently it was written in Spanish. From what we saw, it is in Portuguese?

MR NUNES CÁ (*Interpretation from Portuguese*): It is in Portuguese, but when the captain was reading he used Spanish pronunciation. He read it aloud with a Spanish accent.

JUDGE LUCKY: Spanish is very different from Portuguese, is it not? I know a bit of Spanish but I cannot say a word in Portuguese. Would you agree that there is a difference in the language?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes, there is a difference. He read what we had written and he understood it very well and signed it.

JUDGE LUCKY: Usually the first mate on a ship is close to the captain. Was the first mate or any member of the crew present when he voluntarily, as you say, signed the document?

MR NUNES CÁ (*Interpretation from Portuguese*): Always on the bridge I was there with the captain.

JUDGE LUCKY: Was the first mate present?

MR NUNES CÁ (*Interpretation from Portuguese*): Yes.

JUDGE LUCKY: This is my last question. You have looked at photographs 14 to 16. Did you take any photographs of the crew? I see everybody here dressed in the same way, but no members of the crew. Did you take any photographs of the crew, because they are claiming that they were locked up in the ship?

MR NUNES CÁ (*Interpretation from Portuguese*): No. The photo that I took from the bridge was proof of the position of the ship, and those photos that I have are the ones that I took on board, but on board the *Virginia G* no one was locked up.

JUDGE LUCKY: Thank you very much.

THE PRESIDENT: I thank Judge Lucky for his questions.

Mr Nunes Cá, thank you for your testimony. Your examination is now finished and you may withdraw.

Mr Leitão, are you ready to call the next witness, Mr Carlos Nelson Sanó?

MR MENEZES LEITÃO: Yes, thank you, Mr President.

THE PRESIDENT: The Tribunal will hear the witness Mr Carlos Nelson Sanó. He may now be brought into the room.

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MR NELSON SANÓ
EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/4/Rev.1, p. 23-26]

THE PRESIDENT: I call upon the Registrar to administer the solemn declaration to be made by the witness.

(The witness made the solemn declaration)

THE PRESIDENT: Thank you, Mr Registrar.

Good afternoon, Mr Nelson Sanó. I wish to remind you of the following. The work of the interpreters and the verbatim reporters is a complex task. This is even more so when, as will be the case now, not only English and French are used but also a third language such as Portuguese. Therefore, I must urge you to speak slowly and please leave sufficient time after someone else has spoken to you before you answer. The statements or questions of someone else before you will be translated into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has finished I will give you a sign to that effect by a gesture like *this*. Only then can the interpreters follow you.

Mr Leitão, you have the floor, sir.

MR MENEZES LEITÃO: Thank you, Mr President.

Mr Carlos Nelson Sanó, could you say what is your profession?

MR NELSON SANÓ *(Interpretation from Portuguese):* I worked as a maritime fishing observer for FISCAP for ten years, and I finished 12 years in an administrative capacity at FISCAP as well.

MR MENEZES LEITÃO: What was your position at the time of the arrest of the *Virginia G*?

MR NELSON SANÓ *(Interpretation from Portuguese):* At the time of the arrest of the *Virginia G* I was head of the Secretariat-General of FISCAP.

MR MENEZES LEITÃO: Was it you who returned the passports to the members of the crew?

MR NELSON SANÓ *(Interpretation from Portuguese):* Yes, it was I who returned the passports to the members of the crew.

MR MENEZES LEITÃO: What was the reason for the authorities of Guinea-Bissau to guard the passports of the members of the crew?

MR NELSON SANÓ *(Interpretation from Portuguese):* Usually after the ships are arrested and are in the Port of Bissau the inspectors who make the arrest and the fiscalization brought passports to FISCAP, namely to the fiscal services, and then they are kept for identification and control of the crew.

MR MENEZES LEITÃO: When are they returned to the crew members?

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MR NELSON SANÓ (*Interpretation from Portuguese*): As soon as they are requested they are returned. They receive them at once.

MR MENEZES LEITÃO: When did you first receive the request for the return of the passports?

MR NELSON SANÓ (*Interpretation from Portuguese*): In this concrete case of the *Virginia G* the request was made on a Friday by the end of the working day on the 6th and on the day there was no possibility to deliver the passports, and on the 9th two people came to get the passports and then I returned them.

MR MENEZES LEITÃO: Are you talking of 6 and 9 November?

MR NELSON SANÓ (*Interpretation from Portuguese*): Yes, 6 and 9 November. The 6th was a Friday, and on Monday the 9th I had delivered the passports. It was the first request of that day that came to me.

MR MENEZES LEITÃO: Do you remember the date of the request? It was a request of the Cuban Ambassador.

MR NELSON SANÓ (*Interpretation from Portuguese*): Yes, I do. The request was made by the Ambassador of Cuba, a letter addressed to me in my name, but the correspondence did not come directly to our services. It was handed to the State Secretary. It entered that day. The State Secretary has despatched the request for the Ministry of Fisheries Director and it was responded on 5 November, and that correspondence only entered the services of maritime fiscalization on 6 November, and then it came to me and I have prepared the deliverance of the passports, but they were only delivered on Monday 9 November.

MR MENEZES LEITÃO: Did the request of the Cuban Ambassador make any reference to previous attempts of getting the passports from anyone?

MR NELSON SANÓ (*Interpretation from Portuguese*): No, I have no idea, because usually in previous requests what is usual for passports is that as soon as they are required they are delivered, and it was not usual what happened. The ship's representative acknowledges that a crew member wants his passport back, he requests the passport and then they are returned. That procedure was a little bit not usual, and even so there was no previous rejected requests that I recall.

MR MENEZES LEITÃO: Was the owner of the ship present at that time in Bissau?

MR NELSON SANÓ (*Interpretation from Portuguese*): Usually when the ships are arrested this is communicated to the ship's representative, so this communication is not at my level. Our services concern concrete requests, and that correspondence of the shipowner's representative must be presented as a representative of that vessel. I do not know whether he was there or not.

MR MENEZES LEITÃO: Do you remember a second situation when you returned the passports to the member of the crew?

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MR NELSON SANÓ (*Interpretation from Portuguese*): Yes, there was a second time, a second request, that came directly from the captain of the vessel who has requested the return of the passports on 11 December. That request and passports were given with a notice of their delivery.

MR MENEZES LEITÃO: It is disputed here if the members of the crew were arrested at the ship or if they could leave whenever they wanted. What are you saying about this?

MR NELSON SANÓ (*Interpretation from Portuguese*): There is no reason to arrest any member of the crew. Usually when ships are in this situation in the port the crew are free to leave and to go around. The fact that the passports were handed over, it states that the crew could go out and freely walk away. The crew is not arrested on board.

MR MENEZES LEITÃO: Has any member of the crew of the *Virginia G* requested at any time the supply of medical treatment, food or potable water or anything else to the FISCAP authorities?

MR NELSON SANÓ (*Interpretation from Portuguese*): About this fact, what has been happening usually is that when ships are arrested at the ports the captain must assume the treatment of their crew is allowed to supply the ship as he wants, and he also must come to the help of his representative. Apart from this situation, in case there is the need of any support from FISCAP, it is provided promptly, but at any moment I was not aware that the crew was imprisoned or suffering any damage from this account.

MR MENEZES LEITÃO: I have no further questions, Mr President.

THE PRESIDENT: Thank you, Mr Leitão.

I ask the Agent of Panama whether he wishes to cross-examine the witness.
Mr García-Gallardo, you have the floor.

MR GARCÍA-GALLARDO: Thank you, Mr President.

MR NELSON SANÓ
CROSS-EXAMINED MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/4/Rev.1, p. 26-27]

MR GARCÍA-GALLARDO: Mr Carlos Nelson Sanó, you drafted an affidavit, a witness statement, on 28 February 2012 where you stated “I just want to tell only the truth”. Could you please look at my eyes and tell me if you want to tell the truth?

MR NELSON SANÓ (*Interpretation from Portuguese*): Yes, I do. I will say only the truth.

MR GARCÍA-GALLARDO: Can you confirm that any member of the crew, whether officer or seaman, was accused criminally, civilly or administratively as an individual by any member of the administration or any local court?

MR NELSON SANÓ (*Interpretation from Portuguese*): That I am aware of no, it doesn't come to my knowledge in the case of incrimination or any kind of problem with the crew of *Virginia G*.

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MR GARCÍA-GALLARDO: Let’s go to the witness because we have little time and we have too many witnesses. Would you please go to 46 evidence of our Memorial, in the Portuguese version? This is a request on 16 September 2009 by the local agent to coordination of FISCAP where only three weeks after the arrest of the ship, of any officer or seaman, the local agent requested formally the release or the return of the passport needed by one officer who wanted to leave to renovate his passport in Spain – no, his residence permit in Spain. Now I will show you the reply by Mr Hugo Nosoliny Vieira sent a week after to the local agent of the company, where you can read that they deny the return of the passport with arguments that they need to consider this with the *Fiscalização* or with any other authority. I think with the committee – the *Comissão Interministerial* is the one that takes this type of decisions. So coming back to the truth and only the truth, do you seriously believe that an individual working in the same building as you in FISCAP’s headquarters in Bissau can still argue that the first conservative date that FISCAP returned – and you, because you were the leading person – you said that you were in charge of this – returned the passport to the first officer of the arrested vessel, it was only – I do not want to discuss whether one week or two weeks after, but by mid-November or even later, because, at the end of the day, as you can see, this officer left only just before Christmas. Do you seriously believe that nobody approached anybody from the Guinea-Bissau administration and particularly you, as leading officer – 12 years working in the administration in FISCAP – to release this passport to the officer?

MR NELSON SANÓ (*Interpretation from Portuguese*): I have already said that clearly. As you are showing here, the correspondence signed by Hugo – this is not to my knowledge. No-one has contacted me personally for the passports. The correspondence arrived gradually and nothing came. I only worked to delivery of passports when I get the correspondence in my hands and they requested to return the passports.

THE PRESIDENT: Thank you, Mr García-Gallardo.

I ask the Agent of Guinea-Bissau whether he wishes to re-examine the witness.

MR MENEZES LEITÃO: No.

THE PRESIDENT: No. Thank you very much.

I thank Mr Sanó. Thank you for your testimony. Your examination is now finished. You may withdraw. I am sorry, there is one Judge, Judge Kulyk, who would like to ask questions.

QUESTION FROM JUDGE KULYK
[ITLOS/PV.13/C19/4/Rev.1, p. 27-28]

JUDGE KULYK: Mr Sanó, are you aware of any legislative or administrative rules in Guinea-Bissau that govern the procedures of withdrawing and returning passports to members of the crew from detained or arrested vessels?

MR NELSON SANÓ (*Interpretation from Portuguese*): As I said in a previous question, I worked there. What has been the practice usually for control purposes – it can be confirmed by the general director of the Ministry of Fisheries – that no crew member is arrested on a boat, passports are the only purposes of controlling the crew and then they are returned, so this is my answer.

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JUDGE KULYK: You probably did not understand my question. I was asking whether there are any orders, decrees or something which regulates the withdrawal or returning of the passports.

MR NELSON SANÓ (*Interpretation from Portuguese*): It is like I said. Usually these have been the practices as confirmed by the notice of the general director. I have no legislative report on this. The passports are for controlling of the crew and to help the crew.

THE PRESIDENT: I thank Judge Kulyk for the questions.

Your examination is finished, Mr Sanó. You may withdraw. Thank you very much.
Mr Leitão, how do you wish to continue?

MR MENEZES LEITÃO: I will now call Mr Augusto Artur António da Silva.

THE PRESIDENT: Thank you, Mr Leitão.

The Tribunal will then proceed to hear the witness Augusto Artur António da Silva. He may now be brought into the court room.

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MR DA SILVA
EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/4/Rev.1, p. 28-31]

THE PRESIDENT: I call upon the Registrar to administer the solemn declaration.

(The witness made the solemn declaration)

THE PRESIDENT: Good afternoon, Mr da Silva. I wish to remind you of the following. The work of the interpreters and the verbatim reporters is a very complex task. This is even more so when, as it will be the case now, not only English and French are used, but also a third language such as Portuguese. Therefore, I must urge you to speak slowly and please leave sufficient time after someone else has spoken to you before you answer. The statement or question of someone else before you will be translated into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has finished, I will give you a sign to this effect, like *this*. Only then the interpreters can follow you.

Mr Leitão you have the floor.

MR MENEZES LEITÃO: Thank you, Mr President.

Mr da Silva, could you tell this Tribunal what is your profession?

MR DA SILVA *(Interpretation from Portuguese):* I am a fishing engineer by profession.

MR MENEZES LEITÃO: What political positions have you occupied in the Government of Guinea-Bissau?

MR DA SILVA *(Interpretation from Portuguese):* I was Minister of Fishery; I was Minister of Defence; and I was Minister of National Education, Culture, Science, Youth and Sports. I have worked in cooperation too.

MR MENEZES LEITÃO: What was your position at the time of the arrest of the *Virginia G*?

MR DA SILVA *(Interpretation from Portuguese):* I was Minister of Defence.

MR MENEZES LEITÃO: Were you also a member of the Interministerial Maritime Enforcement Commission?

MR DA SILVA *(Interpretation from Portuguese):* Yes.

MR MENEZES LEITÃO: What was the function of that entity?

MR DA SILVA *(Interpretation from Portuguese):* The Commission is responsible under the law for enforcement of activity of Guinea-Bissau.

MR MENEZES LEITÃO: What happened with the fishing boats *Amabal I* and *Amabal II* from 11 August 2009?

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MR DA SILVA (*Interpretation from Portuguese*): As a member of the Commission, I received information in a notification that *Amabal I* and *Amabal II* should have been arrested, and they were undertaking illegal activities.

MR MENEZES LEITÃO: Was there a fine applied to *Amabal I* and *Amabal II*?

MR DA SILVA (*Interpretation from Portuguese*): Yes, they had to pay a fine of \$150,000 each. Then on request the ship was released.

MR MENEZES LEITÃO: There was a request of the former Consul of Spain to you. Could you please tell the Tribunal what you have discussed with the former Consul of Spain?

MR DA SILVA (*Interpretation from Portuguese*): The Honorary Consul of Spain came to see me as a member of the inspection and explained the situation of the company. We analysed the situation. We also received a letter requesting the release of the ship on behalf of the Embassy of Spain in the person of the Ambassador. We analysed the letters and the Commission decided that it was fair in view of the complaints that had been lodged. The Commission took this condition into account and released the vessels.

MR MENEZES LEITÃO: So there was an intention that the ships will pay the fine after getting resources from the fishing activity.

MR DA SILVA (*Interpretation from Portuguese*): Yes.

MR MENEZES LEITÃO: But after that you discovered that the ships were being fuelled by this vessel, *Virginia G*, without authorization of the vessel *Virginia G* before such an operation. Can you tell us what happened in that moment?

MR DA SILVA (*Interpretation from Portuguese*): In fact the two *Amabal* ships were released and went back to their activity. On the 21st again, the inspection services arrested these vessels because they were being fuelled by the *Virginia G*.

MR MENEZES LEITÃO: What happened afterwards?

MR DA SILVA (*Interpretation from Portuguese*): After that, as they had no FISCAP authorization, they were taken to the port of Bissau.

MR MENEZES LEITÃO: Did the Interministerial Maritime Commission apply the fine for this situation? What kind of sanctions were applied?

MR DA SILVA (*Interpretation from Portuguese*): The *Virginia G* was confiscated but the *Amabal* ...

MR MENEZES LEITÃO: What happened to the *Amabal I* and *II*?

MR DA SILVA (*Interpretation from Portuguese*): As I said before, on the basis of the official note from the Spanish Ambassador, because of the good relations between the two countries, we took this request into account and decided to release them because the crew was Spanish and the captain was also Spanish; so we released *Amabal I* and *Amabal II*. But

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regarding the *Virginia G*, there was no representative; nobody showed up to take responsibility. There was no representative of this ship.

MR MENEZES LEITÃO: Could it have a pernicious effect on Guinea-Bissau if it did not accept to release the Spanish boats?

MR DA SILVA (*Interpretation from Portuguese*): Yes, because our relationship with Spain is very important and we feel that the fine that was imposed on the two *Amabal* boats, due to the cooperation between the two countries, we felt that it was better to let them go and allow them to go along as to continue our commitments with Spain, especially in the sector of fishery.

MR MENEZES LEITÃO: Do you consider the infraction committed by *Virginia G* and the infraction committed by *Amabal I and II* to have the same gravity?

MR DA SILVA (*Interpretation from Portuguese*): No, because the *Virginia G* was bunkering the other vessels without authorization and that was taken into account because the other ships were fishing with authorization while the *Virginia G* had no authorization.

MR MENEZES LEITÃO: So *Amabal I and II* had a valid fishing licence and *Virginia G* had no licence at all? Do you confirm this?

MR DA SILVA (*Interpretation from Portuguese*): Yes, I do.

MR MENEZES LEITÃO: No further questions, Mr President.

THE PRESIDENT: Thank you, Mr Menezes Leitão. I ask the Agent of Panama whether he wishes to cross-examine the witness.

MR GARCÍA-GALLARDO: Your Honour, certainly I wish to but I will not do that now. I need 15 minutes.

THE PRESIDENT: Would you like to cross-examine after the break?

MR GARCÍA-GALLARDO: If you grant me 20 minutes or 15 minutes, I can do that now.

THE PRESIDENT: Thank you. We have reached almost one o'clock so at this stage the Tribunal will withdraw for a lunch break and we will resume the examination at 2.55.

MR GARCÍA-GALLARDO: May I request that the witness remains in a separate room during the break?

THE PRESIDENT: He will withdraw now and he will wait in a separate room.

MR MENEZES LEITÃO: Mr President, may the witness lunch at this time?

THE PRESIDENT: You have two hours from now. Thank you very much.

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MR GARCÍA-GALLARDO: Mr President, perhaps I did not explain myself. I was asking whether it was possible for the witness to stay alone in a courtroom, as is the usual practice when you conduct cross-examinations and there is a break.

THE PRESIDENT: I am sorry. I did not understand your question.

MR GARCÍA-GALLARDO: I will repeat my comment. I would like your Honour to consider that the witness stay alone in the witness room, without the possibility to meet with the lawyers, because the cross-examination will be completely different.

THE PRESIDENT: He may stay alone but as long as he can have lunch.

MR GARCÍA-GALLARDO: Of course.

MR MENEZES LEITÃO: Mr President, I think it is not possible for the witness to lunch in the home of the Tribunal, so the question is, is the witness allowed to go somewhere to lunch or does he have to stay two hours in the Tribunal without getting any food or water? I think it would be worse treatment than the treatment that Panama is saying was provided to the crew of *Virginia G!*

THE PRESIDENT: No, I do not mean that. Of course the witness can have lunch. Perhaps the witness should refrain from having contact with the Agents.

The meeting is adjourned now until 2.55.

(The sitting was closed at 12.55 p.m.)

M/V “VIRGINIA G”

PUBLIC SITTING HELD ON 4 SEPTEMBER 2013, 3 P.M.**Tribunal**

Present: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judges ad hoc* SÉRVULO CORREIA, TREVES; *Registrar* GAUTIER.

For Panama: [See sitting of 2 September 2013, 10 a.m.]

For Guinea-Bissau: [See sitting of 2 September 2013, 10 a.m.]

AUDIENCE PUBLIQUE DU 4 SEPTEMBRE 2013, 15 H 00**Tribunal**

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président*; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK, *juges*; MM. SÉRVULO CORREIA, TREVES, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l’audience du 2 septembre 2013, 10 h 00]

Pour la Guinée-Bissau : [Voir l’audience du 2 septembre 2013, 10 h 00]

THE PRESIDENT: Good afternoon. We will now continue the examination of the witness Mr da Silva.

Mr García-Gallardo, you intended to cross-examine the witness. You now have the floor.

EXAMINATION OF WITNESSES AND EXPERTS – 4 September 2013, p.m.

Examination of Witnesses and Experts (continued)

MR DA SILVA
CROSS-EXAMINED BY MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/5/Rev.1.Corr.1, p. 1-6]

MR GARCÍA-GALLARDO: Mr President, your Honours.

Mr da Silva, I did not hear very well this morning. I apologize. Are you the Minister for Education?

MR DA SILVA (*Interpretation from Portuguese*): No. I am no longer a member of the Government.

MR GARCÍA-GALLARDO: I was a little confused, because I saw your affidavits at the time, and later I saw the summary that was prepared by the representative of Guinea-Bissau on the profile of Mr da Silva.

Basically, I have some questions that I would be glad if you could answer. First of all, based on publicly available information, I have to say that you have a reputation, primarily during your period as Minister of Defence, that has been recognized internationally at all levels, including your Embassy, in the WikiLeaks messages, that they reflect that most people like you are aiming to improve governance and to develop the country as someone with respect. I am sorry. I had not realized that. You were mentioned by the representative of Guinea-Bissau in the papers, that you spent roughly 20 years as a specialist in fisheries. I am glad to learn this because probably I will have some key questions to ask you. At the time of the events in August 2009 you were a member of the Interministerial Commission of Fisheries. Is this correct?

MR DA SILVA (*Interpretation from Portuguese*): Yes.

MR GARCÍA-GALLARDO: The first decision related to this vessel made by the Interministerial Commission – I referred to decision number 7 of 2009 already – announced the intention to confiscate the vessel *Virginia G* and the equipment and the cargo. Was this the case?

MR DA SILVA (*Interpretation from Portuguese*): Yes.

MR GARCÍA-GALLARDO: This morning I raised questions with some other witnesses and, reading your witness report, I am a little surprised at the way you drafted the affidavit and at the way you simply summarize the way that you settled the release of the *Amabal I* and *Amabal II* when they were arrested for the first time on 12 August 2009. You simply say that the vessels were arrested and that it was absolutely normal to offer them the possibility to pay via a credit line. What was the reason for offering this facility to some vessels and not to others? Is there any basis in law that allows you, the Interministerial Commission, to settle like this? I can imagine that there was an administrative proceeding, there were FISCAP officers, *relatórios* – probably not *anuncio de llegada* or *detenção* – on these vessels, that there was any meaningful basis to consider this different to other cases.

MR DA SILVA (*Interpretation from Portuguese*): First, I would like to say we do not give credit to any vessels. There was no credit. The fine was imposed, \$150,000, and that was the

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fine. No credit was given to those vessels. The shipowner has a tax number in Bissau and the intervention of the Spanish Embassy speeded up the process.

MR GARCÍA-GALLARDO: Already at the time, in the administrative proceedings following the detention of the *Virginia G*, you were a member of the Committee – in fact, you were leading the Committee because the Minister of Fisheries was absent, as you reflect in your affidavit. Those vessels, one of them was accused of transshipping of oil by the *Virginia G* in the month of June. What was the consideration to treat those vessels in one category and the *Virginia G* in another category?

MR DA SILVA (*Interpretation from Portuguese*): The Interministerial Commission to which I belonged, the documents were submitted by the inspection secretariat. In the analysis we found that the two *Amabal* vessels had fishing permits and the *Virginia G* had no authorization to operate. We analyzed the events that led to the arrest of the *Virginia G*.

MR GARCÍA-GALLARDO: There was an accusation on the table, one related to and reflected in this case in particular, and I will raise some questions with the last witness on this, where it was reflected that there was an accusation of refueling operations on the *Amabal* and suddenly, three months later, based on the report of the fishing observer that spent three months on board, who is the witness the defence has decided not to invite to come to this hearing, not only there was a second time that the vessels were arrested, but certainly you were for the second time, based on the so-called good relationship with Spain or with the former Consul, or with the new Ambassador – certainly, I have to say I did not very well understand this morning your point – you decided that for the first time those vessels only spent a couple of weeks, and suddenly, on the contrary, the vessel *Virginia G* to remain for 14 months. Not only that, you decided – and it is a document attached by the representatives of Guinea-Bissau in this case – not to impose any fine. So I would like to clarify a little today the role played by the Interministerial Commi[ssion], because when reading accurately the wording of the legislation, it has nothing to do with the practice applied by some members of the administration during the period in this country, and this is a pity because I was thinking that you, with the reputation you have, are certainly not leading the debate, because it was the Minister of Fisheries, as reflected enough in publicly available information, who did not say anything and the vessels *Amabal* were released for the third time, and maybe with another intention that we will maybe raise later on.

MR DA SILVA (*Interpretation from Portuguese*): If you will allow me, the Supervisory Committee analyzes the reports and takes an administrative decision. Therefore, the facts that were submitted to us were the ones that we analyzed. Regarding the *Virginia G*, we analyzed the facts that were submitted to us at the Committee. That is what we based our decision on. Regarding the *Amabal* vessels, the Guinea-Bissau Government decided that, because of the relationship and the agency work in Guinea-Bissau, the fine was imposed and the vessels were released when the authorities requested.

MR GARCÍA-GALLARDO: In the end, there was not any particular difference, because those vessels did not have the flag of Spain. Those vessels, as reflected in the Memorial, were Mauritanian, so I do not really understand how a senior person like you, with the reputation you have, would allow, as a leading member of this Interministerial Commi[ssion], to take such a decision. Is it because of the friendship with Spain you decided, as if you were the President of the country, to allow the pardon?

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MR DA SILVA (*Interpretation from Portuguese*): I can say that the ship was released and the fines were imposed, and then the *Amabal* vessels were released, while there was no representative for the *Virginia G*, either for the shipowner or his representative.

MR GARCÍA-GALLARDO: The only communications sent by the *Amabal* vessels were through a local agent called Bijagós, and there is enough evidence in the file to confirm this point, while the situation of the *Virginia G* was very similar. There was a senior representative and well-reputed, qualified person locally, acting as local agent through the company Africargo-Bissau LDA.

MR DA SILVA (*Interpretation from Portuguese*): When we took the *Virginia G* it had absolutely no representative that we were aware of, so I am speaking when the confiscation decision was taken.

MR GARCÍA-GALLARDO: I received the power of attorney from Panama in here before receiving the instruction from the Republic of Panama to institute legal proceedings, and there are in the file a lot of letters asking to know more about the way these types of cases were handled by the judicial and the legislative powers in your country?

MR DA SILVA (*Interpretation from Portuguese*): That is exactly it. I am not sure that I understand the question. Could you repeat it, please?

MR GARCÍA-GALLARDO: I was saying that, and you raised the same point this morning, there were no representatives of the *Virginia G* in Guinea-Bissau. In this room we heard two days ago that the shipowner, Mr José Antonio Gamez Sanfiel, never came to Bissau before the arrest of the vessel but now has his personal residence in Guinea-Bissau, so I am still afraid that there was not very much interest in this type of case. Maybe there were other interests involved?

MR DA SILVA (*Interpretation from Portuguese*): I do not know if there was any interest but we on the Committee had the facts from the Technical Committee and we took our decision on the basis of the information that we had about the *Virginia G*.

MR GARCÍA-GALLARDO: The next question is related to the financial cost of such authorizations that have been reflected in different orders. Could you please put on the screen the Portuguese version of the Order of 2001, which has been attached by the Respondent? Here on the first page, this is 2013 – no, the previous page, please – here we have based, on article 23(2), the financial conditions. In Portuguese it is *pagamentos ou contrapartidas*, that the *Departamento do Governo responsável pela área das pescas* adopted apparently in 2001. So when reading the third paragraph, now I invite you to read this paragraph. This is a Joint Order of the *Ministério das Pescas* and the *Ministério da Economia e Finanças*. Would you please read the paragraph?

MR DA SILVA (*Interpretation from Portuguese*): Taking account of the fact that the implementation of this policy requires a reduction in the tariffs for licences for fishing in effect and a simplification of the conditions of access to fishing resources by companies or firms from Guinea-Bissau operating with their own ships or with chartered ships.

MR GARCÍA-GALLARDO: (*In Portuguese*) Can we see if there is any reference – you were a member of the Interministerial Commi[ssion] – to the (*Spanish spoken*) – in

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Portuguese I think it is *Embarcações de pesca* – in article 7 of the law 6-A/2000? Will you please let us know – first of all, I do not know, maybe you were not familiar with this, but if you are familiar with this Order, will you please let me know where there are any references to the fees or levies or any other financial contribution to develop certain activities as we will now see on page 2, please? (*No reply*) So Annex 3 relates to *Taxas de operações de apoio logístico e de transbordo de pescado* and here the Guinea-Bissau legislation identifies the set of fees and the way to calculate the yearly fee. Were you familiar with this legislation?

MR DA SILVA (*Interpretation from Portuguese*): I ceased to be connected to fisheries in the year 2000, so this was after I ceased my connection to fisheries.

MR GARCÍA-GALLARDO: You're no longer connected to fisheries. So, if we take into consideration the gross tonnage of the *Virginia G*, which is below 900, using the currency in 2001 this makes a figure of a fee per week of less than €400-500. So my question is perhaps, although you certainly cannot consider details which are the technical team's remit, do you consider that the fee of €400-500 a week allows Guinea-Bissau to take a decision without the right to be heard, just simply to confiscate *ex officio* a ship, its cargo and equipment? Whether this order would apply to foreign vessels is another question.

MR DA SILVA (*Interpretation from Portuguese*): Let me say that when I start analyzing a question, if a ship does not have authorization on board, it is seized. I cannot speak about this legislation because it came into force after I left my position in Fisheries, so I cannot answer this question in full.

MR GARCÍA-GALLARDO: We'll just show other legislation that was published early this year precisely amending or revoking the one of 2001 where certainly the conditions changed. There is not any reference to “national”, and if you move to the second page – this is the second page, this was the first page – so the word “national” in the third recital is not anymore, and in Annex 3 related to logistic supply operations in the way the legislation defines this itself as substantially a distinct increase in the yearly fees of gross tonnage to a level of €21,000 a year. So my question is: certainly you do not know the details, but the relation has not changed substantially from the moment you were a member of the Interministerial Commission. There are very good principles in the law on proportionality but was this sufficient to consider a different treatment between vessels, because, if I understand well, if a fishing vessel does not request a service, there is no service, so you need two parties, so who would give the authorization? (*No reply*) Let us move to other types of question.

MR DA SILVA (*Interpretation from Portuguese*): I was going to repeat again that I was in the Government until 2012 but I ceased to be connected with fisheries in 2000, so anything related to fisheries I am not up to date on. They were doing their work and I was not involved, so I cannot tell you anything about it. This was not my job any more and my duties were different from the ones that I had then. I was not even in the Government in 2013 when this tariff came out.

MR GARCÍA-GALLARDO: I have one question in relation to the period that Mr Antonio was sitting at this Interministerial Commi[ssion]. The vessel was arrested in August 2009 and you have both international and local provisions that impose the authorities to communicate via the Ministry of Foreign Affairs the notification of the arrest to the flag State. Was this matter treated in the Interministerial Commi[ssion] or not?

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MR DA SILVA (*Interpretation from Portuguese*): No, because at ministerial level we only know the data, the case that we receive. We are handed the information by the Inspection Committee.

MR GARCÍA-GALLARDO: My next question was linked to the other, this in relation to the allegations of lack of transparency and governance. Certainly Guinea-Bissau is a small country where you probably know locally each other, but just some weeks after you left the position as Minister of Defence with the reshuffle of the Government and you became Minister of Education, there were many important events that occurred in the Ministry of Fisheries and there was an investigation conducted by the Prosecutor's Office – I do not know if it is the same as attorney-general depending on the countries – and were you aware, and what is your opinion on this, of the creation of a formal committee in December 2009 where the *Procurador-geral da República*, Mr Amine Saad, issued an order determining the creation of an observatory of the Prosecutor's Office together with the Secretary of State for Fisheries granting full competence – I will say this in Portuguese – *o acompanhamento da fiscalização do processo de emissão de licenças de pescas, de despachos sobre prorrogações de licenças e de autorizações de qualquer tipo de transbordo*. Had you been aware about this important event in the administration that you held just a few months ago, an important position in the Interministerial Committee of Fisheries?

MR DA SILVA (*Interpretation from Portuguese*): No. As a minister I take decisions but the most important decisions are taken by the Council of Ministers, so I am not aware of anything of this nature. This is a maritime inspection matter and I do not know any other information about this. I am no longer a member of the executive. This is a matter to which I did not have access.

MR GARCÍA-GALLARDO: Because, based on the experience reflected by a representative of Guinea-Bissau in the paper – the summary is sent to the parties – with 20 years' experience in fisheries I thought you were more familiar with the details, but certainly you have provided an explanation that it is not the case. Thank you.

THE PRESIDENT: Thank you, Mr Gallardo.

May I ask the Agent of Guinea-Bissau whether he wishes to re-examine the witness? Mr Leitão?

MR MENEZES LEITÃO: No.

THE PRESIDENT: Thank you very much.

Mr da Silva, thank you very much for your testimony. Your examination is now finished and you may withdraw.

Now I would like to ask, Mr Leitão, how do you wish to continue? Are you ready to call the next witness?

MR MENEZES LEITÃO: If it pleases the Tribunal, I will call Mr Djata Janga.

THE PRESIDENT: Thank you. The Tribunal will proceed to hear the witness Mr Djata Janga. He may now be brought into the courtroom.

M/V “VIRGINIA G”

MR JANGA
EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/5/Rev.1/Corr.1, p. 6-9]

THE PRESIDENT: I call upon the Registrar to administer the solemn declaration to be made by the witness.

(The witness made the solemn declaration)

THE PRESIDENT: I wish to remind you of the following. The work of the interpreters and the verbatim reporters is a very complex task. This is even more so when, as it will be the case now, not only English and French are used, but also a third language such as Portuguese. Therefore, I must urge you to speak slowly and please leave sufficient time after someone else has spoken to you before you answer. The statement or question of someone else before you will be interpreted into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has finished, I will give you a sign to this effect, by a gesture like *this*. Only then the interpreters can follow you.

MR MENEZES LEITÃO: Thank you, Mr President.
Mr Djata Janga, could you say to this Tribunal what is your profession?

MR JANGA *(Interpretation from Portuguese):* I am a sailing pilot.

MR MENEZES LEITÃO *(Interpretation from Portuguese):* How long are you exercising that professional activity?

MR JANGA *(Interpretation from Portuguese):* I have 18 years of professional experience.

MR MENEZES LEITÃO *(Interpretation from Portuguese):* Have you participated in the enforcement mission... *(Continued in English)*... which ended with the arrest of the *Virginia G*?

MR JANGA *(Interpretation from Portuguese):* Yes, I took part.

MR MENEZES LEITÃO: One question I would like to ask is, is this a photo of the operation?

MR JANGA *(Interpretation from Portuguese):* Yes, it is.

MR MENEZES LEITÃO: Where was the crew at that time, because they were not in the photo?

MR JANGA *(Interpretation from Portuguese):* The crew was aboard but when we were at the bridge with the inspector I, as a pilot – they were there.

MR MENEZES LEITÃO: This photo refers only to a small part of the ship, as I understand. Can you confirm this?

MR JANGA *(Interpretation from Portuguese):* Explain, please.

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MR MENEZES LEITÃO: The entire ship or only a part of it?

MR JANGA (*Interpretation from Portuguese*): It is a part of the ship.

MR MENEZES LEITÃO: Could you say to this Tribunal what were the weather conditions at that time?

MR JANGA (*Interpretation from Portuguese*): At the time the weather was good.

MR MENEZES LEITÃO: Were they good, the climatic conditions?

MR JANGA (*Interpretation from Portuguese*): The weather conditions were good. The sea was calm and it promised to do everything in good order.

MR MENEZES LEITÃO: The state of the sea that we can see in this picture?

MR JANGA (*Interpretation from Portuguese*): Yes, it was really this. The sea is calm.

MR MENEZES LEITÃO: We see on the right side of the picture something in the sea. What is it?

MR JANGA (*Interpretation from Portuguese*): It is a boat. It is a boat of ours.

MR MENEZES LEITÃO: Was there any torture or any threats against the crew during the enforcement of operation?

MR JANGA (*Interpretation from Portuguese*): No, there were not – no torture, no threats – because the ship’s captain cooperated with us.

MR MENEZES LEITÃO: How did you enter in the ship?

MR JANGA (*Interpretation from Portuguese*): We entered through a ladder that was put aboard, and we climbed on board through the ladder.

MR MENEZES LEITÃO: It is disputed in this Tribunal if the trip to Bissau was performed in safe conditions. What do you say about that?

MR JANGA (*Interpretation from Portuguese*): About safety conditions of the ship? They were good. The weather was good. The wind was not blowing. The sea was calm and I have assured everything that I could address the ship until Bissau.

MR MENEZES LEITÃO: Did you discuss the conditions with the captain of the ship?

MR JANGA (*Interpretation from Portuguese*): No. There was the following exchange of opinions. I explained to the captain that even if he did know the area, this is my valid job and I could address the ship until the port of Bissau with no difficulties.

MR MENEZES LEITÃO: Do you have experience of sea navigation in this precise route to Bissau?

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MR JANGA (*Interpretation from Portuguese*): How?

MR MENEZES LEITÃO: I was asking if you were experienced of the sea navigation in this precise route to the port of Bissau.

MR JANGA (*Interpretation from Portuguese*): Yes, I have experience. I have made this several times.

MR MENEZES LEITÃO: Did you have a chart with you?

MR JANGA (*Interpretation from Portuguese*): Yes, I have a maritime chart. I was with it and I was with it in the vessel to bring the ship into the port of Bissau.

MR MENEZES LEITÃO: Did the ship have any problem in travelling to the port of Bissau? Was the journey conducted without any problem or do you want to report anything that happened during the voyage to the port of Bissau?

MR JANGA (*Interpretation from Portuguese*): During the journey to Bissau there were no problems. We navigated in good conditions. The weather was good and we arrived at Bissau with no problems.

MR MENEZES LEITÃO: No further questions.

THE PRESIDENT: Thank you, Mr Leitão.

I ask the Agent of Panama whether he wishes to cross-examine the witness.

THE PRESIDENT: Mr Mizzi, you have the floor.

MR JANGA

CROSS-EXAMINED BY MR MIZZI (PANAMA)

[ITLOS/PV.13/C19/5/Rev.1/Corr.1, p. 9-11]

MR MIZZI: Thank you – just a couple of questions. My colleague used photo 15. Mr Janga, the agreement seems to be that the arrest of the *Virginia G* happened at around seven o'clock in the evening. Do you agree?

MR JANGA (*Interpretation from Portuguese*): No – 6.30 p.m.

MR MIZZI: So we are speaking about the end of the day, dusk. Could I have photo 15? Can you confirm that the conditions of the sea in the top photo – and the amount of light – is in fact approximately 60 kilometres off the coast of Bissau at 6.30 in the evening? Is the water in the EEZ as calm as that? If indeed the photo says that this photo was taken during the arrest, this photo was taken, at earliest, at 6.30 in the evening.

MR JANGA (*Interpretation from Portuguese*): Yes, it does correspond. I am looking at the weather and the sea is calm and it was not evening. You are seeing another part of the ship.

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MR MIZZI: You are now referring to the situation, the condition of the sea – how calm it is, in fact, and the amount of light. The second photo, at the bottom, similarly seems to show land in the background.

MR JANGA (*Interpretation from Portuguese*): That is not land on the bottom - because the weather mistakes when we are at sea. When you are far away the weather makes mistakes. It seems land, but it is not.

MR MIZZI: In the top photo again the caption says on the sea is visible the boat *Baleia V*. In my opinion on the sea is visible – something.

MR JANGA (*Interpretation from Portuguese*): Something is visible on the side – our boat that we take on missions. This is our boat.

MR MIZZI: Are you a navy pilot or a merchant pilot?

MR JANGA (*Interpretation from Portuguese*): Navy pilot of the national navy.

MR MIZZI: Therefore you felt competent and subject to the same regulations as a merchant pilot.

MR JANGA (*Interpretation from Portuguese*): Yes, yes.

MR MIZZI: How did you arrive at the *Virginia G*, on which vessel?

MR JANGA (*Interpretation from Portuguese*): I arrived in Bissau with no problems, without problems.

MR MIZZI: From Bissau to the *Virginia G* – how did you get there, on which vessel?

MR JANGA (*Interpretation from Portuguese*): I was on board the *Baleia V*. I was there. That conducted me until the destination when we found *Virginia G*.

MR MIZZI: You say in your witness statement that you were commander of the vessel *Cacine*.

MR JANGA (*Interpretation from Portuguese*): No, that was my occupation at the time when I left Bissau. That was my occupation at the time. It doesn't mean that I was aboard the *Cacine* vessel. I am commander of the *Cacine* vessel but I was in charge of the mission at the high sea.

MR MIZZI: A navy vessel?

MR JANGA (*Interpretation from Portuguese*): Yes, from the navy fiscalization, and I am commander of that navy boat but I was in charge of this mission.

MR MIZZI: Did you plan your voyage from Guinea-Bissau to the *Virginia G*? As I understand, over such a distance and given the different conditions at sea – land, islands – you would normally plan several waypoints using different charts specifically designed for those waypoints. Did you have that mission plan or voyage plan prepared?

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MR JANGA (*Interpretation from Portuguese*): Sorry, how? There was another person at that vessel who is in charge. We left Bissau and went into the high sea where we accomplished our mission.

MR MIZZI: By you in advance, as a pilot of the voyage from Bissau to the *Virginia G* and back.

MR JANGA (*Interpretation from Portuguese*): I am there to guide the people who are there. We are at the *Baleia V* and I am there as a pilot and to see whether things are going right, orientated to guide the people who are at the boat.

MR MIZZI: That was not my question. One last question: we have heard that the map you used on board was in tatters or in very bad condition, and that the latitudes and longitudes were not synchronized. The map was torn, patched, taped or sewn. In fact, this seems to be the case because you gladly accepted the offer from the master of a brand-new map, more suited for the route.

MR JANGA (*Interpretation from Portuguese*): Yes. In fact, the master saw that my chart was old, but I guided him, whatever the mission was. He could offer me a new chart but if he wants to offer me a new one I receive it. That chart that he promised to offer is different from the one I had. That is the chart I was given to sail the channel. The chart number 1724 is different from the other one.

MR MIZZI: Thank you, your Honour.

THE PRESIDENT: Thank you, Mr Mizzi.

I ask the Agent of Guinea-Bissau whether he wishes to re-examine the witness.

MR MENEZES LEITÃO: No, thank you, Mr President.

THE PRESIDENT: Mr Janga, your examination is now finished. You may withdraw. Now, Mr Menezes Leitão, may I ask you how you wish to continue?

MR MENEZES LEITÃO: Yes, Mr President. I will now call Mr Ildefonso Barros.

THE PRESIDENT: Thank you.

The Tribunal will now proceed to hear the witness Mr Ildefonso Barros. He may now be brought into the courtroom.

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MR BARROS
EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/5/Rev.1/Corr.1, p. 11-13]

THE PRESIDENT: I now call upon the Registrar to administer the solemn declaration to be made by the witness.

(The witness made the solemn declaration)

THE PRESIDENT: Good afternoon, Mr Barros. I wish to remind you of the following: The work of interpreters and verbatim reporters is a complex task. This is even more so when, as will be the case now, not only English and French are used but also a third language such as Portuguese. Therefore, I must urge you to speak slowly and please leave sufficient time after somebody else has spoken to you before you answer. The statement or question of someone else before you will be interpreted into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has been finished, I will give you a sign to this effect by a gesture like *this*. Only then it will be possible that the interpreters can follow.

Mr Leitão, you have the floor.

MR MENEZES LEITÃO: Thank you, Mr President.

Mr Ildefonso Barros, could you please say to the Tribunal what your profession is.

MR BARROS *(Interpretation from Portuguese):* I am a mechanical engineer. I have over 25 years of professional experience in the fisheries sector, where I have been in the position as a director, *chef de cabinet*. My last job was Secretary General of Fishery and coordination of inspections.

MR MENEZES LEITÃO: At the time of the release of the vessel *Virginia G* in 2010, what was your position?

MR BARROS *(Interpretation from Portuguese):* I was Secretary General of Fishery and National Coordinator of Fishery Inspection.

MR MENEZES LEITÃO: Why was it decided to release the ship?

MR BARROS *(Interpretation from Portuguese):* There were two reasons for that. The first and main reason was that the ship had sunk in the port and it could pose a risk to ships sailing in the channel and risks to the marine environment. The second reason was that the relations with Spain that are fundamental for us meant that the Government decided and gave instructions to the Interministerial Commi[ssion] to release the ship, and it was on that basis that this was done.

MR MENEZES LEITÃO: How did you get knowledge of the risk of the ship sinking in the port of Bissau?

MR BARROS *(Interpretation from Portuguese):* We received information from the port authorities and our services went to the ship to see what was happening. That was when we were able to obtain the information about the risk that we were running of the ship sinking in that area.

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MR MENEZES LEITÃO: What is the formal process by which the ship was released?

MR BARROS (*Interpretation from Portuguese*): The procedure after the Commission’s decision – and they are the ones who have to analyze violations and decide on releases – is that FISCAP, which is the secretariat of the Interministerial Commi[ssion], was informed of the decision and did its job of informing the ship’s representative of the decision and to issue the release order. That is what we did.

MR MENEZES LEITÃO: The term of delivery is a document like the one you can see on your screen?

MR BARROS (*Interpretation from Portuguese*): This document is not a term of delivery. The release document is what we used to release the ship. This is a receipt for delivery of documents, which is released after the release order. This is not one of the models that we use.

MR MENEZES LEITÃO: But was this document issued at your services in Bissau or not?

MR BARROS (*Interpretation from Portuguese*): Not in the terms that are here in English. We never issue a document with anything on it in English. It is written in Portuguese and we hand it over in accordance with our form. This is not one of the documents that we use. I do not know where this document came from and I would never issue a document with reservations in English. Our working language is Portuguese. I do not have the power to issue or authorize reservations to representatives, or especially not to the person who wrote this document. The issue of reservations or complaints is the competence of the Interministerial Commission.

MR MENEZES LEITÃO: How do you assume this kind of text in English was put in a different document, the document different from the release notice, that is here now? How do you think it is possible that it appears here?

MR BARROS (*Interpretation from Portuguese*): I think somebody may have forged this, because the normal documents that we have never have this kind of reservation on it, in totally different fonts from the ones that we use.

MR MENEZES LEITÃO: I have no further questions.

THE PRESIDENT: Thank you, Mr Menezes Leitão.

I would like to ask the Agent of Panama whether he wishes to cross-examine the witness. Mr Mizzi, you have the floor.

MR BARROS
CROSS-EXAMINED BY MR MIZZI (PANAMA)
[ITLOS/PV.13/C19/5/Rev.1/Corr.1, p. 13-14]

MR MIZZI: Good afternoon, Mr Barros. I have two questions. You say that the vessel was released because of its rather bad condition in or around October 2010.

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MR BARROS (*Interpretation from Portuguese*): Yes. We received that information, and the Government had the information too, and its guidelines were that the ship was in bad condition, there was a huge risk for ships and for the marine environment.

MR MIZZI: Therefore the condition of the ship is apparently confirmed by Guinea-Bissau. Next question: you were looking at this delivery record, or *termo de entrega*. Your colleague who signed this document apparently chose not to be here today but in his statement he says that the original, or the version he had, was lost.

MR BARROS (*Interpretation from Portuguese*): As I said, we never used a declaration.

MR MIZZI: If I could interrupt you because our time is very limited, for comparative purposes, do you have the document you think is authentic with you and why has it not been submitted to the proceedings?

MR BARROS (*Interpretation from Portuguese*): As I said, in the case files we have normal documents, normal forms that we use. This document does not correspond to the ones that we use. That was the only one that we use.

MR MIZZI: I have no more questions.

THE PRESIDENT: Thank you, Mr Mizzi.

I ask the Agent of Guinea-Bissau whether he wishes to re-examine the witness.

MR MENEZES LEITÃO: No, thank you, Mr President.

THE PRESIDENT: Thank you.

Mr Barros, thank you for your testimony. Your examination is now finished. You may withdraw.

Mr Menezes Leitão, do you wish to call the next witness, Mr Mário Dias Sami?

MR MENEZES LEITÃO: Yes, if it pleases the Tribunal.

THE PRESIDENT: The Tribunal will then proceed to hear the witness Mr Mário Dias Sami. He may be brought into the courtroom.

M/V “VIRGINIA G”

MR DIAS SAMI
EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/5/Rev.1/Corr.1, p. 14-16]

THE PRESIDENT: I now call upon the Registrar to administer the solemn declaration to be made by the witness.

(The witness made the solemn declaration)

THE PRESIDENT: Good afternoon, Mr Sami. I wish to remind you of the following: the work of interpreters and verbatim reporters is a complex task. This is even more so when, as it will be the case now, not only English and French are used but also a third language such as Portuguese. Therefore, I must urge you to speak slowly, and please leave sufficient time after someone else has spoken to you before you answer. The statement or question of someone else before you will be translated into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has been finished, I will give you a sign to this effect by a gesture like *this*. Only then it will be possible that the interpreters can follow.

Mr Leitão, you have the floor.

MR MENEZES LEITÃO: Mr Sami, could you inform the Tribunal of your profession?

MR DIAS SAMI *(Interpretation from Portuguese):* I am Mário Sami, born 15 August 1957, and I am an economist as a profession.

MR MENEZES LEITÃO: What is your professional experience in the fisheries sector?

MR DIAS SAMI *(Interpretation from Portuguese):* I have more than 20 years of experience in the fisheries sector. I have held several positions until I reached the Secretary of State of Fisheries, and then I was Secretary of State of the Environment in Bissau.

MR MENEZES LEITÃO: When did you become Secretary of State for Fisheries?

MR DIAS SAMI *(Interpretation from Portuguese):* I was appointed to that job in October 2009 until August 2011.

MR MENEZES LEITÃO: Due to that quality, you also belong to the Interministerial Commission of Maritime Surveillance. Can you confirm that?

MR DIAS SAMI *(Interpretation from Portuguese):* That is true. My position was preceded by the holder of the fisheries position, and when I was appointed I was the President of the Commission, the Interministerial Commission for Maritime Surveillance.

MR MENEZES LEITÃO: As I understood, at that time there was no Ministry of Fisheries, so you were the top officer of the fisheries sector in the Government.

MR DIAS SAMI *(Interpretation from Portuguese):* That is true, because there was a governmental reorganization in 2009 and there was a change in the holder of the fisheries sectors. I responded directly to the Prime Minister.

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MR MENEZES LEITÃO: In that quality, have you taken care of the process of the ship we are discussing here, *Virginia G*?

MR DIAS SAMI (*Interpretation from Portuguese*): From that date when I entered the fisheries sector I began to receive information about the vessel.

MR MENEZES LEITÃO: Was there any contact from the Spanish Embassy about this ship?

MR DIAS SAMI (*Interpretation from Portuguese*): We had several communications with the Embassy of Spain within the framework of our cooperation and amicable relationships between the two peoples and the two States, so the seizure of the *Virginia G* was worrying not only the Guinean authorities but also the Spanish ones, and in our contacts we had the intention to talk about this matter. I had contacts with the Ambassador and the Consul of Spain.

MR MENEZES LEITÃO: Was there any contact from the Panamanian authorities?

MR DIAS SAMI (*Interpretation from Portuguese*): As far as the Panamanian authorities are concerned, I received the representatives of the shipowner on a date when they sent me a letter on 16 November asking to schedule a meeting on 16 November. On that same date I convened a meeting for the 18th of that same month.

MR MENEZES LEITÃO: But were they the Panamanian authorities or only the representatives of the shipowner?

MR DIAS SAMI (*Interpretation from Portuguese*): Only the cabinet that the agent contacted. They were there saying that they represented the shipowner. I had no contact with the Panamanian authorities directly; only through their representatives.

MR MENEZES LEITÃO: Were you notified of the alert received about the risk of the ship sinking in the port of Bissau?

MR DIAS SAMI (*Interpretation from Portuguese*): Yes, after the ship had unloaded the product there was a note from the Minister of Finance and then we followed the situation closely. After having unloaded the product, it was brought to another place at the canal and this canal cannot be obstructed by any vessel that can eventually sink at that site, because we have a very large experience from vessels that have sunk in the port of Bissau and to remove them was costly and very expensive.

MR MENEZES LEITÃO: After the release of the ship it was possible for Guinea-Bissau to renovate the cooperation memorandum in the field of fisheries with Spain. Can you inform the Tribunal about the negotiation of this cooperation memorandum in the field of fisheries?

MR DIAS SAMI (*Interpretation from Portuguese*): The protocol, which is the memorandum in the partnership of the fisheries sector, is within the framework of the European Union and Guinea-Bissau for the research and the supervision and reinforcement of capacities of human resources in the fisheries sectors, so the Consul told me that the delay for that memoranda was going to end by December 2010; and then I went to Spain on an official visit from 26 to 30 January to extend the cooperation memorandum in the field of fisheries concretely.

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MR MENEZES LEITÃO: Was the Government of Guinea-Bissau worried about the possibility of Spain, as retaliation, not agreeing to the extension of the memorandum?

MR DIAS SAMI (*Interpretation from Portuguese*): No. Because Spain, as a partner within a joint framework, would have changed the conditions for renewing the protocol that was to end on 15 June 2011, and we started to prepare the new protocol in October 2010. We were in Brussels preparing the text for the new protocol. The protocol that was to end on 15 June was dated June 2007 and was to last for four years.

MR MENEZES LEITÃO: Did Guinea-Bissau maintain a good relationship with Spain in the fisheries sector or not?

MR DIAS SAMI (*Interpretation from Portuguese*): Of course. Within the framework of cooperation with the European Union, Spain has a large fleet, and our relationships were very special and not by any chance. We saw Spain opening an embassy in our country and that confirmed our amicable relationships that are based upon respect and common interests.

THE PRESIDENT: Thank you, Mr Leitão.

I ask the Agent of Panama if he wishes to cross-examine the witness. Mr Gallardo, you have the floor.

MR GARCÍA-GALLARDO: Mr President, thank you.

MR DIAS SAMI

CROSS-EXAMINED MR GARCÍA-GALLARDO (PANAMA)

[ITLOS/PV.13/C19/5/Rev.1/Corr.1, p. 16-19]

MR GARCÍA-GALLARDO: Mr Mário Dias Sami, we do not have too much time, so I will try to raise some key questions. Would you consider that the fuelling of gas oil by a small tanker like the *Virginia G* is a fishing-related activity if this service is provided within the EEZ of Guinea-Bissau but outside the territorial sea?

MR DIAS SAMI (*Interpretation from Portuguese*): Yes, any vessel that is not fishing, the remaining activities are called fishing-related activities. They have to do with fuelling the vessels because foreign vessels that make these activities within the waters of Guinea-Bissau make their preparations within the waters of Guinea-Bissau.

MR GARCÍA-GALLARDO: (*Interpretation from Portuguese*): I heard, if I am not wrong, that you have talked about maritime waters of Guinea-Bissau. Would you please explain what you understand by this concept of maritime waters of Guinea-Bissau?

MR DIAS SAMI (*Interpretation from Portuguese*): It is, I understand, not only the coastal sea and the EEZ area of our country that is extending to 200 miles in the Convention, but also the outside sea.

MR GARCÍA-GALLARDO: The definition complies with the International Convention on the Law of the Sea?

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MR DIAS SAMI (*Interpretation from Portuguese*): I am giving my definition and the right terms, and the vessel *Virginia G* committed a serious infraction of the law of fisheries, even though it was not within the 200 miles, as counted from Unhocomo Island, because it had no authorization for that operation.

MR GARCÍA-GALLARDO: Like Namibia, having adopted similar provisions to the one you can read on the screen, article 2 of the Decreto 6-A/2000, had been reviewed voluntarily when the United Nations – I do not know exactly which body within the law, the parliament or following advice from professors – and the reality is that they amended the wording on the maritime waters of Namibia in this case. Are you aware of this amendment made by Namibia?

MR DIAS SAMI (*Interpretation from Portuguese*): I am not a legal adviser. I am only occupied with economic features.

MR GARCÍA-GALLARDO: You were at the *Secretaria das Pescas* or *Ministério das Pescas* because, following the problems that arose before your appointment as Secretary for Fisheries, you were one of the top officers in this Secretariat for Fisheries that provided advice on the conditions for unloading cargo by force. I am talking about the cargo of the *Virginia G* and about the decision taken, and now I can show you Annex 56 of our Memorial. If you look, this decision is signed I think by the *Ministério das Finanças* and you are in copy. It is a decision taken on 20 September and there is an error again – it happens – on the date of the letter, 30 November. Then what was your role played to implement this decision?

MR DIAS SAMI (*Interpretation from Portuguese*): It is correct. That date is correct, because it deals with the date when all the ---

MR GARCÍA-GALLARDO: I am sorry to interrupt you, Mr Sami. You mentioned that this is a correct date. Which one, the one of 30 November or the one of 20 November?

MR DIAS SAMI (*Interpretation from Portuguese*): That document was signed by the Secretary of State of the Treasury giving allowance following the attorney's office decision to unload the ship.

MR GARCÍA-GALLARDO: In preparation for the hearing, summarizing the scope of your witness deposition, I wanted to touch upon some points that are not reflected in your witness statement - and there is no problem with that of course - but could you confirm whether or not you agree that it was not fuel, it was gas oil, carried by the *Virginia G* that was ordered to be unloaded by the Minister of Finance, who is responsible for the management of the State's assets, following the decision to seize the products on board the vessel? At the time there were military problems on the north border of the country and the Minister did not want to spend any money on fuel for the armed forces. Do you confirm this or not?

MR DIAS SAMI (*Interpretation from Portuguese*): That information is written in what document?

MR GARCÍA-GALLARDO: A document in a letter sent by my esteemed colleague to the attention of the Registrar on – I do not think I can see a date on the letter but certainly a couple of months ago. I can show you the letter.

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MR DIAS SAMI (*Interpretation from Portuguese*): I would like you to mention that letter with those details, that the public treasury of Guinea-Bissau had no resources to deal with the features of national sovereignty.

MR GARCÍA-GALLARDO: Because you were already appointed as Secretary for Fisheries, were you aware of the existence of an order letter that was served to you, to the Minister of Finance, on 10 November suspending the confiscation of everything – the ship, the cargo, the equipment?

MR DIAS SAMI (*Interpretation from Portuguese*): It was with those on that document that the Public Attorney has given his affidavit, his statement.

MR GARCÍA-GALLARDO: Does the Public Attorney have the right to decide on a judgment, on an order rendered by a judge in Guinea-Bissau?

MR DIAS SAMI (*Interpretation from Portuguese*): The Public Attorney, yes, is the State’s attorney according to our law, the State’s attorney, so his position as the Public Attorney is valid.

MR GARCÍA-GALLARDO: I do not know if I am hearing you well. Do you mean that the executive power can impose its own decision on a judicial order rendered by the judicial power in Guinea-Bissau?

MR DIAS SAMI (*Interpretation from Portuguese*): There are several parts. What you are dealing with is a restraining order not specified, and that unspecified order has been submitted to the Public Attorney. According to his statement, the letter that has been before shown is from the Secretary of State of the Treasury to proceed with the unloading of the cargo.

MR GARCÍA-GALLARDO: It is article 52 as amended in 2005, which makes part of our Annex 9 in the Memorial. It is at the bottom. It is an amendment (as before). If you look to the column on the right side, article 52(3): *A decisão prevista no número 1 – confiscado ex officio – e susceptível de recurso*. Now I would not like to elaborate more because I think that there will be legal experts from Guinea-Bissau but do you still think that the decision of an Attorney General in Guinea-Bissau can change a decision taken by a judge even, like in this case, an interim relief measure imposing the suspension on any action on the ship, on the cargo, on the equipment of the *Virginia G*?

MR DIAS SAMI (*Interpretation from Portuguese*): As a public attorney who has been shown this opinion, I think so.

MR GARCÍA-GALLARDO: I have no more questions.

THE PRESIDENT: Thank you, Mr García-Gallardo.

MR MIZZI: May I have one question?

THE PRESIDENT: We have reached four-thirty. I do not know if you wish to continue.

MR MIZZI: It will not last longer than a minute or a minute or a half.

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THE PRESIDENT: Can you do that after the break?

MR MIZZI: Yes.

THE PRESIDENT: The Tribunal will withdraw for a break of thirty minutes and we will continue at five o'clock.

(Break)

THE PRESIDENT: Now we will continue the cross-examination of the witness. I would like to know who will speak on behalf of Panama.

Mr Mizzi, you have the floor.

MR DIAS SAMI

CROSS-EXAMINED BY MR MIZZI (PANAMA)

[ITLOS/PV.13/C19/5/Rev.1/Corr.1, p. 19-21]

MR MIZZI: Thank you.

Mr Sami, we need to be rather quick with this question because of the time-limit. I am referring now to Annex 56 of our Memorial which is the letter on the basis of which the confiscation of the oil took place. This letter was handed to the captain on 20 November 2009 and the oil was confiscated thereafter. This letter is dated 30 November 2009 and the first line of the second paragraph says, “notwithstanding the judicial order suspending the decision”, which you have now confirmed on the basis of what we have called an internal appeal – you nevertheless disregarded it. Do you confirm that?

MR DIAS SAMI (*Interpretation from Portuguese*): If it wasn't ignored we would proceed according to the restraining order.

MR MIZZI: Can I have the translation again, please?

THE PRESIDENT: Yes.

THE INTERPRETER: If it wasn't ignored then we would proceed according to the restraining order.

Do you want me to repeat? Could the witness please repeat what he has just said?

LE PRÉSIDENT : Voulez-vous répéter la question ?

MR DIAS SAMI (*Interpretation from Portuguese*): Would you please repeat the question?

THE PRESIDENT: Mr Mizzi, I am sorry – would you repeat the question?

MR MIZZI: The letter that is being shown to you is dated 30 November. It was handed to the captain of the *Virginia G* on 20 November; therefore the letter is forward-dated by ten days; and this letter was the basis on which the oil was confiscated; and the basis on which the oil was confiscated was a complete disregard to the suspension order that had already been obtained by the owner of the vessel, which you said previously you felt justified in

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ignoring on the basis of an opinion of the Public Prosecutor, who apparently has more powers than the judiciary. I just need to clarify that this is indeed your understanding.

MR DIAS SAMI (*Interpretation from Portuguese*): I would like you to show me that letter, please. The letter that is on screen is showing 30 November. If there is another one from the 20th I would like it to be shown on the screen.

MR MIZZI: Your Honour, we have testimony that the oil was confiscated on 20 November, and it is not contested. This letter was forward-dated.

The second point I need to raise is that your appeal, or Guinea-Bissau’s appeal, was considered out of time and appealed in the wrong form. Therefore, I put it to you – and we have the decision, which is publicly available – that all actions taken by your Government from this date, at minimum – possibly even retrospectively – until the date of release of the *Virginia G*, were completely against the court order. That is my last question.

MR DIAS SAMI (*Interpretation from Portuguese*): I have already spoken about the opinion of the Public Attorney. You have not shown me the letter of 20th or the witnesses. Where are the records of the witnesses about the letter of 20th?

MR MIZZI: There was no letter of 20th; this is the letter that was handed to the captain on 20th. This is it.

MR DIAS SAMI (*Interpretation from Portuguese*): Could you please show me the signature of receipt of the letter, received on – show me this on the document when the letter was received.

MR MIZZI: If you scroll down to the bottom right-hand corner of the letter, there is a stamp by the company Petromar, dated 20 November 2009, the company with which the Prime Minister was associated.

MR DIAS SAMI (*Interpretation from Portuguese*): No, I believe that it is not appropriate not show these documents. If you want to rely on this document, I have to study it to establish the facts. The court of Bissau must have received the letter on the unloading of the goods. It would be for the court, not Petromar, which is a company. Do you agree? The letter was not very clear. Petromar is not the addressee of the letter.

MR MIZZI: The addressee of the letter is CLC, which is a company associated with Petromar. My next question is very brief, “yes” or “no”: did you notify Panama, the flag State of the *Virginia G*, about the measures taken against the vessel and the sanctions in terms of article 73, paragraph 4, of the United Nations Convention on the Law of the Sea? Yes, or no?

MR DIAS SAMI (*Interpretation from Portuguese*): We informed Panama in accordance with the proper laws, mainly the general law of fisheries of Guinea. That is inspired by the Convention on the Law of the Sea.

MR MIZZI: Thank you. It is curious that this notification has not appeared.
Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Mizzi.

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I would like to ask the Agent of Guinea-Bissau whether he wishes to re-examine the witness.

MR MENEZES LEITÃO: Yes.

THE PRESIDENT: You have the floor.

MR DIAS SAMI
RE-EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[TTLOS/PV.13/C19/5/Rev.1/Corr.1, p. 21-22]

MR MENEZES LEITÃO: Thank you, Mr President.

Mr Sami, I will be very brief. My colleague stated that I have presented in the annexes of the Rejoinder your deposition and your written statement and in that written statement was made reference to the necessity of the treasury about the use of the oil for military purposes. Can you read without saying in loud voice the statement which is presented in the Rejoinder and tell me if you find any statement of you saying this is something like my colleague said? Did you sign this statement?

MR DIAS SAMI (*Interpretation from Portuguese*): I have signed the deposition, that statement.

MR MENEZES LEITÃO: Can you point there any information like the one my colleague says it was presented in this case?

MR DIAS SAMI (*Interpretation from Portuguese*): I am not saying it.

MR MENEZES LEITÃO: The second question I would like to ask is – I understand you are not a lawyer but my question is this one. Is the Public Prosecutor according to the system of Guinea-Bissau a person who is dependent of the Government or is he totally independent of the Government?

MR DIAS SAMI (*Interpretation from Portuguese*): He is independent. The Public Prosecutor is not a member of the Government.

MR MENEZES LEITÃO: The Government cannot make any orders to the Public Prosecutor relating to proceedings in cases or anything like that?

MR DIAS SAMI (*Interpretation from Portuguese*): In this case, no, it was not. The Government has required the opinion of the Public Prosecutor as a State entity to give an opinion about the restraining order to be executed.

MR MENEZES LEITÃO: The Public Prosecutor can receive any order from the Government in any situation how to conduct some proceedings?

MR DIAS SAMI (*Interpretation from Portuguese*): It is not possible, that.

THE PRESIDENT: Thank you, Mr Leitão.

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I thank Mr Sami for your testimony. Your examination is now finished. You may withdraw.

Mr Leitão, do you wish to call the next witness, Mr Hugo Nosoliny Vieira?

MR MENEZES LEITÃO: If it pleases the Tribunal, yes.

THE PRESIDENT: Thank you.

The Tribunal will then proceed to hear the witness Mr Hugo Nosoliny Vieira. He may now be brought to the courtroom.

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MR NOSOLINY VIEIRA
 EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
 [ITLOS/PV.13/C19/5/Rev.1/Corr.1, p. 22-28]

THE PRESIDENT: I call upon the Registrar to administer the solemn declaration to be made by the witness.

(The witness made the solemn declaration)

THE PRESIDENT: Good afternoon, Mr Vieira.

I wish to remind you of the following. The work of the interpreters and the verbatim reporters is a complex task. This is even more so when, as it will be the case now, not only English and French are used, but also when a third language such as Portuguese is used. Therefore, I must urge you to speak slowly and please leave sufficient time after someone else has spoken to you before you answer. The statement or question of someone else before you will be translated into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has been finished, I will give you a sign to this effect, by a gesture like *this*. Only then you can be followed.

Mr Leitão, you have the floor.

MR MENEZES LEITÃO: Thank you, Mr President.

Mr Vieira, could you say to this Tribunal what is your profession?

MR NOSOLINY VIEIRA *(Interpretation from Portuguese):* I am a biological engineer and fisheries expert.

MR MENEZES LEITÃO: What is your professional experience in fisheries?

MR NOSOLINY VIEIRA *(Interpretation from Portuguese):* Twenty-two years.

MR MENEZES LEITÃO: Were you national coordinator of FISCAP between 2007 and December 2009?

MR NOSOLINY VIEIRA *(Interpretation from Portuguese):* Yes, I was.

MR MENEZES LEITÃO: Could you tell us anything about the arrest of the *Amabal I* and the *Amabal II* on 11 August 2009?

MR NOSOLINY VIEIRA *(Interpretation from Portuguese):* On 11 August 2009, the *Amabal I* and *Amabal II* were surprised on a routine mission by the national inspection service, fuelling each other. They were taken to the port of Bissau and in an inspection of conformity we collected the documents aboard and saw that on 20 June *Amabal II* received 87 tonnes of gas oil from the ship *Virginia G*.

MR MENEZES LEITÃO: Could you look at this document which the *Virginia G* obtained for an operation in the week between 17 and 24/6/2009 about the situation of the bunkering of oil to the ships. Can you read what is the agency, the enterprise, that she requested authorization to perform these operations in June?

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MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Looking at the documents we know that the company that requested the related operation was Afripêche. It was only the vessels belonging to that company which could be supplied by the *Virginia G*.

MR MENEZES LEITÃO: The *Virginia G* at 17 to 24 June did not involve other vessels. Do you confirm that?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): That is correct. The vessels of flipper ships – those are the ones that belong to Afripêche, and the authorization only covered them and it did not extend to the *Amabal* vessels.

MR MENEZES LEITÃO: Can you confirm this is the normal document that is requested by an oil tanker when she needs to do an operation of bunkering in the EEZ? Do you confirm that this document is the document that is normally issued to authorize this kind of operation?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Exactly, yes, I do. It is an authorization signed by the head at the Ministry of Fishery.

MR MENEZES LEITÃO: Who is the Minister? Can you read the signature and the stamp in this document?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Yes, I can read it. It is Carlos Mussa Baldé, Minister of Fishery. I also know him personally.

MR MENEZES LEITÃO: What is the process for getting an authorization like that? What should an oil tanker do if it needs to do such operations and get this document of authorization?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): The representative of the shipowner or the shipowner himself writes a letter to the Minister, requesting coverage of the related operation for a certain ship or group of ships, and on the basis of this letter the Minister gives instructions to the Industrial Fishery Department to proceed according to the rules. Then there is a fee that has to be paid to the national treasury and then the Minister signs the authorization for the related operation.

MR MENEZES LEITÃO: Does this fee have to be paid through an account of the State bank or is it possible to pay this fee to anyone else?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): The Minister only signs authorization for oil bunkering when the money is paid into the Central Bank and there is a receipt which is attached to the case file. That means this is the only way that the Minister will sign the licence.

MR MENEZES LEITÃO: When the two *Amabal* vessels were arrested you became conscious, as you say, of the common practice of the *Virginia G* of infringing the laws that regulate the bunkering of oil in the EEZ. Do you confirm that?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Would you repeat the question, please?

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MR MENEZES LEITÃO: When you made an inspection of the *Amabal* vessels you became conscious that the *Virginia G* was already infringing the rules regarding the bunkering of oil in the EEZ.

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Yes, I can confirm that. It was actually the sixth voyage that they were making.

MR MENEZES LEITÃO: So you concluded that a more intensive control was needed to avoid this situation?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Yes.

MR MENEZES LEITÃO: You received this letter, as I understand – it was produced by Panama – that asks you for an authorization from the *Amabals* to supply oil to the vessels *Amabal I*, *Amabal II*, *Rimbal I* and *Rimbal II*. Do you confirm having received this letter? I am talking about the request. You received a communication from the agency of the *Amabals* and they asked for permission to do an operation of supplying fuel. This is a letter you sent on 14 August. What did you ask for the operation?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): The answer was signed by me in the correspondence that we had with the Bijagós agency. They asked to receive fuel and we, as usual, as it has to be done in the presence of inspectors, asked about the date, the place and time that they were going to take on the fuel.

MR MENEZES LEITÃO: You received a letter from the Bijagós agency. Can you read what the agency answered to you, please?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*):

The management of the agency in reply to your correspondence N180/GCFISCAP/09 of 14 August would like to inform you that the coordinates for fuelling operations are 17,35 and 12,00. This operation will be done at 1600 hours on 21 August 2009. The tanker is called the *Virginia G*.

MR MENEZES LEITÃO: Could you also read the note you wrote in this letter?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): “I have read the contents and I would like to know whether or not the ship in question has authorization for a related operation to sell fuel in the EEZ of Guinea-Bissau.”

MR MENEZES LEITÃO: So it is not the position according to the laws of Guinea-Bissau and you communicated that to the agency Bijagós. Was your decision communicated to the Bijagós agency?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Yes.

MR MENEZES LEITÃO: This decision was communicated to the Bijagós agency. Can you confirm that?

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MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Yes, I can. It was communicated in the same way that they received the first note.

MR MENEZES LEITÃO: My question is, is it possible for a fishing vessel when it demands the authorization to simultaneously get the authorization for the oil tanker to do a fishing-related operation in the EEZ?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): The tanker, in order to bunker, has to have a licence. The place of fuelling has to be reported so that the inspectors can be present.

MR MENEZES LEITÃO: So when you ask for the name of the vessel that will perform this kind of operation, you have an interest in knowing that the vessel is licensed to perform that operation or not. Is that so?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): That is correct.

MR MENEZES LEITÃO: You were not interested in getting the name of the vessel to know if the vessel had a beautiful name, for instance?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): No. I wanted to know the name of the ship because I have a list of ships that have authorization to perform this operation, so I asked the agency to give us the name of the donor ship and to learn if it had authorization for the operation.

MR MENEZES LEITÃO: After that there was a decision of the Interministerial Commission of Maritime Surveillance to confiscate the vessel with all its products and cargo. Was it possible for the *Virginia G* to appeal this decision?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): The *Virginia G* was arrested on the 21st, it arrived in Bissau on the 22nd, and it was only on 28 August that a person appeared with full powers from Penn Lilac Trading who was the appointed representative of the *Virginia G*. Before that date we did not know who the owner of the ship was.

MR MENEZES LEITÃO: Was the owner anonymous according to the registration? Did you only have information about the Penn Lilac company based in Panama?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): There was no reaction after what we did, so what we did was to find out from the crew. We questioned the crew, we found that most of them were Cuban, and contacted the Cuban Embassy. There were three from Ghana and one from Cape Verde. It was only after six days that Mr Alvarenga came from Africargo claiming to be the representative of the *Virginia G*.

MR MENEZES LEITÃO: When that happened you notified the representative of the shipowner of the decision about the vessel – is that so?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): That is true. It was after that date that we knew who we needed to contact. So that is when we submitted the notification to the representative, Alvarenga.

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MR MENEZES LEITÃO: Did Mr Domingos Alvarenga decide to put in an appeal against the decision of the CIFM?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Not that I know of, no. It was only after 15 September that he asked to submit an appeal but he was doing it out of time, as the time-limit was 15 days.

MR MENEZES LEITÃO: He could put in an appeal after being notified before the courts of Bissau, but he did not put in any appeal against the decision of the Interministerial Commission?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): No, he never did.

MR MENEZES LEITÃO: So, having passed the deadline to appeal from this decision, the Interministerial Maritime Surveillance Commission decided to reconfirm the decision. Can you confirm that?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Yes, I confirm that.

MR MENEZES LEITÃO: When was this reconfirmation of the decision disclosed to the shipowner's representative?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): It was communicated on 19 September, as far as I can remember, but I can have a look at the document.

MR MENEZES LEITÃO: I think it is correct. We have not much time. Let me ask this. Afterwards, have you any recollection when they put an interim measure against the decision to confiscate the oil of the ship? Have you any knowledge of this situation?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Yes. After two months Mr Alvarenga came with a lawyer, then after that they scheduled a meeting with us so that we could – all the time-limits had been exceeded and that was when they introduced a suspension order. That suspension order was immediately objected to by the National Attorney's Office.

MR MENEZES LEITÃO: The Attorney of State was not even notified about this interim measure. Do you confirm that?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): What I know is that the Public Prosecutor sent his opinion to the Secretary of State for Fishery. It was then sent on to the supervisory services, who objected to the suspension order.

MR MENEZES LEITÃO: According to the law of Guinea-Bissau, the decision of the Interministerial Commission to confiscate the vessel was definitive. Is that so?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Yes, it was.

MR MENEZES LEITÃO: Has the shipowner at any time requested a bond or anything to release the vessel?

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MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): Not while I was in the inspection service, no.

MR MENEZES LEITÃO: One last question. Is it possible to get an authorization or fishing licence or fishing-related operations authorization in Guinea-Bissau by telephone or radio?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): As I explained at the beginning, there must be a letter sent to the Minister of Fisheries, and he sends it to the appropriate department, and that department writes a *pro forma* invoice and that goes to the Bank of Bissau to the account of the public treasury.

MR MENEZES LEITÃO: Payment can be made by radio or telephone or to anyone else for this authorization?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): That is correct.

MR MENEZES LEITÃO: Was there any payment of *Virginia G* to anyone that you know referring to the August operation?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): No.

MR MENEZES LEITÃO: No further questions.

THE PRESIDENT: Thank you, Mr Leitão.

I would like to ask the Agent of Panama whether he wishes to cross-examine. Mr Gallardo, you have the floor.

MR GARCÍA-GALLARDO: Thank you, Mr President.

MR NOSOLINY VIEIRA
CROSS-EXAMINED MR GARCÍA-GALLARDO (PANAMA)
[ITLOS/PV.13/C19/5/Rev.1/Corr.1, p. 28-33]

MR GARCÍA-GALLARDO: Mr Hugo Nosoliny, what is your current position? Do you have employment in a company?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): I am the CEO of the fishing port of Guinea-Bissau.

MR GARCÍA-GALLARDO: Since when?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): For the last three months.

MR GARCÍA-GALLARDO (*In Spanish*): Are you a party to any civil or criminal proceedings in the courts of Guinea-Bissau?

THE PRESIDENT: Mr Gallardo, would you repeat the question, please? We did not have the translation.

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MR GARCÍA-GALLARDO: I was just asking Mr Hugo Nosoliny whether he still has any open criminal, civil or administrative proceedings for any activity undertaken during his position as coordinator of FISCAP.

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): I was investigated by the Public Prosecutor’s Office and I was placed in preventive custody. The case has not yet been tried. I was arrested so as not to interfere with the investigation by the Public Prosecutor.

MR GARCÍA-GALLARDO: Is it normal that the Prosecutor’s Office decides to issue a *despacho*, in Portuguese – I believe it is an order — to create an *Observatório do Ministério Público* with the Fisheries Department, the Secretary for Fisheries, granting this new body the competence and the measures to *fiscalização do processo de emissão de licenças de pescas, de despachos sobre prorrogações de licenças e de autorizações de qualquer tipo de transbordo?*

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): The Public Prosecutor of Guinea-Bissau is competent to investigate any citizen of Guinea-Bissau. I am a citizen. I am not above the law, and when there is a warrant from the Public Prosecutor I must obey it, but I also have the right to be presumed innocent until proven otherwise.

MR GARCÍA-GALLARDO: Have you ever been on board the *Virginia G*?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): I was on board the *Virginia G*. I went to visit the ship with a parliamentary delegation of Guinea-Bissau, the Committee of Agriculture and Fisheries, because around that time there were five ships under arrest in the port of Bissau. They went to see how the supervision was going of unlawful fishing and I went with the members of the delegation to the *Virginia G*.

MR GARCÍA-GALLARDO: Mr Hugo Nosoliny, what do you understand when reading the provisions of the Decree of 2000, article 3(3)(c), as “activities of logistic support to fishing vessels at sea” – in Portuguese *actividades de apoio logístico ás embarcações de pesca no mar?* (*No reply*) You hear my question, Mr Nosoliny?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): I understood, yes. Fishing itself is a connected activity, a related activity, i.e., the extraction of fish from the water, and there are other related activities which are support activities, maybe fishing gear.

MR GARCÍA-GALLARDO: Has the *Virginia G* capacity to tranship fish catches?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): We surprised the *Virginia G* with its hose inside the *Amabal II* supplying fuel, and it was quite obvious what it was supplying. It was not fish; it was gas oil.

MR GARCÍA-GALLARDO: Is that the type or products or services that can be provided by a fishing logistical support vessel as defined in your legislation?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): There is a clause in our legislation that says all logistical support requires licensing, and the *Virginia G* twice had licences to supply fishing vessels, but it did not have any licence on board on 21 August, unlike the previous two times.

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MR GARCÍA-GALLARDO: The *Virginia G* needed the licence, a licence, in this case an authorization, using the wording of your law, or not?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): It needed authorization – you can call it an authorization or a licence – for fishing-related operations.

MR GARCÍA-GALLARDO: Would you agree with me that article 7 of Decree 6-A/2000 related to the *Embarcações de pesca nacionais e estrangeiras* – article 7(2)(a). Would you read the paragraph, please?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): “National fishing vessels belonging to Guinean natural persons”.

MR GARCÍA-GALLARDO: This is in relation to the implementation of the general provisions of the main Fisheries Act or Decree. I am putting on the screen the first page of the Joint Order, which was in force for 12 years until early 2013, this year, and was issued by the *Ministério das Pescas e do Mar* and the *Ministério da Economia e Finanças*. Could you please read the third paragraph and explain to me the scope of this legislation? Does it apply to national fishing companies operating their own vessels or charter vessels?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): In view of the fact that the implementation of policies requires fees for fishing and a simplification of the conditions for national companies, that is Guinea-Bissau companies, who operate their own or chartered ships. It is written down.

MR GARCÍA-GALLARDO: The next page, please. This is the annex reflecting the levies to be paid. When reading this document and looking to the latest case that you mention of refuelling operations between two fishing vessels with a fishing licence in Guinea-Bissau to operate within the EEZ to exploit marine living resources, what type of levy would be applied if those vessels had the flag of Guinea-Bissau?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): If they were flying the flag of Guinea-Bissau, these would be the charges. Every ship flying the Guinea-Bissau flag refuels in Guinea-Bissau, which is their port of origin. They do not need to remain permanently in the fishing area.

MR GARCÍA-GALLARDO: Could you please explain to this Tribunal at once – any witness has been unable to relate, or the Guinea-Bissau representative at least – what was the purpose of such a wider definition of *apoio logístico*, logistic support, when there are thousands of ships much bigger than the *Virginia G* every day – not every day, certainly not, but a lot – according to publicly available information, lawfully traversing under the principles of freedom of navigation and related rights? What is the risk for these types of vessel that our experts have been able to explain in this room? Is there any reason to impose such a levy for an environmental reason? Is it a reason to improve the sustainable fisheries? Is it customs legislation? What is the level of risk for such tankers that are providing a service that, unfortunately, to date only a few companies own, one of them directly or indirectly by the Prime Minister of this country, called Petromar, public accounts available in Galp, which is now the main shareholder of the company, allowing the country to develop these types of

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activities? What is the finality of its levy in the case as was applied to *embarcações estrangeiras*, a point that I cannot see in this paper, in this order?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): The *Virginia G* twice in 2009 paid for the right to provide logistical support to fishing vessels. In the general fishery law article 23 says that a logistical support operation requires a licence, so the *Virginia G*, as it has a tare of less than 1,500, pays 4,800 a year.

MR GARCÍA-GALLARDO: This is the one paid by *Virginia G*, in this case Penn Lilac Trading or the management company Lotus Federation – I am sorry, Gebaspe – or the charter company at the time of the arrest, and not maybe the one paid by the local agent, to avoid a discussion that has no sense.

But, to finalize my intervention and my questions to the witness, I would really like to come back to Annex 42, which is, unfortunately for this case, the well-known evidence where neither the shipowner of the *Virginia G* nor the charterer of the *Virginia G*, but the local agent of the fishing company who was wishing to receive those services within the economic exclusive zone outside the territorial sea as an ancillary activity to the activity of fishing – and certainly we will elaborate a lot on this on Friday – and then when reading this letter and listening to the explanations that you have provided to the representative of Guinea-Bissau, you have confirmed that this letter was well received by you and that by this second letter, this is the letter from the local agent of the fishing vessels, it is never in the letter of the local agent of the shipowner of the *Virginia G*, you authorize the realization of this supply not for 365 days but particularly for some days – one day in this case – where you agree upon two preconditions.

Then if we move to Annex 16 and we see the letter where you request a position where the bunkering supply of fuel oil or gas oil was being supplied, please retain this position and the date, the hour and the vessel that was making the supply. What is the reason, Mr Hugo Nosoliny, to draft this letter, handwritten, together with another letter on the same date, stating something very ambiguous, where you say: “The content of this correspondence was analyzed and in the conclusion of FISCAP all the differences in the information requested. It proposed that your agency certify whether the vessel supplying fuel” – it is not fuel – “is duly authorized for this operation in the EEZ of Guinea-Bissau”. So the tracking record of companies that had requested in the past to avoid further local problems but contested the interpretation that your country is making of the international provisions of UNCLOS in particular in relation to the activities in the EEZ, you were confusing because – we need to put this in context. Can you please confirm that the vessels *Amabal I* and *II* left the port of Bissau in the night of August 20 after having committed, if I follow your interpretation, different subsequent infringements on refuelling with no imposition of a single fine, allowing them to pay with a credit and informing you whenever they leave that they will come again to apply for bunkering? Do you agree that the vessels were released in the evening of this date?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): I am coordinator of maritime inspection. What I have to do is supervise fishery in the waters of Guinea-Bissau. My job is to make sure all the ships abide by the rules. On the *Virginia G*, on 21 August, at 18.00 hours the inspection team surprised the *Virginia G* supplying fuel. The procedures are that the shipowner or his representative has to ask for authorization, but our job was to supervise and check everything, so that is why we asked the agency if it confirmed whether the *Virginia G* was legally licensed to perform this operation. Did it have a licence? Did it have the same

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licence that it had in June to bunker the *Amabal* without having authorization to supply them? On 21 August it did not have authorization, and so we took the ship to Bissau.

THE PRESIDENT: I am sorry to interrupt you, Mr García-Gallardo. I was advised that you have already exhausted the time allotted to Panama for cross-examination, and we have passed already six o'clock, so could you conclude?

MR GARCÍA-GALLARDO: Thank you.

The only thing I would ask is that this morning the inspector of FISCAP confirmed that the vedettes left the port of Bissau in the evening of 20 August, and it is maybe a coincidence that there was a difference of less than four nautical miles between the position that was reported to you by the local agent of the fishing companies and the position where the vessel was arrested by FISCAP and the navy. It is curious what happened to the *Virginia*, when some days later the *Amabal* vessels were released again without any penalty. Do you have any comment on this?

MR NOSOLINY VIEIRA (*Interpretation from Portuguese*): The inspection ships, the *Baleia II* and *V* have 500 horsepower engines, 34 miles an hour. We knew the position where the operation was going to take place and we went looking for them because the *Virginia G* systematically supplied ships in our waters without authorization. When it had authorization with a group of companies, it did it for others; so we were watching its movements in our waters.

THE PRESIDENT: This is the last question and answer.

MR GARCÍA-GALLARDO: Thank you very much.

THE PRESIDENT: Thank you.

I would like to know if the Agent of Guinea-Bissau wishes to re-examine now we have already passed six o'clock

MR MENEZES LEITÃO: No, your Honour.

THE PRESIDENT: Thank you very much.

Mr Nosoliny Vieira, thank you for your testimony. Your examination is now finished so you may withdraw, please.

This seems to exhaust your list of witnesses for today, Mr Leitão. Since we have already passed six o'clock this brings us to the end of today's hearing. The hearing will be resumed at ten o'clock tomorrow morning. Have a nice evening.

(The sitting was closed at 6.08 p.m.)

5 September 2014, p.m.

PUBLIC SITTING HELD ON 5 SEPTEMBER 2013, 10 A.M.

Tribunal

Present: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judges ad hoc* SÉRVULO CORREIA, TREVES; *Registrar* GAUTIER.

For Panama: [See sitting of 2 September 2013, 10 a.m.]

For Guinea-Bissau: [See sitting of 2 September 2013, 10 a.m.]

AUDIENCE PUBLIQUE DU 5 SEPTEMBRE 2013, 10 H 00

Tribunal

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président*; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK, *juges*; MM. SÉRVULO CORREIA, TREVES, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 2 septembre 2013, 10 h 00]

Pour la Guinée-Bissau : [Voir l'audience du 2 septembre 2013, 10 h 00]

THE PRESIDENT: Good morning. The Tribunal will continue the hearing in the case concerning the vessel *MV Virginia G*.

Mr Leitão, I understand that you wish to call now the expert, Mr Mussa Mane.

MR MENEZES LEITÃO: Yes, Mr President, if it pleases the Tribunal.

THE PRESIDENT: Thank you, Mr Leitão.

The Tribunal will then proceed to hear the expert, Mr Mussa Mane. He may now be brought into the courtroom.

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Examination of Witnesses and Experts (continued)

MR MANE

EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)

[ITLOS/PV.13/C19/6/Rev.1, p. 1-4]

THE PRESIDENT: I now call upon the Registrar to administer the solemn declaration.

(The expert made the solemn declaration)

THE PRESIDENT: Good morning, Mr Mane. I wish to remind you of the following: the work of interpreters and verbatim reporters is a complex task. This is even more so when, as will be the case now, not only English and French are used but also a third language such as Portuguese. Therefore, I must urge you to speak slowly and please leave sufficient time after someone else has spoken to you before you answer. The statement or question of someone else before you will be translated into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has been finished, I will give you a sign to this effect by a gesture like *this*. Only then can the interpreters follow.

Mr Leitão, you have the floor.

MR MENEZES LEITÃO: Thank you, Mr President.

Mr Mane, could you please tell the Tribunal your profession and your professional background.

MR MANE *(Interpretation from Portuguese):* My name is Mussa Mane. I am a lawyer by occupation. I have a degree in law from the State University of Voronezh. I was then part of the State Department of Fisheries. Then I moved to different departments in the legal area. I was *Chef de Cabinet*, Legal Advisor to the Minister of Fisheries and Marine and I was *Chef de Cabinet* for several government members in the area of fisheries. During that time I had contact with around 100 fishing vessels that committed violations in the waters of Guinea-Bissau.

MR MENEZES LEITÃO: Could you tell us what happened in the case of the *Virginia G*? Do you get knowledge of this kind of process?

MR MANE *(Interpretation from Portuguese):* Yes. At the time I was *Chef de Cabinet* of Minister Carlos Baldé, the Minister of Fisheries. I was informed that on 21 August there was a tanker that had been arrested because it was operating in our EEZ without authorization from the competent authorities. The reports were taken to FISCAP and I personally was able to help the office preparing the documentation for the case. The Interministerial Commission analyzed the case exhaustively and, in accordance with our law, under article 52, decided to confiscate the vessel and everything that was on board.

MR MENEZES LEITÃO: Could you give the Tribunal your expert opinion as to whether this decision was correct according to the law of Guinea-Bissau, the fisheries legislation?

MR MANE *(Interpretation from Portuguese):* Yes. In fact, Guinea-Bissau law, like the legislation of most West African coastal countries, provides that fishing-related operations such as the transfer of fish, the transfer of crew and bunkering, are fishing-related operations

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and they are therefore qualified as fishing operations. In this case, to be able to operate in the waters of Guinea-Bissau, in the waters under Guinea-Bissau jurisdiction, the interested party must have authorization issued by the competent authority, i.e., the Ministry of Fisheries, under the law. In the case of the *Virginia G*, it did not have this authorization. It was not issued, and so, as a result, *Virginia G* was covered by the decree law that provides under article 52 for the confiscation of the ship *ex officio* and all the product, cargo, on board.

MR MENEZES LEITÃO: What are the proceedings according to the law of Guinea-Bissau to apply this kind of sanction and what are the legal remedies available to the shipowner in that case?

MR MANE (*Interpretation from Portuguese*): Under the law, article 52, which was revised in 2005, it orders *ex officio* confiscation, which was what happened. The law also provides that the courts of Guinea-Bissau are competent to handle infractions of the fisheries law and the shipowner has the right to appeal under article 56. The shipowner can require immediate release of the ship and this request is decided in 48 hours against payment of a bond, which would include any costs of repatriation and any other costs of the proceedings. All the shipowner had to do was request immediate release of the vessel and the court would allow this. The shipowner had to ask for this immediate release and did not do so.

MR MENEZES LEITÃO: If the shipowner has asked for the prompt release of the ship, would the case still be tried by the tribunal?

MR MANE (*Interpretation from Portuguese*): In this case, if there was the guarantee of a bond, the court, before learning the merits of the case, i.e., if there was actually a violation, could quite freely release the vessel if the bond had been paid as required by law. This is not what happened because the shipowner preferred to go the wrong way and was not able to achieve the result.

MR MENEZES LEITÃO: My question was that if the shipowner decided to pay the bond and ask for the prompt release of the vessel, what could happen afterwards? Could the bond be restituted for the shipowner if the court concluded that no sanction was to be applied in that case?

MR MANE (*Interpretation from Portuguese*): Yes, the shipowner could ask for prompt release if he paid the bond. The merits of the case and the evidence are considered. If there is an infraction, the bond is forfeited to the State. If the infraction is not proven, the bond would be returned to the shipowner. He would be entitled to get it back.

MR MENEZES LEITÃO: Do you recall any case in which the bond was restituted to the shipowner?

MR MANE (*Interpretation from Portuguese*): Yes, there was a case of the Italian ship *Mare Undarum* in 1992. It was arrested because of a false gross tonnage. The Public Prosecutor investigated the case and then it was concluded that there was actually no forgery. The bond had been deposited and it was returned to the shipowner in 1997.

MR MENEZES LEITÃO: Now my questions will be as to the remedies taken by the shipowner. I understand the shipowner did not appeal the decision of the CIFM. Is that correct?

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MR MANE (*Interpretation from Portuguese*): That is right. He took the wrong path and the time-limit had expired. He had 15 days. He could have requested an extension. The decision of the Commission was made public on 17 August and confirmed on 27 September but up till then the shipowner had not appealed against the decision, so the problem was the expiry of the time-limit. The other thing was the form used in the case. The Public Prosecutor supervises legality. If he had not agreed, he would have sent the case back to the origins, and it would have either proceeded to trial or it would have been dismissed. The competent court, the criminal branch, would have examined its merits. If there was a violation, the violator would have been found guilty. The court would never have increased the sentence that had already been issued. All this procedure in the case of the *Virginia G* was not respected.

MR MENEZES LEITÃO: To my understanding, this is a proceeding that should be appealed to the Transgressions Court. It is not correct to put an interim measure in the Regional Court of Bissau. Could you confirm that?

MR MANE (*Interpretation from Portuguese*): Yes. According to the organization of the courts of Guinea-Bissau, the Administrative Court and Civil Court are not responsible for crimes or misdemeanours. According to this assumption, the Civil Regional Court could not handle the suspension order and the decision of the Supreme Court on the case of the *Geba* was quite clear. The Supreme Court decided that the Civil Court was not competent to analyze the questions of the misdemeanour so the appeal was not the appropriate form to proceed. The Public Prosecutor reacted to this illegality because the opposing party was not heard, so the case was not legal. There was an appeal and the Guinea-Bissau Government was invited to proffer its decision, and that is how the case took place.

MR MENEZES LEITÃO: Do you confirm that according to paragraph 2 of the Civil Procedure of Guinea-Bissau it is not legal to give an interim measure without hearing the other party?

MR MANE (*Interpretation from Portuguese*): Exactly. There must be a hearing for the opposing party for legal purposes. This principle is illegal under our law if that is not the case.

MR MENEZES LEITÃO: It was affirmed that hearing or not the other party is in the discretion of the court. Do you agree with this statement?

MR MANE (*Interpretation from Portuguese*): I would not agree with that principle because I believe that the law is clear. There must be a hearing of the opposing party. It is fundamental to reach a safe decision.

MR LEITÃO: I have no further questions, your Honour.

THE PRESIDENT: Thank you, Mr Leitão.

As Panama has exhausted the time available to it for cross-examination, there will be no cross-examination of the expert.

Mr Mane, thank you for your testimony. Your examination is now finished and you may withdraw. Excuse me, would you stay here for a little longer? Judge Akl would like to ask you some questions.

Judge Akl, you have the floor.

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M. MANE

QUESTION POSÉE PAR M. LE JUGE AKL

[ITLOS/PV.13/C19/6/Rev.1, p. 4-5; TIDM/PV.13/A19/6/Rev.1/Corr.1, p. 4-6]

M. LE JUGE AKL : Monsieur Mane, vous êtes un expert juridique. Pourriez-vous fournir, s'il vous plaît, sur la base de la législation de Guinée-Bissau, des éclaircissements au sujet de la décision du tribunal régional de Bissau en date du 5 novembre 2009, ordonnant au FISCAP et à la Commission interministérielle des pêcheries de s'abstenir de toute mesure concernant la saisie du navire *Virginia G* et des produits se trouvant à bord ?

Le 13 novembre 2009, le Procureur général de Guinée-Bissau a tenu cette décision pour nulle et non avenue. Il a informé le même jour le Premier Ministre que la décision de la Commission interministérielle était correcte et a conclu en ces termes (*interprétation de l'anglais*) : « Nous n'avons pas de réserves quant à l'utilisation du carburant que transportait ce navire dans notre ZEE. »

Pouvez-vous éclairer, s'il vous plaît, sur les points suivants ?

Est-ce que le fait de former un recours entraîne *ipso facto* la suspension de la décision du Tribunal ?

Deuxièmement, à quelle date le recours a-t-il été formé et quelle suite lui a été donnée par la juridiction compétente ?

Troisièmement, la décision du tribunal régional de Bissau était-elle, oui ou non, en vigueur lorsque le Ministère des finances a ordonné le déchargement du gazole et, cela, en stipulant « *malgré l'ordonnance judiciaire de suspension de la saisie* » ?

MR MANE (*Interpretation from Portuguese*): The suspension order was presented after the deadline. This was an illegal action. The legal time-limit for making the appeal had administratively expired.

The second question: Although they tried to present this suspension and make an appeal, the administrative appeal for these situations was impossible because these processes are aimed at an inquiry. These are misdemeanours and they remained in effect even after the reform of 1993. The law of 1852 was in effect in Guinea-Bissau and, in accordance with this law, this type of case does not allow an administrative appeal although it comes from the Interministerial Commi[ssion].

The third question: After the suspension order was received there was a violation of the sacred principle in our law, which is the hearing of the opposing party. There had to be a guarantee and there are precedents in case law, there are legal cases from the courts of first instance, in which a person cannot be charged *in absentia*. So there was a series of illegalities committed by the judge in this case, in which case the Public Prosecutor has the right as the supervisor of the law in our legal system – he is the supervisor of legality and, as such, he could not allow an illegality committed by a judge. The appeal must have a suspensive effect and all that was necessary here was for the State to confiscate the fuel aboard, as it belonged to the State. The Ministry of Finance is the government entity that manages the State's property and the Minister of Finance did it legally and as part of his legal powers.

M. LE JUGE AKL : Merci, Monsieur Mane, mais je parlais du recours contre la décision du Tribunal qui a été fait par le Procureur général.

Pouvez-vous nous donner la date du recours du Procureur général contre la décision du tribunal et dire quelle suite a été donnée par la cour compétente de Guinée-Bissau ?

MR MANE (*Interpretation from Portuguese*): I have to say that I do not remember the whole course of the appeal. What I can say is that in the contestations that I actually

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presented to the Guinea-Bissau court, the heart of the question, even regarding the main case, unfortunately the acts were suspended and the case did not go forward because the shipowner did not use the mechanisms available to him to lodge an appeal.

M. LE JUGE AKL : Merci beaucoup Monsieur Mane.

THE PRESIDENT: I thank Judge Akl for his questions.

Mr Mane, I thank you for your answers. You may now withdraw. Thank you very much.

Mr Leitão, do you wish to call the next expert, Mr Adilson Dywyná Djabulá?

MR MENEZES LEITÃO: If it pleases the Tribunal, yes.

THE PRESIDENT: Thank you, Mr Leitão.

The Tribunal will proceed to hear the expert Mr Adilson Dywyná Djabulá. He is now entering the courtroom.

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MR DJABULÁ
EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/6/Rev.1, p. 5-9]

THE PRESIDENT: I now call upon the Registrar to administer the solemn declaration.

(The expert made the solemn declaration)

THE PRESIDENT: Good morning, Mr Djabulá. I wish to remind you of the following. The work of the interpreters and verbatim reporters is a complex task. This is even more so when, as will be the case now, not only English and French are used but also a third language such as Portuguese. Therefore, I must urge you to speak slowly and please allow sufficient time after someone else has spoken to you before you answer. The statements or questions of someone else before you will be translated into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has been finished I will give you a sign to that effect by a gesture like *this*. Only then can the interpreters follow you.

Mr Leitão, you have the floor.

MR MENEZES LEITÃO: Thank you, Mr President.

Mr Djabulá, can you say for the Tribunal what is your profession and your professional experience in the fishing sector?

MR DJABULÁ *(Interpretation from Portuguese):* Good morning, everybody. I am Adilson Dywyná Djabulá. I am from the Law Faculty of Bissau, where I have been teaching the law of the sea and maritime law until the present day. I am also currently the Legal Adviser for the Minister of Fisheries since 2010 and also adviser of the national coordinator of the Commission. I have a published work about fishery in Guinea-Bissau, the legal framework on fishery in the face of the law of the United Nations.

MR MENEZES LEITÃO: Could you explain to this Tribunal what has been the framework for the situation of supplying fuel at sea in the African region in which Guinea-Bissau is situated?

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

MR MENEZES LEITÃO: What are the statutory provisions in the States of West Africa referring to the qualification of fuel bunkering as a fishing-related activity?

MR DJABULÁ *(Interpretation from Portuguese):* For example, in Senegalese and Mauritanian law, when they talk about fishing vessels they include support vessels also in the

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broad sense. Cape Verde’s and Guinea-Bissau’s legislation also sets out very clearly this position.

MR MENEZES LEITÃO: What is the framework for the supply of fuel at sea in Guinean law?

MR DJABULÁ (*Interpretation from Portuguese*): In Guinea-Bissau’s legislation the law on the supply of fuel is governed by three basic instruments. They are: the general fishery law of 2000; what we call the regulation on industrial fishery of 1996; and a joint ordinance of 2006. The general law of fisheries, articles 1 and 2, covers fishing and connected activities. Article 3 describes fishing-related activities, including bunkering of fishing vessels.

Article 6 speaks of fishing vessels again. Here, once again, it includes support vessels, therefore vessels for fishing-related operations.

Article 23 of the general fisheries law expressly provides for this support activity and states that the member of a government responsible for fishery must issue authorization against payment of a fee.

Article 52 establishes the sanctions for misdemeanours and violations.

Other articles cover fisheries and fishing-related activities. They state that a lack of authorization results in the confiscation of the vessel.

MR MENEZES LEITÃO: If a fishing vessel needs to be bunkered for fuel, is it enough for that fishing vessel to have a fishing licence, or does the tanker also have to get a fishing-related operational licence? Is it necessary for the tanker to have a fishing-related operational licence?

MR DJABULÁ (*Interpretation from Portuguese*): This question is answered in article 29 of 1956. This article says that fishing vessels, those that actually operate in fishing, only need a fishing licence; they do not need authorization for bunkering. The vessel that needs the authorization is the vessel that supplies the fuel, i.e., the logistical support vessel. That one needs an authorization. The support vessel, in order to be able to do its work, requires this authorization.

MR MENEZES LEITÃO: What are the fees applicable to a tanker when it asks for an authorization to perform a fishing-related operation?

MR DJABULÁ (*Interpretation from Portuguese*): The charge is in the joint ordinance of 2006. There are two of them and the second one revoked the first one. In the annex to these ordinances for the supply of fuel, vessels of up to 1,500 GRT have to pay – to convert it into euros – around €6 or something per gross registered tonnage. This is the basis for establishing the total amount, and it depends on duration; there are quarterly, six-monthly and other lengths of time for the authorization.

MR MENEZES LEITÃO: My question is – because it has been alleged before this Tribunal – is this kind of payment anything similar to applying a tax to this kind of activity? To explain better, if an oil tanker is subject to the customs law of Guinea-Bissau, to the tax laws of Guinea-Bissau, what would she pay? Would it be the same as this fee for the fishing licence that is applied, or would it be different?

MR DJABULÁ (*Interpretation from Portuguese*): There is a difference in terms of the law between bunkering at sea and bunkering on land. Bunkering in the port, according to current

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law, is regarded as a commercial activity, and as such it is subject to more of a tax charge. There it will have to pay an import tax; in terms of gas oil it would be a tax of 5 per cent of the value of the product. It would also have to pay an industrial tax, which is 25 per cent on the income, i.e., the amount it earns from this activity. In the case of bunkering at sea it is different. Our law takes account of the aspect of conserving resources, the environment, because as this activity causes environmental damage because of fuel spillages, waste that may occur during the transfer, and the time that fishing vessels actually remain in the fishing area means that they fish more because they do not interrupt their fishing activity to go to port to refuel and therefore they catch more fish, which has environmental effects. Even in the joint ordinance it says that we must take account of the environmental aspect, and this activity must be conditioned. So the charge that is made takes account of the principle of environmental protection. The idea of this charge is to influence the work of the agents in this activity and make them think twice, and if they do not want to pay then they will not bunker at sea. If they want to continue bunkering at sea they have to pay this amount to fund environmental policies, the consequences of a spillage and the funding of policies and remedying the damage that can be caused. It is a very small amount in fact, but it can be raised if it is not enough to deter this kind of activity.

MR MENEZES LEITÃO: Can we infer from your statement that this kind of fee is not an extension of the customs law of Guinea-Bissau to the EEZ? Can you say something about that?

MR DJABULÁ (*Interpretation from Portuguese*): Of course. If it was an extension of the customs law it would have to pay more. It would be approximately what we find in the industrial tax, 25 per cent. To charge a ship 25 per cent of the value of the cargo, then it would be different.

MR MENEZES LEITÃO: I was only trying to ask, because we have not much time, two questions more, first of all to do with the powers – and I ask you to be brief – of maritime surveillance officers and maritime fishery officers. What could you say to this Tribunal about the kind of powers that these maritime surveillance officers have in controlling activity in the waters in the jurisdiction of Guinea-Bissau?

MR DJABULÁ (*Interpretation from Portuguese*): FISCAP is an independent authority. According to our law it is considered the secretariat of the CIFM. The inspection agents have authorization to stop a ship. They can stop a vessel if there is strong evidence of a violation. They have the authority to arrest a ship. They can conduct a provisional arrest, and then the violation is checked on arrival at the port of Bissau. We also have observers who do not have this power; they are on board the fishing vessels and all they do is keep a record of what is happening, making sure that the fishing vessel is operating in accordance with the law. If they find there has been an infringement, then they report it to FISCAP by radio or they can mention it in their report, which they submit later. They do not have the power to arrest the ship. The report and the observations of the observer are evidence for any administrative cases brought against vessels.

MR MENEZES LEITÃO: Is there any intervention by military forces in this process of arresting vessels or controlling the activity of vessels in the seas?

MR DJABULÁ (*Interpretation from Portuguese*): Within the surveillance operations we find the operative forces. We have inspectors. The seafarers are requested from the navy,

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such as pilots. They are involved in this process. There are also fusiliers; they are there simply to protect the inspectors, the surveillance operators and the safety of the ship. Sometimes there are even attempts to sink the surveillance vessel because the ship is pursuing another and it does not want to be caught, and they even undertake manoeuvres to try and sink the surveillance vessel. So members of the military are there to protect the ship and the participants in the mission. The inspector is the person who supervises and runs the mission. They are there only at the orders of the head of the mission.

MR MENEZES LEITÃO: Have there been, to your knowledge, any situations in which FISCAP inspectors were attacked by the vessels they were inspecting?

MR DJABULÁ (*Interpretation from Portuguese*): Yes, yes. An example of this situation is the case of a witness who was here yesterday, and he was attacked and thrown overboard. He had to be rescued by another ship that was passing and he was then taken to shore in Sierra Leone and then returned to Bissau. During an approach in an area near Senegal, when an inspection boat was addressing a vessel, the vessel refused to stop and there was resistance from the master of the ship and people were thrown overboard.

MR MENEZES LEITÃO: No further questions, Mr President.

THE PRESIDENT: Mr Djabulá, Vice-President Hoffmann has a few questions to ask.

MR DJABULÁ
QUESTION FROM VICE-PRESIDENT HOFFMANN
[ITLOS/PV.13/C19/6/Rev.1, p. 9-10]

VICE-PRESIDENT HOFFMANN: Actually I only have one question, Mr President. Thank you.

Mr Djabulá, you are the Legal Advisor to the Ministry of Fisheries and you explained to us about the procedure, the practice and the legal requirements with regard to authorization for supplying fuel. You also mentioned that fishing vessels do not require authorization to receive the fuel. You said that they required a licence for fishing operations. Then you explained it is the supplying vessel that supplies the bunkering that would need the authorization, and that is according to the law of Guinea-Bissau, as you explained.

However, yesterday we had the testimony – this was also in the file in front of this Tribunal – of Mr da Silva, who was the former Minister of Defence and also a member of the Interministerial Commission. He mentioned the arrest of two vessels, the *Amabal I* and the *Amabal II*, ten days prior to the arrest of the *Virginia G*. The one fishing vessel was arrested for supplying fuel to the other, and they were both arrested, I presume, because they did not have authorization for that purpose.

They were taken to the port of Bissau, and then on the 20th, nine days later, they were released, but on the next day they were again arrested because of receiving fuel from the *Virginia G*. I just wanted some clarification on this issue. Does the vessel receiving fuel need authorization to receive the fuel, other than the authorization required by the vessel providing the fuel?

MR DJABULÁ (*Interpretation from Portuguese*): This situation mentioned before happened before I joined the Ministry of Fisheries, because I joined in 2010 and the case occurred in 2009, but I can say something about this. In the case on the 11th, with *Amabal I* and *II*, there

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was the supply of fuel from one vessel to the other, and this supply is similar to supply by a tanker. The idea is to avoid environmental damage. The ship was authorized to do it but they were arrested. One was supplying the other. The other had a fishing licence. We could ask why did we also arrest the one that was receiving the fuel. In this case our law requires the supplying vessel to have authorization only but, as I said, in this case the inspectors have the power in the event of a suspected violation to arrest a ship. This is a provisional arrest, which is later going to be checked. They will examine the case in detail in the port to make sure it is in order. Then when they arrive at the port, they check who supplied who with fuel and see who has actually committed the infringement. The case may be submitted to FISCAP to prepare charges, which then sends the case to the Interministerial Commission, but the ship that needs the authorization is the one supplying the fuel. I hope this explanation has cleared up your query.

VICE-PRESIDENT HOFFMANN: Mr Djabulá, I wish to note that in that case, both vessels, according to the testimony by Mr da Silva, received a penalty of US \$150,000, the one receiving the fuel and the one supplying the fuel.

LE PRÉSIDENT : M. le juge Marotta Rangel souhaiterait poser une question.

M. DJABULÁ

QUESTION POSÉE PAR M. LE JUGE MAROTTA RANGEL

[ITLOS/PV.13/C19/6/Rev.1, p. 10-11; TIDM/PV.13/A19/6/Rev.1/Corr.1, p. 12-13]

M. LE JUGE MAROTTA RANGEL : J'aimerais avoir certains éclaircissements additionnels. Malgré le fait que vous avez été très clair dans le désir de montrer la législation de votre pays, non seulement à l'égard de la pêche, mais aussi à l'égard du phénomène le plus récent que l'on appelle la *bunkering*. Il y a, d'après la législation de votre pays, certains points qui méritent des éclaircissements parce qu'il y a des conséquences concrètes à l'égard de la question qui a été soumise au jugement de notre Tribunal.

Il y a quelques points plus concrets d'après lesquels on voit que la législation de votre pays n'est pas tout à fait la même que celle que l'on trouve dans d'autres pays, même peut-être dans le mien. Il n'y a pas de doute que, d'après ce que vous venez de dire, les pouvoirs de l'Etat côtier à l'égard de la pêche ne restent pas seulement dans le cadre de la mer territoriale, mais aussi s'étendent au cadre de la Zone économique exclusive de l'Etat côtier, quoique la Convention sur le droit de la mer reste imprécise ou en silence à l'égard de cette question. C'est exactement le point que j'aimerais comprendre et à l'égard duquel je vous demande une réponse précise.

Dans le cadre de la Zone économique exclusive de votre pays, la compétence de l'Etat ne reste pas, à l'égard de la pêche, dans le cadre traditionnel de la mer territoriale, mais s'étend aussi à une distance de 200 milles marins à compter de la frontière intérieure de la mer territoriale. C'est-à-dire qu'il y a une certaine compétence plus large qui nous ne trouvons pas jusqu'à ce moment, au moins dans le cadre de la législation de mon pays. C'est exactement ce point à l'égard duquel j'aimerais recevoir de votre part une confirmation par rapport à ce que vous venez de dire, c'est-à-dire, au fond, que la compétence de votre pays à l'égard de la pêche ne reste pas seulement dans le cadre traditionnel de la mer territoriale mais s'étend également, d'une certaine façon, dans le cadre de la Zone économique exclusive. Ai-je bien compris ce que vous avez dit, Monsieur le témoin, s'il vous plaît ?

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MR DJABULÁ (*Interpretation from Portuguese*): If I understood correctly, the question has to do with knowing whether our legislation setting out the power granted to Guinea-Bissau includes not only the use of living resources but also the operation of other activities in relation to this activity.

M. LE JUGE MAROTTA RANGEL : J’aimerais avoir des informations non seulement sur la compétence de votre Etat à l’égard de la juridiction sur la mer territoriale, mais aussi à l’égard de la zone économique exclusive.

MR DJABULÁ (*Interpretation from Portuguese*): In terms of territorial waters, there can be no doubt that the United Nations Convention is clear on this aspect. It is a territorial space; it is the State’s maritime area. Here there can be no doubt about the State’s power over living and other resources. In terms of the EEZ, the powers of the State over living resources in the space, article 56 recognizes the right of States to have this power. They also have other competencies under article 56, for example, the regulation of artificial islands, among others. Guinea-Bissau law is very close to the Montego Bay Convention. If we look at our Constitution, article 10 speaks expressly of the sovereignty or jurisdiction over living resources and other resources under article 56. Our fisheries law is a development of the Convention and very closely reflects the law of the Convention.

This was the subject of my masters dissertation, in which I give my opinion. My dissertation is about whether fishing law in Guinea-Bissau closely follows the Convention and how it agrees with it and how it diverges from it, and my conclusion was that it follows the Convention very closely. The supply of fuel is not expressly covered by the Convention but it is an activity that can be regulated by the State. If we compare the rights of a coastal State and other States, there is a standard that we can find in article 59 which says that a conflict between the rights of the coastal State and a third State is settled on the basis of the advantage that can be created for the coastal State and the other. This can result in some restrictions in the EEZ to protect the interests, for example, of fisheries. Our legislation is very similar.

M. LE JUGE MAROTTA RANGEL : Je vous remercie. Merci bien.

THE PRESIDENT: Judge Ndiaye.

M. DJABULÁ

QUESTION POSÉE PAR M. LE JUDGE NDIAYE

[ITLOS/PV.13/C19/6/Rev.1, p. 11-12; TIDM/PV.13/A19/6/Rev.1/Corr.1, p. 13-14]

M. LE JUGE NDIAYE : Je vous remercie Monsieur le Président. Bonjour Monsieur Djabulá. Pourriez-vous avoir la gentillesse de produire devant le Tribunal la Convention sous-régionale de 1993 - cela nous aidera peut-être à régler ce problème -, à laquelle sont parties le Sénégal et la Guinée-Bissau ? Merci beaucoup. Vous avez un exemplaire de la Convention de 93 ?

MR DJABULÁ (*Interpretation from Portuguese*): I have it on my computer. I can only consult article 4 of the Convention.

THE PRESIDENT: Will you give us the text later, please, because time is running out.

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I thank the Vice-President and Judges Marotta Rangel and Ndiaye for their questions and I thank Mr Djabulá for your explanation. Your examination is now finished and you may withdraw.

Mr Leitão, I understand you wish to call the last expert, Mr Carlos Pinto Pereira. The Tribunal will then proceed to hear the expert Mr Carlos Pinto Pereira.

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MR PINTO PEREIRA
EXAMINED BY MR MENEZES LEITÃO (GUINEA-BISSAU)
[ITLOS/PV.13/C19/6/Rev.1, p. 12-16]

THE PRESIDENT: I call upon the Registrar to administer the solemn declaration to be made by Mr Pinto Pereira.

(The expert made the solemn declaration)

THE PRESIDENT: I wish to remind you of the following: The work of interpreters and verbatim reporters is a complex task. This is even more so when, as will be the case now, not only English and French are used but also a third language such as Portuguese. Therefore, I must urge you to speak slowly, and please leave sufficient time after someone else has spoken to you before you answer. The statement or question of someone else before you will be translated into English and then into French, so you have to wait until the interpretation into French has been completed. When the interpretation into French has been finished, I will give you a sign to this effect by a gesture like *this*. Only then the interpreters can follow.

Mr Leitão, you have the floor.

MR MENEZES LEITÃO: Mr Pinto Pereira, could you please tell the Tribunal your profession and your professional background?

MR PINTO PEREIRA *(Interpretation from Portuguese)*: I am a lawyer. I graduated from the Faculty of Law of the University of Lisbon and I have practised the law of the sea since 1985.

MR MENEZES LEITÃO: You also have held political offices in Guinea-Bissau. Would you tell the Tribunal what those political offices were?

MR PINTO PEREIRA *(Interpretation from Portuguese)*: Actually in Guinea I had several political responsibilities in government both as a Minister of Justice and as a Minister of Public Administration and Work. I was also a counsel to the President of the Republic and Head of the Cabinet of the Minister of the Republic.

MR MENEZES LEITÃO: Do you recall the General Law of Fisheries of Guinea-Bissau?

MR PINTO PEREIRA *(Interpretation from Portuguese)*: Yes, I believe I know it reasonably.

MR MENEZES LEITÃO: I want to ask you a question about the situation of fishing vessels and bunkering vessels. To my knowledge, a fishing vessel needs a fishing licence and a bunkering vessel needs a licence to perform fishing-related operations. Is that so?

MR PINTO PEREIRA *(Interpretation from Portuguese)*: Yes, that is correct. Actually our General Law of Fisheries, which rules this activity in our country, follows what happens in these regions, a very large concept for fisheries where both fishing operations and fishing-connected activities are included in the General Law of Fisheries. This last one concerns support vessels that make fuel transfers as well as the transport of fishing. These are all concerned in this law.

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MR MENEZES LEITÃO: To perform a fishing-related operation, but does she need to communicate where the fishing related-operation will take place?

MR PINTO PEREIRA (*Interpretation from Portuguese*): In my understanding, yes, any operation must be reported to the competent authorities.

MR MENEZES LEITÃO: What would be the sanction for a fishing vessel, according to the law of Guinea-Bissau, for not communicating that such an operation will take place?

MR PINTO PEREIRA (*Interpretation from Portuguese*): Section 14 in our Law of Fisheries is very large, from small fines and to confiscation of the vessel, of all its gear and other products that are within the ship. The sanction will depend on the gravity. Probably it will have a sanction not so severe. When there is not a licence to perform the operation, the sanction will be much, much larger.

MR MENEZES LEITÃO: I was asking about the lack of communication. You do not have this text in front of you but I can expose it to the [expert] if the Tribunal permits me to. It is article 54 of the General Law of Fisheries. (*Same handed to the expert*) Can you read the first statement under point (e)?

MR PINTO PEREIRA (*Interpretation from Portuguese*): “Not fulfilling the dispositions of article 31 is a very serious infraction. Serious fishing infractions are punished according to this article of the law”.

MR MENEZES LEITÃO: In your opinion, is it legal for a fishing vessel to receive fuel from non-authorized bunkering vessels to operate fishing-related operations in the waters of Guinea-Bissau?

MR PINTO PEREIRA (*Interpretation from Portuguese*): Can you please repeat the question?

MR MENEZES LEITÃO: Is it legal for a fishing vessel to receive bunkering of fuel from non-authorized bunkering vessels that are not authorized to operate in the area of Guinea-Bissau?

MR PINTO PEREIRA (*Interpretation from Portuguese*): It is not legal.

MR MENEZES LEITÃO: Now I would like to ask another question. It relates to the legality of the sanction that was applied to the *Virginia G*, confiscation by the State. Could you give your opinion on the act of confiscation that was performed? Is it legal or not?

MR PINTO PEREIRA (*Interpretation from Portuguese*): The operation was conducted by a fiscal entity from our surveyors entity. They are fishing inspectors and they are competent to proceed with the application of measures, namely the confiscation of the vessel when they find those vessels in situations of illegality. One of these is the absence of authorization. When a vessel is found with no competent licence, it is making an impeachment of the law according to our law, and this is the most serious punishment – the lack of licence and the lack of authorization for fishing-related activity. Any vessel found in our waters, in both fishing operations and fishing-related operations, without a licence is officially confiscated. This is the law of our country and it confers on the Minister of Fisheries and the

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Interministerial Commission the possibility to apply this measure. What happened in the case of the *Virginia G* was what I have said. It was confiscated in conditions already displayed, supplying another vessel. The measure was reported to the Interministerial Commission of Maritime Surveyors and the sanction was applied under these terms. The vessel was confiscated by the law because the law says so, and by the Minister of Fisheries.

MR MENEZES LEITÃO: What remedies are applicable to the shipowner to contest this decision of the Interministerial Commission?

MR PINTO PEREIRA (*Interpretation from Portuguese*): The shipowner has several solutions to decide. One of them is ruled by our General Law of Fisheries, which concerns fisheries in our country. In this framework our law follows the United Nations Convention which concerns the immediate release of the vessel. When the shipowner decides that the conditions in which its vessel was confiscated did not respect the law, he has a measure foreseen by the General Law of Fisheries that the courts of Guinea have 48 hours to decide on the immediate release of the ship upon payment of a fine. If the shipowner follows this course, the vessel must be released within 48 hours. It has to be this way, because we are ruled by administrative measures and executive powers, so this could be executed immediately. If a shipowner does not want this measure, he may ask for the immediate release of the ship upon payment of a bail, which will be returned to him in the final hearing of the case, in case it is found that these measures were not legally applied. Besides this special measure, it is possible for the shipowner to take other measures, namely to ask for the suspension of this act, followed by a main action, that is to say an appeal that this measure be not applied. Do you wish me to continue?

THE PRESIDENT: Mr Leitão, we have reached 11.30, but I would like to extend the sitting so that you can finish the examination of the expert witness.

MR MENEZES LEITÃO: Thank you, Mr President.

Mr Pinto Pereira, I only want to know whether you considered what the shipowner did to be correct, namely to request an interim measure before the Regional Court of Guinea-Bissau?

MR PINTO PEREIRA (*Interpretation from Portuguese*): If it depended on me, I would not follow this course. As I said, the General Law of Fisheries foresees a special solution for this case, which would result within 48 hours. Article 65 requires a delay for the court to give its opinion. If the shipowner followed it in that way, the court would have to respond and answer within 48 hours.

MR MENEZES LEITÃO: That was the interim measure. Do you recall whether there was an appeal of that decision of the Regional Court of Bissau?

MR PINTO PEREIRA (*Interpretation from Portuguese*): There was actually an appeal that came, and it could not be another way, because the decision was postponed and several factors must be considered. First of all, a measure was done without the State having been heard. Penalties cannot be applied without hearing the other party, and when there is a risk that a final measure may be effected without hearing the other party, the adversarial principle must be used. In the end this is similar to the Portuguese legislation as well as the European legislation. The adversarial principle when hearing the other party can influence the primary hearings. In this case there was no other risk, because it had already been applied.

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Besides this measure, I cannot see any other one that could be used. Here in this case it would not be created no other situation of risk as the judges did not proceed right because an appeal should be placed. This appeal was made, a suspensive effect was granted to it, and the decision could be executed. But the worst was when making reference to the special appeal foreseen in the General Law of Fisheries there is a conclusion that I could take. We see that once the injunction was made, the shipowner tried a main action, but this main action was not followed because the shipowner was no longer interested. So that an action can be appreciated in courts, an entity must pay something in the beginning, and when this is not done, then the proceedings do not take place. The shipowner made an injunction, he also made a main action, but when he was asked to pay this beginning amount, then when this party does not pay the costs within the foreseen delay, the court also allows it to be paid but it would be doubled; and as it is nothing of those, the injunction is still in court and it is still running in Guinea-Bissau.

MR MENEZES LEITÃO: Thank you so much, Mr President.

THE PRESIDENT: Thank you, Mr Leitão. I understand that the list of witnesses and experts of Guinea-Bissau has been exhausted.

We have now reached 11.38. The Tribunal will withdraw for a break and continue at noon.

The examination of Mr Pereira is now finished. Thank you very much for your testimony. You may withdraw.

(Break)

THE PRESIDENT: We will now continue the hearing, and I give the floor to the Co-Agent of Guinea-Bissau, Mr Bastos.

MR MENEZES LEITÃO: Sorry, Mr President, we decided that I will give the first statement, and my colleague afterwards.

THE PRESIDENT: Then, Mr Leitão, you have the floor.

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First Round: Guinea-Bissau (continued)

STATEMENT OF MR MENEZES LEITÃO
 AGENT AND COUNSEL OF GUINEA-BISSAU
 [ITLOS/PV.13/C19/6/Rev.1, p. 16-20]

MR MENEZES LEITÃO: Mr President, distinguished Members of the International Tribunal for the Law of the Sea, I am now going to present my closing remarks about this case. But first I will take some time to answer verbally the questions raised by the International Tribunal.

The first question about the environmental effects of bunkering will be answered by my colleague Fernando Loureiro Bastos. Therefore I will start by answering the question about the legal remedies available under the Guinea-Bissau legal system against the confiscation of a vessel, its cargo and its gas oil.

The sanctioning process of fishing vessels is divided into two phases: one administrative phase and one judicial phase. At the administrative level, the competent administrative authority, CIFM, analyzes the infraction documented by FISCAP, and decides upon it.

Following the CIFM decision, the shipowner has 15 days to complain, to appeal to the court or to pay the fine (article 60, paragraphs 1 and 2, of Decree-Law No. 6-A/2000).

If the sanction is the confiscation of the vessel, article 52(2) of Decree-Law 6-A/2000 provides for an appeal to the Guinea courts against the CIFM decision.

If the shipowner presents the appeal, the case will be heard by the criminal branch of the territorially competent court. In this case, this would be the Bissau Regional Judicial Court. The Minister of Fishery would send the case files to the Public Prosecutor's Office, which would conduct the necessary enquiries and send them back to the criminal branch, if the charge was confirmed. The case is tried, with an appreciation of whether or not there has been a violation. CIFM's decision may be totally or partially confirmed or also reformulated, safeguarding the principle of the prohibition of *reformatio in peius*, i.e., it cannot increase a sentence that has already been fixed; but the court may also decide on an acquittal, provided that there are grounds for it. The final outcome depends largely on the evidence.

The other possibility is for the shipowner to submit to the criminal branch a request for an immediate release of the vessel, pursuant to article 65 of Decree-Law 6-A/2000. The court would hear the request and decide the case summarily, within 48 hours, and decide on a suitable bond to cover the cost of the ship, procedural costs, etc. After the security deposit had been paid, the vessel would be released immediately. In case the request is denied, the shipowner is allowed to use the means set out in article 292 of the Convention of Montego Bay.

If a bond is fixed, the shipowner would still be able to mount a defence in the main case, in which the court would appreciate the basic issue, i.e., the existence or not of the offence of unauthorized fishing-related operations. If the offence is confirmed, the bond is declared forfeit to the State. Otherwise the court orders its return to the shipowner.

THE PRESIDENT: Excuse me, would you slow down?

MR MENEZES LEITÃO: This happened in the case of the Italian ship *Mare Undarum* between 1993 and 1997.

In the case of the *Virginia G* none of this occurred because the shipowner didn't pay the fine, didn't appeal in time against the decision of the CIFM, and did not request the prompt release of the vessel through payment of a bond. As our experts had the opportunity

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to say today, they decided to apply to another forum because they did not want to pay the costs, and afterwards they did not pay the judicial costs of the proceedings.

Another question is Guinea-Bissau's practice in implementing article 23 of Decree-Law 6-A/2000 with respect to bunkering operations for fishing vessels in the EEZ in general and, in particular, for fishing vessels flying the flag of Panama.

In Guinea-Bissau, fishing-related operations require authorization from the person in charge of fishery. The interested party has to submit an application in advance and the ship that it assists must have a fishing permit. The application for fishing-related operations must be submitted ten days prior to the start of the intended operation.

THE PRESIDENT: I am sorry, Mr Leitão, would you slow down, please?

MR MENEZES LEITÃO: The applicant or his representative (usually a shipping agency) directs the request to the Minister of Fisheries, requesting authorization for refuelling at sea, identifying the ships or beneficiary fishing companies and the characteristics of the support vessel (the fuel supplier).

The application is received by the Minister's office, which sends it to the Directorate-General of Industrial Fishery for the necessary procedures (checking the conformity of the documentation, issuing a *pro forma* invoice and payment of the invoice to the treasury's current account). The applicant settles the payment of the fee in the account of the public treasury at the Central Bank of West African States (BCEAO).

After this stage has been completed, the authorization is printed; proof of payment and other documents are attached to it and they are sent to the Director-General of Industrial Fishery. The Director-General confirms its legality and the payment; he appends his signature and submits it to the Minister for a signature, giving authorization. The authorization goes to the owner of the oil tanker or its local representative.

This process is followed by every vessel, regardless of the flag she flies. Guinea-Bissau attaches examples of authorizations given to Russian or Chinese vessels. For example, Annex 1 is an authorization for a fishing-related operation for a Russian fishing vessel. It was asked for by Afripêche and it was paid in this case for a period of six months for the Russian vessel to do a fishing-related operation.

You can now see another authorization for fishing-related operations for a Chinese vessel. It has a six-month validity and authorizes it to carry out operations in the area of Guinea-Bissau.

In the case of Panama we have managed to find *this* example, besides the case of the *Virginia G*. This is a case where a Panamanian ship, the *Anuket Ruby*, was authorized between 4 May 2011 to 3 November 2011 to do bunkering in the EEZ.

You can see in Annex 4 that this precise ship, *Anuket Ruby*, of Panama, was verified due to inspection. They saw proof of payment and authorizations, and it was inspected and left to go after verification; so there was no question that the *Anuket Ruby* was authorized in the areas of Guinea-Bissau.

The process of requesting the shipping operation was already performed by Guinea-Bissau, as you can see. The first request for the operation in May was a request from the enterprise Afripêche. We have provided translations, but this is the real document. This enterprise asked the Minister to give an authorization to perform the operation in a week in May between 22 and 29 May. It attached its certificate according to Panama. It was produced in Las Palmas, Spain, although certified in Panama, and now what is the process, the emission of a *pro forma* invoice establishing the payment in Guinea-Bissau by the *Virginia G* itself.

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This is the deposit in the BCEAO for the fishing-related operation into the bank that has to be attached to the process, the account of the BCEAO – established in the account of the treasury the payment by the *Virginia G*. It was in May, I must stress.

The first version of the authorization: at the first point it is only signed by the Director-General, and then the definitive authorization is signed by the Ministry of Fisheries, as it is duly performed. It was received by the local representative and now it is how it was done.

Moving to Annex 6, we see the June operation by the *Virginia G*. You can see the same letter by Afripêche of 15 June requesting authorization for its ships and not any other ones.

These are the same certificates that have to be presented – and the *pro forma* issued in this situation is valid until 16 July, and it has to be paid. With this *pro forma* they paid the amount into the BCEAO in June. The receipt is the first emission of this authorization by the Director-General of the Fishing Industry, and it comes to the Minister and the Minister issues the definitive authorization that is delivered to the shipowner or its local representative, normally a fishing agency in Bissau.

That is how it was done before by the *Virginia G* on two previous occasions, a few months before the arrest of the *Virginia G*, but unfortunately this did not happen in August when they did not have the required fishing licence authorization.

You have also asked if logistical support vessels (bunkering vessels) are required to obtain and keep on board their authorization for carrying out bunkering operations, or if it is enough for fishing vessels to obtain these authorizations for bunkering operations for both fishing vessels and bunkering vessels by telephone or radio.

The answer is that all logistical support ships and fishing vessels must obtain their authorization in advance and keep on board any authorizations and/or permits issued for them to operate in the Guinea-Bissau EEZ. This is mandatory, according to article 16 of Decree-Law 6-A/2000, so it is not possible to do the operations without having this document at all times on board. That is mandatory, according to the laws of Guinea-Bissau. However, it is possible to have this document many days before the voyage and is normally received in another port, and they travel with the document from there.

It is not possible at all for ships performing fishing-related operations to be authorized to operate by a phone call or by radio. There has been confusion in this situation. What happens by phone call or radio is the obligations of communication from the fishing vessel itself, which has to report everything about its situation, even naturally an activity of bunkering. If they fail to do so, they can be sanctioned because it is considered a serious fishing infraction according to article 54(f) and (i) of the General Fisheries Law, and No. 2 establishes a minimum fine for serious fishing operations of \$150,000.

Even so, if a fishing vessel fails to perform this kind of communication, it could also be sanctioned as a serious fishing operation; but this has nothing to do with the authorization that the bunkering vessel should have, which is different, as explained here today. It is a different licence to the fishing vessel. The bunkering vessel must have a licence for a fishing-related operation and the fishing vessel has to have a licence for fishing operations – although it would not be legal, according to the laws of Guinea-Bissau, because it would be an accessory to an infraction to accept bunkering from a ship that is not authorized to perform this kind of activity in the waters of Guinea-Bissau. Therefore this situation will be naturally sanctioned according to the laws of Guinea-Bissau.

You have also asked how much had to be paid for authorization and if a payment was made in the case of the *Virginia G*.

The answer is that all logistical support ships, whether they supply fuel or provisions or take on fish, pay a symbolic charge, naturally, to bear the cost of issuing the authorization

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(designing and printing the authorisation form as you see in this case). It is not a very big fee, as you can see.

This payment is totally mandatory according to article 23 of Decree Law 6-A/2000 with articles 39 and 40 of Decree 4/96. It is mandatory without exception.

Fishing-related operations have to be specially authorised in advance by the Minister of Fishery and the interested party must pay a symbolic charge, at the time fixed by Joint Ordinance of the Minister of Fishery and the Minister of Finance 02/2006, which has returned to the 2001 charges. Now my colleague will speak of a new Joint Ordinance, 1/2013 of 31 January 2013, which is in force, and has updated the fees. That is perfectly normal because there have passed 12 years after the last fixation of the fees and there has been growth, inflation, in the area of the CFA franc. Because of that, it is perfectly normal that the fees are updated.

In the case of the *Virginia G* the Joint Ordinance applied this rate, 4,800 CFA francs per year gross registered tonnage (GRT) for tankers up to 1,500 GRT and 6,000 CFA francs GRT per year for tankers above 1,500 GRT. In the case, as happened, of semi-annual or quarterly authorization, the law established that these amounts are divided by 2 and 4, but what happens very frequently is to divide even for lesser periods and *pro rata temporis*. That is what happened to the *Virginia G*; they had twice before only asked for a week's authorization, and what the authorities of Guinea-Bissau did was to apply to *pro rata temporis* the rates that were established at that moment.

In the case of the *Virginia G*, as was explained, no payment was made to perform the operation and this is why she was arrested. As you can see, it is impossible to pay any amount outside the legal channels. It is required, according to the administrative rules, that a *pro forma* invoice is issued, confirmation of payment in the treasury's account of Guinea-Bissau is attached, and only after that is the authorization issued, first by the Director-General and afterwards by the Minister. So it is impossible to make payments outside this process.

What are the rates? The rates are very low in this situation but the *Virginia G* did not bother even to pay that. The *Virginia G* has a GRT of 1,500 so would pay 4,800 CFA francs for the GRT. The calculation is that what the *Virginia G* would pay per year would be 3,840,000 CFA francs, which is an amount of €5,840. If you divide this by 52 weeks, which would be done for the *Virginia G*, the amount is €112. This is what the *Virginia G* should pay to perform this activity in Guinea-Bissau. Remember that the rate which I am applying for conversion from CFA francs to the euro is 655.95.

I would like to say more but I understand we are very short of time, so I will do the rest tomorrow and I will now hand over to my colleague for further comment. Thank you very much for your attention.

THE PRESIDENT: Mr Leitão, thank you very much for your answers to the questions asked by the Tribunal.

Now I give the floor to Mr Bastos.

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STATEMENT OF MR LOUREIRO BASTOS
CO-AGENT AND COUNSEL OF GUINEA-BISSAU
[ITLOS/PV.13/C19/6/Rev.1, p. 20-29]

MR LOUREIRO BASTOS: Mr President, distinguished Members of the International Tribunal for the Law of the Sea, before starting my arguments in defence of the Republic of Guinea-Bissau, I must express my personal satisfaction at being present at this International Tribunal and before the learned Judges that compose it.

My interest in the international law of the sea and international law dates back several decades and the opportunity to address your Excellencies about some relevant issues in these areas is an honour I cannot refrain from expressing publicly.

In the distribution of questions within our team, it is my responsibility to address the issues relating to the international law of the sea and the international law in general. I will present the position of Guinea-Bissau on two matters: the objectives of the fisheries legislation of Guinea-Bissau and the powers of Guinea-Bissau as a coastal State in relation to the regulation of refuelling or bunkering fishing vessels in its exclusive economic zone.

Guinea-Bissau is one of the poorest countries in the world, and it has a very fragile economy. It is completely dependent on agriculture and fisheries. Revenue resulting from fishing, the preservation of its fishing resources, and the protection of the marine environment are absolutely essential for the country.

Since independence, the country has trusted fully in international mechanisms for conflict resolution, which is clearly demonstrated in its use of arbitration for the delimitation of its maritime boundaries.

Guinea-Bissau has cooperated fully with the International Tribunal for the Law of the Sea so that the present dispute with Panama can be resolved in accordance with the rules of the United Nations Convention on the Law of the Sea and international law.

Before turning to the development of the two questions previously listed, attention should be drawn to the importance of sustainable fisheries for Guinea-Bissau and for the international community as a whole.

A balanced policy of conservation and exploitation of marine living resources in the exclusive economic zones and in the high seas is constantly threatened by illegal, unreported and unregulated fishing. All coastal States, large and small, powerful or extremely weak, as is the case of Guinea-Bissau, are equally victims of this criminal practice. The combating of illegal, unreported and unregulated fishing should be done taking into consideration the traditional principles of international law of the sea by the flag States of the vessels pursuing this illegal activity.

The 1995 FAO Code of Conduct for Responsible Fisheries proposed, as a general principle, that:

6.11 States authorizing fishing and fishing support vessels to fly their flags should exercise effective control over those vessels so as to ensure the proper application of this Code. They should ensure that the activities of such vessels do not undermine the effectiveness of conservation and management measures taken in accordance with international law and adopted at the national, sub-regional or global levels.

Reality has, however, shown that the performance of the flag States is not sufficient to prevent the uncontrolled exploitation of marine living resources. The performance of the flag State would be appropriate if the nationality of the ships actually revealed a genuine link between the flag State and the fishing vessel. Unfortunately, this is not what happens in a

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high percentage of cases of fishing vessels and ships engaged in the support of fishing activities.

If the flag State is not interested in exercising the competencies that international law imposes on them, there are two possible options. On the one hand, we have the prospect of a progressive and irreversible extinction of marine living species. On the other hand, we need to find legal options that will permit the achievement of results equivalent to the proper performance of its duties by the flag State. Watching the extinction of marine species passively does not seem to be a real option. Accordingly, the only option really available to us is to try to find legal solutions that will achieve results equivalent to the effective performance of the responsibilities of the flag State with regard to combating illegal, unreported and unregulated fishing.

One alternative that has been followed to overcome the inertia and passivity of the flag State has been the strengthening of the powers of the port State. Another solution has been the disruption of the merely formal legal relationship that exists between the vessel and its flag State on the one hand, and that between the flag State and those who collect the benefits of the activities they pursue on the other.

In the present case, Guinea-Bissau has already shown the lack of a genuine link between the vessel *Virginia G* and Panama, and also between the company owning the vessel and Panama. The substantial juridical ties are not with Panama but with the Spanish State. That is the reason that justifies all the efforts that were made by the Ambassador of Spain with regard to the release of the vessel. The reality of the Spanish nationality of the vessel is sufficient proof of the good relations that exist between Guinea-Bissau and Spain which led to the release of the vessel *Virginia G* and not to its sale after legal confiscation as compensation for the damage suffered by Guinea-Bissau in this case.

As this is the genuine link with Spain of both the vessel *Virginia G* and the owner of the vessel *Virginia G*, it is important to highlight the solution that the European Union has adopted in regard to the combating of illegal, unreported and unregulated fishing. According to Council Regulation (EC) No 1005/2008 of 29 September 2008, which established a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, the combating of this criminal practice is done through the application of Community law applied directly to European Union nationals who reap the benefits of this activity. Article 39 (Nationals supporting or engaged in IUU fishing) of Council Regulation (EC) No 1005/2008 states that:

1. Nationals subject to the jurisdiction of Member States (nationals) shall neither support nor engage in IUU fishing, including by engagement on board or as operators or beneficial owners of fishing vessels included in the Community IUU vessel list.
2. Without prejudice to the primary responsibility of the flag State, Member States shall cooperate amongst themselves and with third parties and take all appropriate measures, in accordance with national and Community law, in order to identify nationals supporting or engaged in IUU fishing.
3. Without prejudice to the primary responsibilities of the flag State, Member States shall take appropriate action, subject to and in accordance with their applicable laws and regulations with regard to nationals identified as supporting or engaged in IUU fishing.

Reference to European Union law is, according to Guinea-Bissau, relevant and adequate for the demonstration of the possibility of circumventing the perverse effects of the classical principles of the international law of the sea, and doing it legally.

The International Tribunal in this case is faced with two situations where it is also obliged to overcome the perverse effects of an outmoded application of the international law of the sea according to a traditional perspective. On the one hand, there is the recognition of

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the substantial content of the link between the vessel *Virginia G* and its flag State and, on the other hand, the question of the powers of the coastal State and the recognition that the refuelling or bunkering of fishing vessels is an integral part of the powers of coastal States.

In order to solve these problems it is necessary to acknowledge that the Convention was negotiated during the 1970s and that there has been considerable change and development within the field of environmental law. It seems both logical and desirable that the Convention give expression to this commendable evolution by the manner in which it interprets current issues and applies an environmental understanding to them.

In 1999 President Mensah, commenting on the functions of the International Tribunal, said that:

The International Tribunal for the Law of the Sea and, as appropriate, the Seabed Disputes Chamber, have a major role in the interpretation and application of provisions in UNCLOS regarding the protection and preservation of the marine environment in disputes between Parties to the Convention and other appropriate entities concerning those provisions.

He added that: "The Tribunal is conscious of the special role it may be called upon to play in interpreting the provisions of the Convention on the protection and preservation of the marine environment."

The interpretation of the Convention according to the protection and preservation of the marine environment should consider the practice of a number of States, as demonstrated by Spanish legislation, to sanction members of the crew criminally for fishing violations committed on the high seas, especially when a flag of convenience is used, and it should also take into consideration the practice of the European Union to sanction their nationals for fishing violations related to illegal, unreported and unregulated fishing, as regulated by the Council Regulation of 2008.

Therefore, taking in consideration an evolutionary interpretation of the Convention, Guinea-Bissau states that it did not violate article 300 of the Convention as it has always exercised its rights in good faith and in a non-abusive manner in order to defend its natural resources and achieve the highest protection of its marine environment.

It is time to start examining each of the two legal issues that I listed earlier. We will begin with the objectives of the fisheries law of Guinea-Bissau. Guinea-Bissau argues that its national fisheries legislation pursues the regulation of fishing and environmental objectives, employing a precautionary approach, taking into consideration that the country is very poor and is totally dependent on the living natural resources that can be gleaned from the maritime areas within its sovereignty and under its jurisdiction.

The 1995 FAO Code of Conduct for Responsible Fisheries proposed as a general principle that:

6.5 States and sub-regional and regional fisheries management organizations should apply a precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and to preserve the aquatic environment, taking account of the best scientific evidence available. The absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment.

Giving application to the Code of Conduct for Responsible Fisheries, and applying a precautionary approach, Guinea-Bissau approved Decree No. 4/96 of 2 September 1996 that "establishes the general principles of the policy of use of fishing resources". Article 39 (logistical support and transshipment operations) of Decree No. 4/96 provides:

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1. Logistical support operations for vessels that operate in waters under the national sovereignty and jurisdiction, such as provisioning with victuals, fuel, the delivery or receipt of fishing, materials and the transfer of crews, and transhipment of catches must be previously and specifically authorized by the Ministry of Fisheries.

2. Requests for the authorization of the operations considered in the previous number must be made at least ten (10) days prior to the expected date of entry in the waters under the sovereignty and jurisdiction of Guinea-Bissau of the vessels that should perform said operations and include the following information:

- a) A precise description of planned operations;
- b) Identification and characteristics of the vessels used for logistical support or transhipment of catches and the time to be spend in the waters of Guinea-Bissau;
- c) Identification of the vessels that will benefit from operations of logistical support or transhipment of catches.

In 2006, Alan Boyle, commenting on the environmental jurisprudence of the International Tribunal, during the commemorations of its 10th anniversary, stated:

It is not only the fisheries conservations Articles of the 1982 LOSC which may have been modified by the precautionary principle. The definition of pollution of Article 1, the obligation to do an environmental impact assessment in Article 206, the general obligation to take measures to prevent, reduce and control pollution under Article 194, and the responsibility of States for protection and preservation of the marine environment under Article 235 are also potentially affected by the more liberal approach to proof of environmental risk envisaged by Rio Principle 15.

Bunkering has been regulated as a fishing-related activity in the fisheries law of Guinea-Bissau since 1996, because the domestic law has as its objective the highest standards of environmental protection and conservation of natural living resources.

The regulation of bunkering as a fishing-related activity is a direct consequence of the use of the precautionary approach by Guinea-Bissau. The evaluation by the International Tribunal about the way the precautionary approach was used by Guinea-Bissau should take into consideration what was said in the Advisory Opinion of 1 February 2011 about the concepts of “due diligence” and “reasonably appropriate administrative measures”.

In paragraph 117 of the Advisory Opinion it was stated:

The content of ‘due diligence’ obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that ‘due diligence’ is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.

In paragraph 228 of the Advisory Opinion it was also said:

What is expected with regard to the responsibility of the sponsoring State in terms of Annex III, article 4, paragraph 4, of the Convention is made clear in the second sentence of the same paragraph. It requires the sponsoring State to adopt laws and regulations and to take administrative measures which are, within the framework of its legal system, ‘reasonably appropriate’ for securing compliance by persons under its jurisdiction. The standard for determining what is appropriate is not open-ended. The measures taken must be ‘reasonably

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appropriate'. The appropriateness of the measures taken may be justified only if they are agreeable to reason and not arbitrary.

There is no justification to consider that the fisheries law of Guinea-Bissau is not "agreeable to reason" or that it is "arbitrary":

First, because payments by vessels fishing in the exclusive economic zones of coastal States, or pursuing fishing-related activities in these maritime zones, are expressly authorized by article 62, paragraph 4(a), of the Convention.

Secondly, because all bunkering operations of fishing vessels that may be pursued in its exclusive economic zone must be pursued only after formal authorization from the authorities of Guinea-Bissau, through a formal written document, in which the precise location of where the fishing boat will be refuelled is noted.

Thirdly, because prior authorization to conduct refuelling operations in its national fisheries law is not a customs duty or other tax in disguise, and it was not intended to extend a customs-type radius beyond the territorial seas and the contiguous zone, but is merely a payment for a service rendered by its administration.

Taking into account what was said earlier, Guinea-Bissau rejects allegations that the collection of an amount of money for the issuing of a written authorization for the bunkering of fishing vessels in its exclusive economic zone has fiscal objectives contrary to the position taken by the International Tribunal in the *M/V "SAIGA" (No. 2) Case*.

The classification of the activity of bunkering as a fishing-related operation by the domestic law of Guinea-Bissau is also in accordance with the laws of the States of the West African sub-region.

According to Judge Tafsir Malick Ndiaye, giving a summary of the fisheries law of the West African area where Guinea-Bissau is situated:

National legislation provides a more complete definition of fishing and related fishing operations than the Convention. Thus, fishing implies the act of capturing or trying to capture, retrieve or kill by any means whatsoever, biological species whose habitual or dominant living environment is water.

Related fishing operations include: (a) transshipment of fish products in maritime waters under national jurisdiction; (b) storage, processing or transport of fishing products in maritime waters under national jurisdiction aboard vessels prior to their landing, and the collection of fishing products at sea; (c) bunkering or supplying fishing vessels, or any other activity to provide logistical support to vessels at sea.

The performance of a fishing-related operation without authorization in the exclusive economic zone is sanctioned by the confiscation of the vessel and all its products according to the domestic law of Guinea-Bissau.

Guinea-Bissau states that its actions were in full conformity with article 73, paragraphs 1 and 2, of the Convention, which legitimizes confiscation as a legitimate reaction to serious violations of domestic law in fishery matters.

It is now possible to make an assessment of the powers of Guinea-Bissau, as a coastal State, in relation to the regulation of bunkering of fishing vessels in its exclusive economic zone.

Guinea-Bissau points out that bunkering is a relatively recent economic activity and that the problems it raises are still not adequately addressed at the level of international law and, consequently, by the Convention.

The International Tribunal, in the *M/V "SAIGA" (No. 2) Case* in 1999, took no definitive position on the question of whether the regulation of the activity of bunkering of

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fishing vessels in the exclusive economic zone is a competence of the coastal State or, alternatively, is a residual activity covered by the high seas freedom of the flag State of the vessel pursuing it.

In the *M/V "SAIGA" (No. 2) Case* the International Tribunal said:

The Tribunal considers that the issue that needed to be decided was whether the actions taken by Guinea were consistent with the applicable provisions of the Convention. The Tribunal reached a decision on that issue on the basis of the law applicable to particular circumstances of the case, without having to address the broader question of the rights of coastal States and other States with regard to bunkering in the exclusive economic zone. Consequently, it does not make any findings on the question.

Guinea-Bissau asserts, in its exclusive economic zone, an exclusive competence in relation to the conservation and exploration of its natural resources, living or non-living, and, as a consequence, employing a precautionary approach, an exclusive competence over certain "fishing-related operations", which include the refuelling services of fishing vessels provided at sea.

Guinea-Bissau accepts that the exclusive economic zone has a *sui generis* status, but, in this status, the interests of the coastal State in the preservation of maritime resources and the regulation of fisheries should prevail over the economic interest of bunkering activities carried out by tankers.

The regulation of bunkering should be included in the rights of the coastal State to regulate the capture of biological resources in its exclusive economic zone, according to article 61 of the Convention, because off-shore bunkering of fishing vessels is an activity that goes against, or otherwise hinders, the conservation of living resources.

According to the International Tanker Owners Pollution Federation Limited, in the past four decades 600 accidental oil spills caused by bunkering have been reported: 564 cases below seven tons; 33 cases between seven and 700 tons; and one above 700 tons.

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

The various facets of the bunkering of fishing vessels as an economic activity pursued in the maritime zones subject to the sovereignty or jurisdiction of a coastal State, including issues of environmental assessment, can be addressed adequately only within the powers of coastal States.

Accordingly, the freedom of navigation of ships with a flag of third States through the exclusive economic zone of coastal States should not include the right to be involved in the economic activity of bunkering of fishing vessels, according to an evolutionary interpretation of articles 58 and 61 of the Convention, given that the activity has a much stronger connection with the exercise of fishing than with the freedom of navigation.

Guinea-Bissau argues that the decision the International Tribunal will take on the matter of the recognition of the powers of the coastal State to regulate the activity of bunkering of fishing vessels in its exclusive economic zone should take into consideration what was decided in the field of environmental international law in the Advisory Opinion of 1 February 2011.

It is also important to recall what the International Court of Justice said in 1997 in paragraph 112 in the *Gabčíkovo-Nagyymaros Project* case:

the Court wishes to point out that newly developed norms of environmental law are relevant to the implementation of the Treaty ... [b]y inserting these evolving provisions in the Treaty,

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the parties recognized the potential necessity to adapt the Project. Consequently, the [68] Treaty is not static and is open to adapt to emerging norms of international law.

According to an evolutionary interpretation of the Convention, Guinea-Bissau stresses that the regulation of bunkering of fishing vessels in the exclusive economic zone is admissible owing to the sovereign rights and jurisdiction of the coastal State, recognized in articles 56, 61, 62 and 73 of the Convention. At the same time Guinea-Bissau reaffirms that it has not violated article 58 of the Convention because bunkering is a fishing-related activity, which is not included in the freedom of navigation or internationally lawful uses of the sea.

Mr President, distinguished Members of the Tribunal for the Law of the Sea, these are the main arguments relative to the international law of the sea in defence of the Republic of Guinea-Bissau.

The essence of this case, from the perspective of the international law of the sea and the international laws, is to know the current extent of the powers of a coastal State in its exclusive economic zone. Using an evolutionary interpretation of the Convention that takes into due account the developments of environmental law in the past decades and the progressive relevance of a precautionary approach, the International Tribunal will defend the position of a very poor country totally dependent on its natural resources and, at the same time, will contribute to the strengthening of environmental law in its protection.

But this case also involves damages caused to Guinea-Bissau by Panama because that country violated article 91 of the Convention by granting its nationality to a ship without any genuine link to Panama. The granting of this nationality facilitated the practice of the illegal action of the bunkering of fishing vessels without permission in the exclusive economic zone of Guinea-Bissau along with all the potential risks that derive from such an activity.

Guinea-Bissau argues that by the granting of a flag of convenience to the vessel *Virginia G* without there being the least connection between the ship and Panama, Panama has facilitated the fact that an unseaworthy vessel could conduct fishing-related operations in the waters under the jurisdiction of Guinea-Bissau.

Therefore, the counter-claim presented by Guinea-Bissau is directly connected with the subject matter of the claims of Panama, and the country is entitled to claim costs and damages that result from the granting of a flag of convenience to the vessel *Virginia G* by Panama.

On the one hand, it claims the high occupation costs resulting from keeping the vessel *Virginia G* under surveillance in the port of Bissau, relative both to the berth itself and its official and military personnel. It must be noted that the ship was in such a poor condition that the risk of it sinking in the port of Bissau was ever present.

On the other hand, it claims adequate compensation for the damage caused to the environment and the plundering of its marine resources in consequence of the inefficient supervision by Panama of the vessel *Virginia G* to which it had granted a flag of convenience.

For these reasons, I conclude by reiterating that Guinea-Bissau asks the International Tribunal to dismiss the submissions of Panama in total and to adjudge and declare that: first, Panama violated article 91 of the Convention; second, Panama is to pay compensation in favour of Guinea-Bissau for damages and losses caused as a result of the aforementioned violation, in the amount quantified and claimed by Guinea-Bissau, or in an amount deemed appropriate by the International Tribunal; and, third, Panama shall pay all the legal and other costs that the Republic of Guinea-Bissau has incurred in this case.

Mr President, learned Members of the International Tribunal, thank you very much for your attention.

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THE PRESIDENT: Mr Bastos, thank you very much for your statement.

May I understand that Mr Leitão and Mr Bastos have completed their statements this morning?

MR MENEZES LEITÃO: Yes, Mr President.

THE PRESIDENT: Thank you very much.

That brings the first round of pleadings by Guinea-Bissau to an end. The hearing will be resumed tomorrow morning at 10 a.m. for the second round of pleadings. The sitting is now closed.

(The sitting was closed at 1.02 p.m.)

M/V “VIRGINIA G”

PUBLIC SITTING HELD ON 6 SEPTEMBER 2013, 10 A.M.**Tribunal**

Present: President YANAI; Vice-President HOFFMANN; Judges MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judges ad hoc* SÉRVULO CORREIA, TREVES; Registrar GAUTIER.

For Panama: [See sitting of 2 September 2013, 10 a.m.]

For Guinea-Bissau: [See sitting of 2 September 2013, 10 a.m.]

AUDIENCE PUBLIQUE DU 6 SEPTEMBRE 2013, 10 H 00**Tribunal**

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président*; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK, *juges*; MM. SÉRVULO CORREIA, TREVES, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l’audience du 2 septembre 2013, 10 h 00]

Pour la Guinée-Bissau : [Voir l’audience du 2 septembre 2013, 10 h 00]

THE PRESIDENT: Good morning. Today we will hear the second round of oral arguments in the case concerning the vessel *M/V Virginia G*.

Before we begin, I wish to inform you that Judges Wolfrum and Kateka, for reasons duly explained to me, are absent today.

I also wish to inform you of the following: At the end of the afternoon session on 2 September 2013 the Agent of Guinea-Bissau objected to the previous display of photographs by Panama on the grounds of article 71 of the Rules of the Tribunal. Yesterday the Tribunal held deliberations on this issue and decided that only the photographs submitted by Panama in Annex 60 of its Memorial form part of the official file of this case. The Tribunal will not, however, make any modifications to the verbatim records of the hearing.

Finally, I wish to inform you that during the course of today the Registrar will communicate to the Agents of both parties a further list of questions from the Tribunal. The parties are requested to answer those questions in writing and to submit their answers by 6 p.m. on Wednesday, 11 September 2013.

I now give the floor to the Agent of Panama, Mr García-Gallardo, to make his statement.

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Second Round: Panama

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AGENT OF PANAMA
[ITLOS/PV.13/C19/7/Rev.1, p. 1-14]

MR GARCÍA-GALLARDO: Mr President, distinguished Members of the Tribunal, colleagues, when I opened the case for Panama, I explained why we seek an award for damages. We do so to secure reparation for the losses that Panama has suffered.

Panama has not abandoned any aspect of the claim. If we fail to repeat orally what we have already said in writing, we must not be taken to have withdrawn any part from our written submissions.

Those losses are both tangible and intangible, particularly the last one to Panama as flag State, with a list of arguments against our maritime policies and practices that are simply unacceptable. Some were suffered directly by Panama and others have been indirectly suffered in the person of some individuals and companies for whose protection Panama is responsible.

Panama is defending this case in the interest of its flag, its entities, the vessel *Virginia G* in particular, and all the persons and companies associated with this vessel, some of whom are still affected – the transient and multinational composition of the ship’s crew and the multiplicity of interests that may be involved in the cargo on board a single ship like the *Virginia G*. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue (*M/V “SAIGA”*, para. 107).

Panama does not seek damages on the premise that Guinea-Bissau acted lawfully; she claims damages on the premise that Guinea-Bissau acted unlawfully. Guinea-Bissau has violated the rights of Panama.

Any person who suffers interference with a right protected by international law has the right to claim damages. The claimed losses were the consequences of the arrest and the unlawful confiscation of the ship *Virginia G* and its cargo in Bissau over 14 months, including several months of *de facto* detention of the crew members.

This case has to be the second case to start consolidating the right to claim damages under the provisions of UNCLOS and other rules of international law before ITLOS. Beyond the violations of articles 56, 58, probably 73, and other related provisions, there are other very important provisions such as 224, 110, 111, 225, 300, 304, and other general principles of international law that are also the basis for this claim.

Yes, abuse of right and good faith are also important principles already mentioned not just by the doctrine but also by the jurisprudence of the ICJ and some separate opinions of Judges of this Tribunal. The protection of human rights such as those providing for the protection of due process and relevant provisions contained in international instruments for the protection of human rights, as expressed by Judges Mensah and Wolfrum in the “*Juno Trader*” Case, point 3, are also valid.

The case also presents special difficulties, but please let us be clear that this is not a “test” case where bunkering in the high seas and in the EEZ must be put under scrutiny. Those activities do not make the object of this dispute. In point 9 of a Separate Opinion in the *M/V “SAIGA” Case*, Judge Vukas stated: “It appears that both Parties accept as legal the supplying of bunkers to all other type of ships in transit through an EEZ other than fishing vessels.”

In this respect, the task is reduced to: (a) the analysis and adjudication of the conflict of the position of the parties with respect to bunkering only to fishing vessels; and (b) the fact

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that Guinea-Bissau has violated other important provisions of UNCLOS and other rules of international law.

I have to say that most Members of this Tribunal participated in the case of the *Juno Trader*, and this certainly will facilitate your task in relation to your knowledge and scope of the local provisions of Guinea-Bissau in the field of fisheries.

I would like to dedicate some minutes to the definition of logistic support ships. According to the jurisprudence of the Tribunal, the content and the consequences of the law of a State applicable in proceedings before the Tribunal is a question of fact. (Judges Wolfrum and Mensah, point 6, “*Juno Trader*”).

In the framework of the interpretation to be given to article 73, paragraph 1, and the scope of “related fishing operations”, it is critical to conduct in this case a founded analysis of the definition of “supply ships, or logistical support ships” to fishing vessels within an EEZ. Can any type of those ships be defined as fishing vessels? Do they carry out related fishing operations? Bunkering activities to fishing vessels within an EEZ is a very ancillary activity that cannot be considered as a related fishing activity.

As confirmed by different witnesses and experts proposed by Panama and me during the first round, and by some witnesses represented by Guinea-Bissau, a supply or logistics ship can provide very different services and products to fishing vessels. As explained, a supply or logistics ship is able to provide more than one of the following: food, victuals; potable water; new crews; replacement of fishing observers; medical assistance – there are also ships that operate in West Africa dedicated as hospitals to attend fishing fleets in the area, and the vessel *Esperanza del Mar* is a good example that was mentioned in the case of *Juno Trader*; cold storage capacity; fishing gear; FADs (fish aggregating devices employed in the tuna sector; equipment for the fishing vessel (spare parts, chemical products); re-labelling, packaging, cartons; transfer of catches; processing vessels (filleting, slicing, freezing and processing); and of course gas oil;

Subject to fishing regulatory approvals, there is a list of vessels recorded in the regional fisheries organizations. This also has to be taken into account because in these regional fisheries organizations mainly there are only additional vessels to traditional fishing vessels, called reefers or logistic/auxiliary vessels. There are vessel monitoring systems to control their movements into an area, such as the reefers.

It is our opinion that a wise approach would be to consider that if a ship can provide several services and products to a fishing vessel, such as the ones I have mentioned, then, effectively, it is arguable that it is a vessel conducting fishing-related operations that could enter in the scope of the sovereign rights of a coastal State in the framework of article 73, paragraph 1, because of the close link to the fishing operations of the “traditional” fishing vessels; it would be an activity directly and intrinsically related to fishing operations. On the contrary, when the ship is able only to supply a service or provide a product, it would be extremely disproportionate to consider it as a vessel related to fishing activities. The mere supply of gas oil, it is not a serious argument to consider it as a related fishing activity.

One other element that could be considered is the exclusivity of the activity. A tanker such as the *Virginia G* normally supplies bunkering not only to fishing vessels but to a wide range of merchant shipping vessels. A reefer, or a tuna auxiliary vessel on the contrary, can operate only with fishing vessels. Therefore, I think that only ships dedicated exclusively to supporting fishing activities could be entered into the definition of related fishing activities to a fishing vessel.

Another final way is to consider whether or not the activity is essential to operate as a fishing vessel. In this respect, I would say that most transport modes, whether by air, sea or road, using vehicles, aircraft or ships, need, for the moment at least, energy, and for this they need gas oil, benzenes, independent of the place where they operate, so it does not seem to be

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essential or inherent to fishing activities. A fishing vessel also consumes gas oil when it goes to port; it runs the auxiliary engines to keep power on board and cold storage.

In the end, we firmly think that the supplying of gas oil to fishing vessels can be considered as merely an ancillary activity to the fishing activity. An ancillary activity is not a related activity. Certainly it has different meanings: in French, *activités liées*; in English, *ancillary* is an adjective, meaning providing necessary support to the primary activities or operation of an organization or system – for instance, ancillary staff, in addition to something else but not as important – a person whose work provides necessary support to the primary activities of an organization or system, the employment of a specialist.

To consider a wide definition of “related fishing activities” would be like considering that for the work undertaken by your Honours in this Tribunal power or heating are essential activities to operate and to work on a daily basis. Certainly it is not the case. It could certainly affect your activity but it is not essential to the activity; it is absolutely ancillary.

To finalize this, I have another point. Judge Vukas, in the Separate Opinion (point 13), expressed the position of Guinea-Conakry, which is a neighbouring country of Guinea-Bissau and also a Party that signed the regional convention in the field of fisheries. On this point, Judge Vukas reproduced the position of Guinea-Conakry in this case in relation to these activities.

Yet, notwithstanding the link of its arguments with fishing, Guinea-Conakry insists that bunkering of fishing vessels in the EEZ is not relevant to the sovereign rights of the coastal State provided for in article 56(1)(a) of the Convention. It claims that ‘although the bunkering activities are ancillary measures of a considerable importance for the fishing vessels concerned, they constitute neither fishing nor conservation or management activities with respect to the living resources themselves’ (Counter-Memorial, paragraph 106).

We could continue for hours looking at related fishing activities. When researching the internet to look for a list of countries that has definitions of fishing vessels, I found a variety of definitions, and I even found, just for information, guidance on environmental assessments of fishing-related activities, in this case in Australia. If I were to read to you the list of fishing-related activities, you would see that it has nothing at all to do with the discussions that we are having in this case.

Just to give you an example, examples of fishing-related activities to which these guidelines apply include the use of non-prescribed fishing gear, the use of prescribed fishing gear requiring permits, taking fish in excess of FAD limits, and taking and possessing fish for charity auctions. Therefore, you can see a logical way to open the debate, that it is and was absolutely clear when UNCLOS was ratified by a lot of States.

I will also dedicate some minutes to the argument of the conservation and management of the living resources in the EEZ. This part is also critical to determine the scope of any activities covered by article 73, paragraph 1, to exploit, protect and manage living resources in the EEZ. The different arguments raised by Guinea-Bissau are really very vague and unfounded. I have the highest esteem for professors of international law, and in particular for those who on a daily basis dedicate part of their time to drafting articles and position papers on new cases and jurisprudence. Without them it would be impossible to advance the development of the international law of the sea before you, the Judges whom I have the honour to address.

Yesterday’s presentation by Professor Bastos was really interesting, but I honestly have to say that I can agree with only half of it. Environmental concerns affecting living resources and sustainable fisheries are fine and fair principles, but it is our opinion that they do not apply to support this case.

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The supporting experts and witnesses presented by Guinea-Bissau have also launched the argument of sustainable fisheries. However, their position on paper during the administrative investigation in Guinea-Bissau seems to contradict what they said in the witness box during their examination.

On the contrary, we have been unable to find a solid reason in the different provisions of Guinea-Bissau legislation to justify the need for an authorization for refuelling operations of fishing vessels in the EEZ based on grounds of environmental or fisheries laws, and concretely on the need to exploit, to conserve or to manage the living resources in the EEZ.

We are just practitioners of international law of the sea, but I will try to explain why we consider that Guinea-Bissau’s position on this point is weak:

First of all, it is surprising that a State that claims sustainability of fisheries in the Atlantic when it is not even a signatory contracting party of ICCAT, the regional fisheries management organization of Atlantic tuna. “Only” 48 States and one international organization, the European Union, are contracting parties of this organization, but Guinea-Bissau is not on the list.

In the ICCAT regional fisheries organization (and the same I could say in regard to other RFMOs such as IOTC or CCAMLR), it is only forbidden to make transshipments of fish at sea. The reefers are allowed to supply all types of services and products, including tankers doing bunkering, except the transfer of fishing products. It is mandatory to conduct these operations in the ports or anchored in the port and with the presence of fishing observers.

This is the same in Guinea-Bissau. Without any express authorization, any unloading of fish has to take place in the port of Bissau.

ICCAT Recommendation 12-03, which I put in our legal bundle, also contains a large list of types of vessels related to fishing operations in the tuna sector (please see my verbatim on day one): fishing vessels (including catching vessels, fish-processing vessels, support vessels, towing vessels, vessels engaged in transshipment and transport of tuna products, auxiliary vessels except container vessels). As I said, ICCAT is an organization with 48 contracting parties, including the European Union, and they do not ban bunkering activities to fishing vessels either in the high seas or in the EEZ. The word “bunkering” does not even appear.

The fact that some West African countries have a Regional Convention on Access and Exploitation of Fishery Resources like the one signed in 1993 by five West African countries including Guinea-Bissau, allowing them to regulate bunkering at sea, is fine, but this is not the international rule; it is not in UNCLOS, which, in the end, is the Convention on the Law of the Sea.

In the same way that Guinea-Bissau has presented examples, certain aspects – we have not seen the subsequent part of the text – of local legislation from other neighbouring countries, the situation is very different, for instance in Guinea-Conakry. I will not come back to that. I have already textually mentioned the position of Guinea-Conakry on this point.

The legislation that Guinea-Bissau unlawfully applies with the argument that neighbouring countries have similar provisions is not a good argument. Indeed, there are 166 States which have ratified UNCLOS and only quite a few have decided unilaterally to make a different interpretation to the others that are in the majority. I could start enumerating the list of States that, with the tool of the internet again, we have been able to check. I can tell you that across the world the majority of them –starting by a variety of countries – Brazil, Spain, Canada, Australia, Namibia, Mexico, plenty, including Ghana, Nigeria, Kenya – I have a list – do not have the consideration as fishing vessels making related fishing activities. In most of the cases, even the related fishing activities are not defined, and certainly many of them apart from China – and I have only found China – mention tankers. I have not found one other single country mentioning the activity as a fishing vessel apart from China.

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This Tribunal is currently working on the Request for an Advisory Opinion formulated by the Sub-Regional Fisheries Commission (SRFC) in preparation of the amendments to this Convention - Case No. 21. It may be a good opportunity to remember again the entire Declaration of Judge Kolodkin in the "*Juno Trader*" Case. I will not read it now.

Yesterday, Judge Marotta Rangel in some ways, but very clearly in the end, tried to suggest to Guinea-Bissau's expert the same (page 10, day 4). What is the concept of "maritime waters of Guinea-Bissau"? Two days ago, the Tribunal heard my cross-examination of the current Secretary for Fisheries and I am sure that quite a few of us in this room were surprised by the way that someone wrongly advised years ago the drafting of a fisheries law in Guinea-Bissau contrary to essential principles of UNCLOS.

Furthermore the reading of our learned colleague yesterday is not accurate. Judge Vukas, in a Separate Opinion in *M/V "SAIGA" (No. 2)*, was very clear on this. The position of Guinea-Conakry indicates:

Although the bunkering activities are ancillary measures of a considerable importance for the fishing vessels concerned, they constitute neither fishing nor conservation or management activities with respect to the living resources themselves.

It is clear that this case hides other types of activities when interpreting the provisions of the contentious provision of Guinea-Bissau on logistic support - these "hidden" customs or tax/fiscal laws in the EEZ, outside the territorial sea, of course internal waters and why not the contiguous zone, no doubt. Yesterday, the Agent of Guinea-Bissau mentioned that the income generated for these authorizations was needed to cover any risk of casualty. Mr Djabulá (pages 7 and 8, day 3) stated:

Our law takes account of the aspect of conserving resources, the environment, because as this activity causes environmental damage because of fuel spillages, waste that may occur during the transfer, and the time that fishing vessels actually remain in the fishing area means that they fish more because they do not interrupt their fishing activity to go to port to refuel and therefore they catch more fish, which has environmental effects.

The argument that, with bunkering, a fishing vessel can catch more fish is anachronistic; it is old-fashioned. Normally, the licences, more and more, are granted under various strict conditions. I am talking of the fishing permits. They take into consideration total allowable quotas. They take into consideration the power/energy of the engines of a fishing ship; they take into consideration the price or the levy to pay per tonne. Those considerations leave me a little bit indifferent.

The expert from the Fisheries Department, Mr Djabulá, stated in regard to the Joint Order that Guinea-Bissau attached as Annex 5: "It says that we must take account of the environmental aspect, and this activity must be conditioned".

When reading this Joint Order from the Minister of Finance – not only from the Fisheries Department - it says mainly that: "Considering the Government's Policy of encouraging and promoting private initiative in order for the private sector to make a positive contribution towards the country's economic and social development ...".

I am unable to find a reference to sustainable fisheries or to environmental reasons. "This charge takes into account the principle of environmental protection ... to fund environmental policies, and remedying the damage ... it can be raised if it is not enough to deter this kind of activity."

That Order of 2001 and also the new Order of 2013, attached to our written document, do not say that - not even the one adopted this year, I repeat.

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Can those arguments be taken seriously?

As I said during my previous intervention before this Tribunal, a lot of merchant ships daily traverse the EEZ of Guinea-Bissau navigating with good and bad weather conditions, with no limitation by type or category of ships; most of them are huge, big megaships, container ships – the same that we can see on the river here – oil tankers that themselves employ more heavy fuel oil (capacity even much bigger than what the *Virginia G* can store on board – more than 1000 tonnes) than small oil tankers like the *Virginia G* can supply.

Also, all the cargo vessels entering and traversing the Canal of Bissau, the EEZ and the territorial sea, arriving to call at the port of Bissau, are in a critical marine conservation area where the risks in an operation of bunkering can be much higher. Even now the *Virginia G* regularly traverses this area to navigate to Cap Vert, to Senegal, and does not pay any tax. The *Virginia G* was 60 miles off the boundary lines of the territorial sea. The entry to the Canal of Bissau is not precisely the best place to navigate. We asked the First Officer of the *Virginia G* about the circumstances surrounding the traversing of this canal on the night of 21 August. They could have really provoked a serious accident and that is why Panama is claiming the violation of article 225.

Furthermore, vessels like the *Virginia G* do not supply heavy fuel oil but just gas oil. You do not need to be an oil expert to confirm that gas oil (a clean and volatile product) has not caused relevant marine environmental problems.

Another point is that there are quite a few fishing vessels in the area of the EEZ of Guinea-Bissau (supertrawlers operate in Mauritania for the catch of mackerel) that use heavy fuel; tankers like the *Virginia G* only supply gas oil. The EEZ is not so big as to operate with supertrawlers. It is tuna and shrimp, mainly done with relatively small fishing vessels. You can see the list of the licences granted in the agreement between the European Union and Guinea-Bissau.

Any risk to the marine environment in the case of an incident: in the written answer to the questions that this Tribunal sent to the Parties, we have sufficiently explained, with the support of marine, oil and bunkering experts, in a detailed answer confirming that the risks during the bunkering operations are minimal. It is outrageous and unfair to compare this activity with the oil spills/big casualties such as the *Erika* or the *Prestige* mentioned by my esteemed colleagues.

The risks during the bunkering operations are minimal, because these operations are studied and prepared in advance and executed following security protocols set up in international conventions. The statistics provided by my esteemed colleague showed that yesterday, because 95 per cent of the total related to a spillage below a very low amount of tonnage – I cannot remember whether it was five or six.

I refer to the rest of the comments I put in the written questions.

Certainly it will be important not to consider the bunkering spills mentioned by the representative of Guinea-Bissau as similar to the spillage in maritime accidents such as the *Erika* or the *Prestige* cases. In addition, it must be noted that the oil spilled in the case of major accidents was crude oil, whereas the bunkering operations to fishing vessels performed in the EEZ are made with gas oil.

Last but not least, it is also questionable to give seriousness to Guinea-Bissau's argument to justify the counter-claim of US\$4 million mainly related to "Adequate compensation caused to the environment and the plundering of its marine resources".

Could we finally see any evidence of such damage? As a minimum, the legal costs of the defence of this part of the dispute would need to be borne by Guinea-Bissau.

I have been making some inquiries in relation to environmental damages, particularly the article of Mr Gautier. I cannot see in the article on "Environmental damage and the United Nations Claims Commission: New directions for future international environmental

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cases” any reference to prospective claims for potential damages. Have they provided one single piece of evidence about any potential risk related to the vessel?

The other hidden reasons: it definitively seems to be a hidden tax/fiscal measure that only applies in the EEZ to benefit the Government of Guinea-Bissau.

In the administrative files of the Interministerial Commission deciding on the confiscation (Annex 15 of Guinea-Bissau’s Counter-Memorial), it is mentioned: “It was taken into consideration the ecological danger of the fuel sale in our EEZ ...”.

The fuel oil is gas oil. “The tax evasion and the unfair competition with the oil companies operating in the country.”

As has been stated before, there is enough publicly available information proving that the top officers of the Government of Guinea-Bissau during the period that some tankers were arrested were beneficial owners of the largest oil distribution company in Guinea-Bissau, the company Petromar. The annual accounts of the Portuguese company GALP (www.galp.com) prove that recently the former Prime Minister sold 80 per cent of the company Petromar. It seems that the *Virginia G* was a case of absolute interest for the Prime Minister. As stated by one Member of the Tribunal yesterday, the Attorney General’s legal opinion on the order suspending the confiscation was sent directly to the Prime Minister. He did not send a copy to the officers of the Fisheries Department in charge of the case. Does a Prime Minister need to be personally involved in this type of case?

It seems to be a fiscal measure to benefit the local oil companies that later normally paid more taxes to the State for the import of gas oil (Annex 6 of the Rejoinder), when Guinea-Bissau has repeatedly argued that bunkering to fishing vessels is damaging the national economy (in the local appeals, the Coordinator of FISCAP mentioned that, and also in Annex 14 of our Memorial, the press release where they call Panama a pirate State).

In case of conflict regarding the attribution of rights and jurisdiction in the EEZ, who can benefit? The coastal State or other States? The interpretation of article 59. Yesterday the first expert for Guinea-Bissau advised the Tribunal that he had prepared a Masters dissertation (page 11, day 4) on his wrong interpretation of article 59, which reads that it plays, in case of doubt, in favour of the coastal State. There is no debate on this point. If there is a debate, it will play in favour of the rest of the States. There is enough jurisprudence on this, and debates on the preparations (*travaux préparatoires*) of the UNCLOS Convention.

A few words on the need for authorization. We have deeply explained this point and also we have submitted to this Tribunal a written answer to the questions raised in relation to this matter.

I would simply like to highlight two points, one highlighted yesterday by Mr Loureiro Bastos (page 24, day 4) on article 39 of Decree 4/96 on industrial fisheries in Guinea-Bissau, which states that:

logistical support operations for vessels that operate in waters under national sovereignty and jurisdiction, such as provisioning with victuals, fuel, the delivery or receipt of fishing, materials and the transfer of crews...

It does mention fuel, but not gas oil. Someone could understand that heavy fuel is dangerous for the marine environment in case of a casualty; certainly it is not the case of the gas oil.

I continue reading:

...the authorizations ... should include the following:

(c) Identification of the vessels that will benefit from operations of logistical support or transhipment of catches.

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I invite the honourable Members of the Tribunal to review the copies of the said authorizations provided by Guinea-Bissau, and you will never find the name of the fishing vessels in the authorization. You will only see the name of the local agent, the local agent of the local companies, or the companies that have a charter for foreign fishing vessels to local companies. That is the scope of the Joint Order.

Then I wonder: if the fee to pay did not depend on the number of bunkerings to be made during the period of the authorization, why did they need to know the name of the fishing vessels? Why was the *Virginia G* accused of supplying other vessels if the authorization did not reflect the name of the vessels? Why did they accuse the *Virginia G* that the authorization granted to the local agent Afripêche in June 2009 did not have the name of the fishing vessels to be refuelled?

What has the practice of Guinea-Bissau been in implementing article 23? I do not want to lose any more time on this, so I refer you to the written answer.

Is this abuse of right? Is this abuse of procedure? Is this a violation of the principles of good faith of article 300? During the past few days I have tried to be respectful – I have probably not always been respectful, and for that I apologize, but certainly I have been trying to be respectful with some of the Guinea-Bissau witnesses. I have tried to avoid using hard words on the way some top officers of Guinea-Bissau’s Fisheries administration and other members of the Government operated.

It is not very difficult to understand the way that the *Amabal* vessels were released and left the port of Bissau in the vicinity of the night of 20 August, which is more than suspicious. The two *Amabal* vessels were accused of refuelling operations with the *Virginia G* in the month of June, but they were also arrested on 12 August. The two vessels were eventually released “without any formality” (Statement of the former Minister of Defence and member of the Interministerial Committee, who was sitting in the witness box), without the payment of any fine, just with a credit granted by the Government in the form of an alleged postponement of the payment when the vessels restarted the fishing operations.

More than probably the *Amabal* vessels towed the vedettes of FISCAP that went to arrest the *Virginia G* the day after in the vicinity of the position that had been communicated in advance by the local agent of the shipowner of the *Amabals*.

The witness Nunes Cá (page 15, day 3) confirmed in this witness box before this Tribunal that the inspection team spent exactly 11 hours and 40 minutes. Is it normal that a person, three or four years after the events, can give the exact number of minutes it took from the port of Bissau to the place where they were arresting the vessel, having left at 6.30?

In the afternoon session, the coordinator for FISCAP explained that the vedettes have a speed of 34 miles an hour with 400 HP. There is something that does not fit: they would not have got so far without bunkering. You have seen the size of the vedettes. They were travelling by night. Indeed, the position where the *Virginia G* was arrested was just 5 nautical miles from the position provided by the local agent to FISCAP when applying for the authorization.

The *Amabal* vessels were also arrested. Regardless of the fact of three infringements in June, and two in August, they were released on 30 August for the second time, and this time for free. This is written in the decision of the Interministerial Commission.

We textually copied in the Memorial where the money was paid: in Lisbon. The *Virginia G* shipowner firmly refused to pay any ransom, and then the Interministerial Committee confiscated the ship and the cargo.

Some months later, the Coordinator of FISCAP, together with other top officers, including the Director of Industrial Fisheries, was detained and sent to jail.

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Let us move to another point, the local remedies. What are the local remedies available under the legal system of Guinea-Bissau against the confiscation of a vessel, its cargo and its equipment?

Yesterday in the written answer I tried to provide the best answer. I requested advice from the lawyers who attended the shipowner in Guinea-Bissau, from the reputed Miranda law firm, with offices in the largest former Portuguese colonies, and also in Bissau. If you read my written answer, the situation is very simple. When I read the verbatim of the three experts, I become very confused. First of all they say that the shipowner decided not to lodge a prompt release action, but the wording of the first paragraph of article 65 is very good; it almost reflects the provision that you have in the UNCLOS treaty, but if you continue reading the subsequent paragraphs, which not one expert and not one representative of Guinea-Bissau read in this room, they simply say yes, release upon the deposit of a bond. A bond of what? Of the amount of the fine? If the vessel and the fishery products – there is no reference to the products because the law was not made for tankers – you need to add the value of the vessel, the value of the cargo and the value of any equipment.

Is this a fair and proportionate way to allocate interim measures, even by a local court? The local court sticks to this provision; it cannot reduce the amount of the bond. So this mechanism is useless. They even mentioned, and I was glad to hear it, that there was a case where five years elapsed before the recovery of the bond. The system certainly does not work.

There were also administrative measures. Yes, of course, I should meet it with evidence in the Memorials and Reply. Three or four written letters, observations, on the first decision of confiscation are attached. I will find the reference later. Surprisingly, in the second decision of confiscation, which is a kind of confirmatory decision of confiscation number 1 of 2009, it states: “Because of lack of action of the ship owner, we confirm the confiscation of the ship, the cargo and the equipment.”

So what is the way to use the administrative way, if they considered in writing, like they later considered with the unloading of the cargo, that no allegations were made? The unloading of the cargo, similar, was taken with opportunism. It was taken on a Sunday to avoid getting a judge to allow them to get a second order suspending the unloading operations.

This is at provisional level, but certainly we are all persons working in the legal area, and certainly there were very key questions raised by honourable Members of this Tribunal yesterday with the experts. This seems not to be considered very well, the answers provided by them. Of course, there have been main actions requesting the annulment of the confiscation orders. We have mentioned that. We have provided additional information yesterday, and we see in the documents submitted by Guinea-Bissau not any single reference to the interim measures – apart from a comment I will make later – or to the merits of the main case. The interpretation provided by the three experts yesterday was completely confused, and I will elaborate later.

In relation to the suspension, already in the “*Juno Trader*” Case there was this confusion, and if you read the questions that you raised with the parties on the local remedies on the confiscation, it is the same question that you raised in the “*Juno Trader*”, textually the same. Why? Because, again, Guinea-Bissau is not clear. Hopefully the Separate Opinions of Judge Wolfrum and Mensah in that case, “*Juno Trader*”, tried to summarize what was the understanding of the suspension provoked by an order of a judge against a confiscation decision while the decision on the merits is pending and while the potential appeal of the Government in this case is pending.

This question was raised yesterday by one of the honourable Members of the Tribunal, and certainly it has an answer, but the answer is not that the Attorney General

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suddenly wakes up and decides “Ah, I will make a letter. No, I will make a legal opinion. I will not make an appeal. I will draft a letter and I will state that this order is illegal and I will send this to the Prime Minister and I will put pressure on the judge.” That is what really happened but it is very funny – I am sorry to be so colloquial on this point – if you read the legal opinion of the Attorney General of Guinea-Bissau. There are two main errors. First of all, it does not mention at all the arrest of the vessel *Virginia G* on 21 August. It just mentions the alleged infringements that occurred in June 2009. There is not one single reference to the reasons for the order. The second point, when reading the second page – and I do not want to lose too much time – he says, the highest legal authority of the State, that the decision was not subject to appeal. He was reading the version of the law that some of you had the pleasure to read in 2004, when the “*Juno Trader*” Case occurred. At that moment the possibility to challenge the confiscation order was not possible. It was even forbidden in the law of 2000. In our attachment No. 9 in 2005, and certainly provoked by the decision taken by this Tribunal in the “*Juno Trader*”, it amended the law and it allowed the possibility to challenge by judicial means confiscation under article 52. Who can imagine that an Attorney General drafting a legal opinion for the attention of the Prime Minister – are we talking seriously or not – can draft an opinion stating textually that the decision is unappealable?

They lodged an appeal, and they are defending that the appeal suspends the suspension granted by the order of the first order. It is not possible. It is possible to lodge an appeal. It is normal. It has been taking what we call in Spain *medida de cautela*, precautionary measures; certainly it is a unilateral measure that later on the respondent has the right to appeal or to challenge but the second order reconfirmed the previous one, and it is not myself but the legal expert provided by Guinea-Bissau in 2004 that textually stated that the suspension, the appeal against the first order, does not suspend the order number one. It is very clear and it has been confirmed by our lawyers locally corresponding in Guinea-Bissau.

The only problem that happened was that the Government, via the Minister of Finance, did not take this into consideration and continued to keep the military on board, maintained restrictions on the mobility of the crew, and continued to impose measures such as the one that happened in the vicinity of 20 August, unloading the cargo. That decision was also challenged by the shipowner. I have provided the data of the number of the decision, and also an order was obtained imposing similar sanctions to the ones that would not respect the order, but then they explain, they start to play with the mechanics of the legal judicial system in Guinea-Bissau. I will be happy to elaborate further on this if I have time.

On the merits, certainly following the interpretation of article 295 of UNCLOS, the possibility at the time for the shipowner was to lodge an appeal at local level.

It was in good faith. It was a case of: “What are my rights? What can I do? I need to lodge an appeal”. In Portugal, as in Spain, and probably in your countries of origin, soon after lodging an interim measure, or at the same time, you need to lodge an appeal on the merits. This was submitted. First an appeal was submitted against the two confiscation orders. In Guinea-Bissau legal pleadings, legal observations, were submitted – yesterday I attached them to my written submissions – arguing exceptions on admissibility. I do not know how the judge in this country can issue a new order, can issue deadlines to submit a reply rejecting the reasons on admissibility; and at the moment the dossier is found at the level of the rejoinder. The system in Guinea-Bissau has been absolutely inoperative.

Three years and six months have elapsed from the moment of the reply to the exception on admissibility. A subsequent order rejecting the exception for admissibility has been decided, granting the right of a rejoinder to the Government of Guinea-Bissau, represented by the *Advogado do estado*, the legal counsel of the Government, and today, after three years, no decision has been taken. That is why we will have provided sufficient evidence to show that we have been trying to exhaust all the possible local remedies in this

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country. Certainly we have provided evidence to show that this is not the case. Therefore, there is enough jurisprudence, enough reference in the law and in the articles to confirm that the system does not work. For instance, Professor Ian Brownlie, referring to page 53 of our Reply, concludes that a fair number of writers on arbitral awards have been willing to presume ineffectiveness of remedies from the circumstances, for example on the basis of evidence that the courts were subservient to the executive.

Therefore, the precautionary remedies available in Guinea-Bissau were rendered ineffective by virtue of the forceful and unjust manner in which Guinea-Bissau acted above the law, such as against the owner of the *Virginia G*. The only viable option, therefore, was for Panama to submit the matter to international arbitration, and that is why we are here today.

I think I have talked too much. We have provided enough argument in the written material, and on the other pending points I prefer to give the floor to my colleague to continue explaining some parts of our claim.

THE PRESIDENT: Thank you, Mr García-Gallardo.

I now give the floor to the Co-Agent of Panama, Mr Mizzi, to make his statement.

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 [ITLOS/PV.13/C19/7/Rev.1, p. 14-22]

MR MIZZI: Good morning, Mr President, Members of the Tribunal, this case raises a number of interesting questions. It has a number of approaches, we think. One of them would seem to be the question as to whether a tanker that provides refuelling services to fishing vessels in the exclusive economic zone enjoys freedom of navigation as an internationally lawful use of the sea relates to that freedom as being associated with the operation of ships. That is quite a mouthful but there is a reason behind it, and if you would allow me to analyze in brief the drafting of the main provisions of the EEZ, it could perhaps offer some clarity at least for the record.

Bunkering services to fishing vessels in the exclusive economic zone of a coastal State is not dealt with specifically in the Convention, and is not settled by international law. The *M/V “SAIGA” (No. 2) Case* was an opportunity for the International Tribunal to consider the question. However, the customs jurisdiction context of that case ultimately led the International Tribunal not to make any general findings about the legal aspects of bunkering in the EEZ. It seems that it is now pertinent to approach this angle.

At the time UNCLOS III commenced there was a strong lobby in place in support of the creation of the exclusive economic zone. It was believed that the establishment of the exclusive economic zone would enable coastal States to control and manage their marine resources; and this is perhaps true in particular of fishing resources in the EEZs of developing States. Developing States were concerned about long-distance fishing fleets exploiting fishing resources in the seas adjacent to their coasts. A historical overview of the negotiations leading to the creation of the exclusive economic zone reveals a tension between States.

Whilst the vast majority of States supported the idea, there were different views as to what legal status the exclusive economic zone should take. Some States saw the exclusive economic zone as an extension of the territorial sea – an extension of sovereignty (and considered that this would be the only way of truly protecting their resources). Other States considered that this would be an encroachment on the freedoms of navigation and communication at the time, and that the exclusive economic zone should have high sea status, with certain limited rights of exploitation and exploration. The exclusive economic zone was ultimately created as a *sui generis* zone, which is neither part of the territorial sea nor part of the high seas. It is set up specifically to cover exploitation and exploration activity. This can be seen in article 55 of the Convention.

For the next part I hope to be a little clear, because in the hall-of-mirrors fashion of the Convention I shall need to cross-refer to a number of articles. An analysis of the exclusive economic zone must begin with the high seas, and in this case the freedoms afforded in the high seas. Article 87 of UNCLOS lists those freedoms as: the freedom of navigation; the freedom to communicate; the freedom to construct artificial islands and installations; the freedom of fishing; the freedom of scientific research.

The freedoms are not absolute but are limited by certain rules designed to ensure a balance between States in the exercise of such freedoms. Article 86 “extracts”, quite specifically, the exclusive economic zone from the application of the high seas regime, but then makes a specific reference to article 58 (to be found the exclusive economic zone chapter), stating that the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58 are not abridged; in other words, will not be reduced in scope or limited or curtailed.

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We then look at article 56, paragraph 1, which uses the term “sovereign rights” and establishes the “jurisdiction” of the coastal State in relation to specific activities. It also refers to other rights and duties in the Convention.

The provisions of article 56, paragraph 1(a), are relevant to this present case; that is, exploring, exploiting, conserving and managing the living natural resources. Whilst article 56 establishes “sovereign rights” over the resources in the zone, article 58, paragraph 1, provides that all States enjoy in the exclusive economic zone the high seas freedom of navigation, overflight and communication – only three of the five freedoms, thus excluding fishing and scientific research. In other words, it seems that article 58 re-incorporates the application of only these three freedoms from the high seas into the EEZ. How does it do that? Article 58, paragraph 1, refers to these three freedoms as the freedoms set out in article 87. Article 87 therefore links back to article 58, and the reference to article 87 seems, therefore, to associate the value or quality of the high seas freedoms to those that can be exercised in the exclusive economic zone.

If Members of the Tribunal agree with this approach – that it is the same freedoms enjoyed on the high seas as those that are enjoyed in the exclusive economic zone – then, at least in respect of those three freedoms, the interpretation in case of a dispute of this kind would, or perhaps should, be in favour of these three freedoms.

The interconnection to article 87 in article 58, therefore, seems to assert, or re-assert, the legal value of those three freedoms. Indeed, the exclusive economic zone is excluded from the high seas (article 86) but article 58 then reincorporates three high seas freedoms into the EEZ.

The history of the establishment of the exclusive economic zone regime would show that an exclusive economic zone without these three freedoms – in other words, subject only to the right of innocent passage – could not have been negotiated. It is critical, therefore, to preserve the three freedoms as they were intended.

Two further points need to be made on the drafting of article 58. First, the words “other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships ...”, which I think is particularly relevant to this case. This is a second confirmation that the freedoms are there in their totality. The freedoms are not abridged or subject to a restrictive interpretation; they are meant to be equivalent to those on the high seas.

A third confirmation is article 58, paragraph 2, through which articles 88–115 of the Convention and other pertinent rules of international law are made applicable to the exclusive economic zone. Article 58, paragraph 2, therefore incorporates almost the entire section 1 of the High Seas Chapter VII. Yet we need to keep in mind that article 58, paragraph 2, also provides that in the exclusive economic zone all States enjoy the freedoms of navigation and communication provided they are not incompatible with the parts of the Convention dealing with the exclusive economic zone.

Therefore, a fishing vessel intending to exploit the living resources of a coastal State might well be subject to measures that a coastal State may wish to take, and which would limit that freedom. Therefore, we have gone full circle: the coastal States would be reasonably allowed to impose limitations in respect of its resources, but the Convention maintains the freedoms in relation to activities that fall within the two excluded freedoms – fishing and scientific research – and the other rights mentioned in article 56.

The question is whether States can legislate in a manner that goes further than the allowances of the Convention. Indeed, during the UNCLOS negotiations a number of States had sought to include provisions in what was to become article 56 to extend their rights in respect of enforcement of customs laws within what was then termed “the economic zone”.

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Those efforts were expressly rejected by many States representing different perspectives. In this context it was specifically put that the application and enforcement of customs laws within the exclusive economic zone would limit freedom of navigation.

Today, the statement is being put again in another way: that the enforcement of national laws which seek to regulate, via ever creeping definitions, an activity which is not fishing in the sense of the Convention or indeed perhaps of international understanding, as my colleague explained, is not and cannot be seen to be in line with the Convention, and would, likewise, limit the freedom – the other internationally lawful uses of the sea related to these freedoms, indeed such as those associated with the operation of ships.

Members of the Tribunal, the law of Guinea-Bissau is the law of Guinea-Bissau and Guinea-Bissau cannot defend the law of Guinea-Bissau simply because it is the law. It should be assessed for compatibility with the Convention.

Indeed, a coastal State is to have due regard to the rights and duties of other States (article 56), and the laws and regulations which that coastal State expects other States to comply with must be in line with the Convention. There is no residual authority in a coastal State to make laws which themselves violate or result in a violation of the Convention.

Here we have a resonance, do we not? The suggestion that a degree of residual authority in respect of the emerging economic zone should be with the coastal State was already made by a small number of States during the negotiations for the 1982 Convention, but was rejected overwhelmingly. They supported the concept that such freedoms of the seas were only to be limited in accordance with any rights recognized expressly to the coastal States in the new Convention.

Italy commented: "Any residual regime applied in the area should be that of the freedom of the seas, not that of the authority of the coastal State."

Ukraine commented: "Some delegations had even proposed that the coastal State would establish customs, fiscal, immigration and health controls in the exclusive economic zone. The delegation wondered what would eventually be left of the freedom of navigation, and commented that under the pretext of exercising such controls a coastal State might at any time detain a foreign vessel ... That was the purpose of the attempts to replace the concept of the economic zone with concepts such as 'national sea'. A clear distinction must be made between the regime of the territorial waters and that of the economic zone."

Yet, decades down the line, we see article 2 of Guinea-Bissau's Fisheries Law, which includes the exclusive economic zone in the definition of "maritime waters of Guinea-Bissau"; and yet we have seen how Guinea-Bissau has extended its national laws to somehow include the recent phenomenon of bunkering within the scope of such legislation, by defining it as an activity which is related to the primary activity or operation of a fishing vessel.

Yet we hear conjecture from published experts such as Mr Djabulá, who was here yesterday or the day before, who, in answer to a question put by the Honourable Judge Marotta Rangel, stated that article 59 of the Convention provides that a conflict between the rights of the coastal State and a third State is settled on the basis of the advantage that can be created for the coastal State and the other State; but he excluded the words "as well as the international community as a whole."

I refer here to Judge Vukas's Separate Opinion in the *M/V "SAIGA" (No. 2) Case*, where he said:

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

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“On issues not involving the exploration for and exploitation of resources, where conflicts arise, the interests of other States or of the international community as a whole are to be taken into consideration”.

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

“A satisfactory solution must ensure that the sovereign rights and jurisdiction accorded to the coastal State are compatible with well-established and long recognized rights of communication and navigation which are indispensable to the maintenance of international relations, commercial and otherwise”.

The bunkering activity carried out by the *Virginia G* is a commercial activity for which vessels, including fishing vessels, in the exclusive economic zone of West Africa offer a particular market, namely the sale of gas oil.

The argument has been propounded that the connection between the rendering of bunkering services to fishing vessels in the exclusive economic zone results in overexploitation by fishing vessels; that the activity of bunkering could have an effect on the environment, and that, hence, it is justified to strip the bunkering vessel of its freedom of navigation or other internationally lawful use of the sea and consider her activities akin to fishing activities for the purposes of regulation. In other words, a fictitious distinction is sometimes made between navigation pure and simple of a bunkering vessel through the EEZ, and the rendering of bunkering services in the EEZ.

It is true that whilst that distinction might hold for an activity that is specifically subject to sovereign rights in the EEZ, for example fishing, the extension of this logic to a bunkering vessel (which is subject to its own special body of rules) would be misconceived.

Indeed, why is the fishing vessel the discriminating factor? Why not consider the *Virginia G* a bulk carrier today, a container ship tomorrow, depending on the ship being refuelled?

Panama contends that, logically, the contrary conclusion should be reached: that it is precisely the inherent connection between bunkering and navigation, and hence the necessity of the former for the performance of the latter, that would lead to the conclusion that bunkering activities should be considered to be more akin with the freedom of navigation and other internationally lawful uses of the sea, such as those associated, in fact, with the operation of ships.

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. In this regard, Guinea-Bissau cannot reasonably contend that the activity of bunkering of vessels, even in relation to fishing vessels, would be, or should be, captured by its sovereign rights or jurisdiction in its EEZ, in terms of article 55 of the Convention.

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.

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, and it is perhaps reasonable that these terms can even

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be described as “sufficiently wide to embrace all normal enterprise and governmental functions that pertain to living resources.” I refer here to the work of Burke in *The New International Law of Fisheries*.

However, it would also be reasonable to state that even a wide interpretation would necessarily have to preserve the fundamental link to the living resources themselves. Indeed, Burke says:

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.

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 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 – on which note, that would be the Vienna Convention on Treaties.

THE PRESIDENT: Thank you, Mr Mizzi.

We have almost reached eleven-thirty so the Tribunal will withdraw for a break. The hearing will continue at noon.

(Break)

THE PRESIDENT: We will continue the hearing but before I call upon Mr García-Gallardo I would like to inform you that Judge Nelson will join us a bit later.

I give the floor again to the Co-Agent of Panama, who will continue his statement. Would you please speak a bit slower so that the interpreters can follow you? Thank you.

MR MIZZI: Since this is my final remark, I take the opportunity to thank the excellent work of the interpreters.

Your Honours, I would like to spend a few minutes in order to underline at least two of the provisions that we think have particularly been breached during these events.

The basis of the events surrounding the *Virginia G*'s case Panama sees as being a series of continual, persistent and deliberate actions in bad faith by an administration of Guinea-Bissau that abused its powers and caused harm to the vessel and her crew, and to an owner who would not acquiesce to their illegal requests.

The result – the punishment – was a completely disproportionate and a manifestly deliberate 14-month detention that caused damages and losses, psychological, physical and

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financial hardship, and represented a blatant irreverence towards the rights of Panama as a flag State.

Guinea-Bissau demonstrated a high level of disregard to its obligations under the Convention.

Testimony to the events in relation to 21 August 2009 and thereafter, as heard by the Tribunal over the past days, demonstrates not only the particular breaches of a number of articles of the Convention, as mentioned earlier by my colleague Mr García-Gallardo, but an overall shroud of bad faith and abuse of rights, and a disrespect of another State's rights, in clear breach of articles 300 and 56, paragraph 2. The violations, we suggest, also include breaches of basic humanitarian provisions and principles of due process of law.

Guinea-Bissau did not fulfil in good faith the obligations assumed under this Convention and did not exercise the rights, jurisdiction and freedoms recognised in the Convention in a manner which would not constitute an abuse of right.

Reference to "good faith" reflects the fundamental rule of *pacta sunt servanda*.

The concept of "abuse of rights" is founded on the obligation of States under international law to act in good faith in fulfilling their treaty commitments.

Oppenheim explains that the doctrine arises when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by legitimate considerations of its own advantage. Thus, even if technically acting within the law, a State may incur liability by abusing its rights.

The *Dictionnaire de la terminologie du droit international* defines "abus de droit" as:

The exercise by a State of a right in such a manner or in such circumstances as indicated that it was for that State an indirect means of avoiding an international obligation imposed upon that State, or was carried out with a purpose not corresponding to the purpose for which that right was recognized in favour of that State.

UNCLOS, unusually, contains a provision that expressly relates to abuse of rights. The framers of the Convention deliberately made article 300 an overarching part of the Convention, as all factual and legal circumstances could not be predicted and covered by explicit rules.

Article 300 fills a gap by authorising ITLOS to find justice in cases of abuse. The States Parties in article 300 empowered ITLOS with residual authority to hear about instances of injustice and to provide remedies where merited.

The principle also appears in the case law of the ICJ: in *The Case concerning certain German interests in Polish Upper Silesia* and *The Case of the Free Zones of Upper Savoy and the District of Gex*.

I would also like to make a few comments in relation to article 73 of UNCLOS, if indeed the Tribunal were to find that this article applies.

The Separate Opinion of Judge Treves in the "*Juno Trader*" Case is particularly relevant in relation to this article, which states:

While paragraph 1 includes a broad and non-exhaustive list of measures the coastal State may take to ensure compliance with its laws and regulations, the three paragraphs that follow have the purpose to ensure that these measures will not have the effect of limiting the freedom of the persons involved (prompt release of the crew, prohibition of imprisonment as a penalty) and of unduly jeopardizing the rights of ship owners and of the flag State (prompt release of the vessel), while ensuring timely protective action by the flag State (obligation to notify in case of arrest and of the imposing of penalties).

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With particular reference to article 73, paragraph 4, I should remark that, insofar as Guinea-Bissau deemed it was enforcing its EEZ rights against the *Virginia G*, the violation of article 73, paragraph 4, had particular repercussions. Article 73, paragraph 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."

It is quite simple: Guinea-Bissau did not notify Panama of the measures it took against her vessel. Guinea-Bissau does not deny this, but, rather, seeks to justify it in its Counter-Memorial, as being owing to the alleged lack of a genuine link, and the lack of a Panamanian diplomatic representation nearby.

Guinea-Bissau was not entitled to do this. Panama is the flag State, and Guinea-Bissau was bound to notify it. By failing to do so, Panama was denied the opportunity to take timely protective action in respect of her vessel and its crew.

In fact, Panama was never officially, and through appropriate channels, informed by Guinea-Bissau of any occurrence in relation to the *Virginia G* during the entire 14 months of detention. Even the release of the *Virginia G* was never officially notified to the Panamanian authorities.

There is a connection between paragraphs 2 and 4 of article 73, since absence of prompt notification may have a bearing on the ability of the flag State to invoke article 73, paragraph 2, and other measures under the Convention (for instance article 292) in a timely and efficient manner, with humanitarian considerations at the forefront. This was recognized in the "*Camouco*" Case.

THE PRESIDENT: I thank Mr Mizzi for his statement.

I now give the floor again to the Agent for Panama, Mr García-Gallardo. I would like to ask you again to slow down. Thank you for your cooperation.

MR GARCÍA-GALLARDO: Thank you. Even speaking slowly I will try to finish earlier than expected.

THE PRESIDENT: Thank you very much.

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AGENT OF PANAMA
[ITLOS/PV.13/C19/7/Rev.1, p. 22-28]

MR GARCÍA-GALLARDO: Mr President, thank you.

Your Honours, I will not repeat each and every paragraph of our Memorial and Reply in relation to the annexes. We have provided sufficient legal basis and jurisprudence from the ICJ and the *M/V "SAIGA" Case* because that was the first case in which this Tribunal considered the principle and ordered compensation.

I will repeat some of the main principles set out by the jurisprudence.

As I learned in university, every damage must relate to an illegality, in this case an international illegality, to real damage, and there should be a causal link between the damage and the illegality. We have tried to prove that over the five days of the hearing and previously in writing, tried to show that Guinea-Bissau violated not only one but different provisions of UNCLOS but also other international conventions and well-established principles and rules of international law.

My colleague has referred to the classic principles of violation and explained the scope of the main provisions on freedom of navigation. That is the first principle set out by this article and we always forget to continue reading the full paragraph which deals not only with freedom of navigation but to the lawful rights in this area, including the possibility to operate ships.

Coming back to the basis of compensation, I will just highlight that the claim for reparation brought by Panama is principally in the form of compensation, and illustrating Guinea-Bissau's responsibility in international law, specifically but without limitation under the provisions of the Convention and under the existing rules on responsibility of States for the consequences of their unlawful actions in terms of the general article 304. Certainly in this case we cannot apply the principle of hot pursuit – article 110, I think, where it is also possible specifically to claim damages for that particular violation. We rely more on the general provision of article 304 and link this to the different provisions that we have claimed have been violated by Guinea-Bissau.

Panama submits that Guinea-Bissau is liable to compensate Panama, as well as all persons, for all the consequences of its unlawful actions and its abuse of right, as stated in article 300. There is quite a lot of jurisprudence on article 300 but we hope that for the time being this provision will be more and more applied by this Tribunal, as described in our Memorial and in our Reply. It is submitted that in accordance with the general rules of international law Guinea-Bissau is internationally responsible to Panama for the violations of international law occasioned by its actions in respect to the vessel *Virginia G*, its owner, crew and cargo owners as well as the rights of Panama and other interested parties.

The scope covered by the responsibility, in addition to the State of Panama, the flag State, certainly will be a key issue for the internal discussions of the Tribunal to consider the amount of our claims.

We have for the moment some references, particularly on ships. Certainly in the *M/V "SAIGA" Case* the reality of business life in the maritime sector was taken into consideration. It is absolutely unacceptable to continue hearing in this room that the vessels of Panama need to go to Panama to pass inspections. When someone hears this, they realize that the activities are not related to the international activity that characterizes the activity of the shipping, maritime and fishing industry all over the world. Certainly the scope will be a key question.

We do not abandon the possibility that we justify linking sister ships. We have very well established, I think, and provided supporting evidence about the consequences of the

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arrest of the *Virginia G* for the family group of the shipowner, Mr Gamez, which included a second vessel, the *Iballa G*. Just out of interest, the *Iballa G* and the *Virginia G* are the names of the daughters of the shipowner, so it certainly did considerably affect the family group. It happened at the moment that the economic crisis started not only in Spain but also in Panama and all over the world, and certainly the credit lines were suddenly cut and it was impossible to stop the consequences of one arrest on the second vessel of the company.

So there will be a discussion, I hope, as to whether in the scope of the claim you can consider the possibility to claim for damages to related individuals and related companies, such as charterers – charterers were recognized in the *M/V "SAIGA" Case* – but also to consider the possibility of going beyond this scope and to consider the rest of the group.

We have not quoted any amount in relation to the *Iballa G*. If my information is correct, the experts, particularly the expert Mr Moya Espinosa, confirmed in his report that there is not any particular claim relating to the *Iballa G*, although it did suffer arrest in Las Palmas, as was pointed out by my colleague, but we consider to keep this particular point to assess the scope of this parameter.

The second point we have modified following instructions from our flag State, which is not to consider any more the claim of moral damages reflected in a quantum, as we reflected in the Reply, but rather to come back to basic principles and to consider a letter of apology, a letter of consideration, following the case law set down by this Tribunal in the *M/V "SAIGA" Case*.

I think it is fair that I invite the Tribunal to consider the reasons that Panama has to claim this point because, first of all, it is totally inadmissible that an authority of the Guinea-Bissau Government, in particular the Coordinator of FISCAP, as stated in our annex to the Memorial, issued a press release to the media in different countries setting out that a pirate ship had been arrested flying the flag of Panama, and repeating these words on two or three occasions. This is totally unacceptable for the quality and seriousness of the Panamanian Shipping Registry. In accordance also with references taken from other cases that are still to be judged by an arbitral tribunal – I am referring to the *ARA Libertad* case – I think that it is fair to consider declaring that Guinea-Bissau has violated different principles of UNCLOS and related provisions and that that will be, in principle, enough compensation in terms of moral damages for Panama.

For the rest, I would not like to comment further on damages, on the right to have damages. They are well reflected in our submissions. In relation to quantum, I simply rely on the reports of the economic experts. Certainly it took a lot of time to consider and double-check the different amounts. Certainly we have supporting evidence in our room, and we will provide in due course a full set of originals or certified copies of each and every invoice, bank statement, contract, and any other evidence relating to the different claims coming all together to pay, starting with salaries that remain unpaid. We heard Mr Fausto Ocaña starting the payments to suppliers of the vessel to pay reparations, and that certainly all of them have been providing support to the shipowner that certainly went into bankruptcy. Mr Gamez simply closed – not formally and legally – the company but was forced to stop the activities with the vessels for a while.

So I would just rely on the two reports. The second report, to avoid duplicity, is a confirmatory report made by an appropriate expert in international shipping. You can see the *curriculum vitae* as an appendix to his report, and I think it is quite a solid and deep report, very consistent with the practice in terms of claims for damages – perhaps not before an international public tribunal, much more relating to national level and private arbitration, if I can use these words, or before the high courts in the United Kingdom and similar courts, but certainly I think it is a very good quality and informed report and certainly justifies the direct

STATEMENT OF MR GARCÍA-GALLARDO - 6 September 2013, a.m.

link for each and every cost that he considers admissible and to justify the amount of the compensation.

I will read later the conclusions on our claim but I now need to dedicate ten minutes to the counter-claim that the Republic of Guinea-Bissau decided to lodge in response to the legal action launched by Panama. What can I say about the counter-claim? I do not know whether this is a kind of reprisal strategy but, in my opinion, it really shows a lack of respect to this Tribunal to submit such a counter-claim if someone really considers they have suffered damage, not even about the quantum, because I have tried to put an overall figure, US \$4 million, but the minimum thing that we need when submitting a document or a plea to this Tribunal is a minimum of respect in considering and grounding minimally one and another argument of such a counter-claim. I do not think it is the case to elaborate too much, again, adjudge this against my esteemed colleagues, but certainly I am very sure that you will consider that, in the absence of any substantive report, any substantive split of the amounts claimed overall of such an amount, it is in principle purely a lack of respect to this Tribunal to submit a counter-claim in this way.

Based on that, and following some Separate Opinions that have already been adopted by the Tribunal in previous cases, I think the time has arrived to consider also the possibility of imposing the legal costs. Certainly, if my information is not wrong, there are no rules on costs to date in this Tribunal. It has been subject to some comment by some honourable Members of the Tribunal but I think that independently of the assistance of rules on costs, a minimum rule would need to exist, but particularly in cases where a claim for damages has to be taken into consideration, and in this respect I would really take into consideration only and exclusively in particular the extra costs that not only the Republic of Panama but also the human resources you in this Tribunal have invested in the extra preparation of this counter-claim.

As I said before, I would not like to elaborate more on the counter-claim with arguments. I just said, for instance, this morning in relation to the environmental cost, it is really problematic because there is not any founded argument to consider a claim for such a big amount in a case where there is not one single reference – maybe one reference, which is the surprising letter of release of the vessel with allegations that the vessel was in very bad condition or was at risk of a problem with navigation and would probably sink in the port of Bissau and that it is better to release the vessel after 14 months to the shipowner, but apart from that element, I have never seen – and I may be wrong – one single document justifying the payment of such a claim for environmental problems created even potentially by the *Virginia G*.

I invite the honourable Members of the Tribunal to consider this argument, because, for the rest, they have not even considered any costs in relation to the costs of the administration dealing with this case or whatever other costs to date. Not one single piece of evidence, not one single contradictory report on the costs has been submitted by Guinea-Bissau, and probably I am wrong, but maybe this afternoon they will surprise us with supporting evidence to justify the \$4 million claimed, but in my opinion it will be too late and the Tribunal should not admit any more evidence at this stage of the proceedings.

Thank you very much.

THE PRESIDENT: Thank you very much, Mr García-Gallardo.

I understand that this was the last statement made by Panama during this hearing. Article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of the last statement made by a party at the hearing, its Agent, without recapitulation of the arguments, shall read that party's final submissions. A copy of the written text of these submissions,

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signed by the Agent, shall be communicated to the Tribunal and transmitted to the other party.

I now invite the Agent of Panama to take the floor to present the final submissions of Panama.

MR GARCÍA-GALLARDO: I have split the submissions in relation to the claim and the counter-claim.

Case No. 19 “Virginia G”

6 September 2013

1. Submissions in relation to the claim.

Panama respectfully requests the International Tribunal for the Law of the Sea of the United Nations to declare, adjudge and order that:

- 1 The International Tribunal has full 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 articles 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;

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- 14 Guinea-Bissau is to immediately return the gas oil confiscated on 20 November 2009, of equivalent or better quality, or otherwise to pay adequate compensation;
- 15 Guinea-Bissau is to pay in favour of Panama, the *Virginia G*, her owners, crew and all persons and entities with an interest in the vessel's operations, compensation for damages and losses caused as a result of the aforementioned violations, in the amount quantified and claimed by Panama in paragraph 450 of its Reply (p. 84) or in an amount deemed appropriate by the International Tribunal;
- 16 As an exception to Point 15, the amount of moral damages requested in paragraph 470 of the Reply as due to Panama for moral damages is withdrawn and replaced by a request for a declaration of satisfaction/apology to the attention of the Republic of Panama, for the derogatory and unfounded accusations against the *Virginia G* and her flag State and as regards all aspects of the merits of the *Virginia G* dispute as from 21 August 2009;
- 17 Guinea-Bissau is to pay interest on all amounts held by the International Tribunal to be due by Guinea-Bissau;
- 18 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;
- 19 In the alternative to the previous paragraph 15, Guinea-Bissau is to compensate Panama, the *Virginia G*, her owners, crew (or spouse or dependant in the case of Master Guerrero)" – who has passed away, as you know – "charterers and all persons and entities with an interest in the vessel's operations in the form of any other compensation or relief that the international Tribunal deems fit.

2. Submissions in relation to the counter-claim

Panama respectfully requests the International Tribunal to:

A Declare, adjudge and order that Guinea-Bissau's objections to the admissibility of Panama's claim are outside the time-limit and/or are brought in bad faith such that they should be dismissed, rejected or otherwise refused;

B Dismiss, reject or otherwise refuse Guinea-Bissau's counter-claim on the basis that Guinea-Bissau has no legal basis under international law and under the Convention to bring the counter-claim, given the existence of the required links between Panama and the *Virginia G*, or, in the alternative, on the basis that Guinea-Bissau's counter-claim is unfounded in fact and at law, and that the counter-claim is frivolous and vexatious;

C Dismiss, reject or otherwise refuse each and all of the submissions of Guinea-Bissau, as set out in Chapter IX of Guinea-Bissau's Counter-Memorial, and declare, adjudge and order that:

20. Panama did not violate article 91 of the Convention;

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21. In connection with Submission B above, Panama is not to pay in favour of Guinea-Bissau compensation for damages and losses as claimed by Guinea-Bissau in its counter-claim as set out in Chapter VII of its Counter-Memorial; and

22. Panama is not to pay all legal costs and other costs that Guinea-Bissau has incurred in relation to this counter-claim;

D Declare, adjudge and order that Guinea-Bissau's Decree Law 6-A/2000, as was applied to the *Virginia G* (and as applied in general) in the EEZ of Guinea-Bissau, is a unilateral extension of the scope of the Convention, restricting the freedoms under the Convention, and, in effect, an extension by Guinea-Bissau of a type of tax and/or customs-duty radius, in violation of the Convention.

Hamburg, 6 September 2013.

THE PRESIDENT: Thank you, Mr García-Gallardo.

That completes the second round of oral arguments of Panama. The hearing will be resumed today at 3 p.m. to hear the second round of oral arguments of Guinea-Bissau.

The sitting is now closed.

(The sitting was closed at 12.38 p.m.)

STATEMENT OF MR MENEZES LEITÃO - 6 September 2013, p.m.

PUBLIC SITTING HELD ON 6 SEPTEMBER 2013, 3 P.M.

Tribunal

Present: President YANAI; Vice-President HOFFMANN; Judges MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; Judge ad hoc SÉRVULO CORREIA; Registrar GAUTIER.

For Panama: [See sitting of 2 September 2013, 10 a.m.]

For Guinea-Bissau: [See sitting of 2 September 2013, 10 a.m.]

AUDIENCE PUBLIQUE DU 6 SEPTEMBRE 2013, 15 H 00

Tribunal

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président*; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK, *juges*; MM. SÉRVULO CORREIA, *juge ad hoc*; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 2 septembre 2013, 10 h 00]

Pour la Guinée-Bissau : [Voir l'audience du 2 septembre 2013, 10 h 00]

THE PRESIDENT: Good afternoon. The Tribunal will now hear the second round of oral arguments by Guinea-Bissau in the case concerning the vessel *Virginia G*.

I wish to inform you that Judge *ad hoc* Treves, for reasons duly explained to me, will be absent for the remainder of the day.

I give the floor to the Agent of Guinea-Bissau, Mr Leitão, to make his statement.

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Second Round: Guinea-Bissau

STATEMENT OF MR MENEZES LEITÃO
AGENT AND COUNSEL OF GUINEA-BISSAU
[ITLOS/PV.13/C19/8/Rev.1, p. 1-10]

MR MENEZES LEITÃO: Mr President, distinguished Members of the International Tribunal for the Law of the Sea, I am now going to present my closing remarks about this case in the second round.

Within our team, it is my responsibility to address the issues related to the facts of the case and the enforcement of the legislation of Guinea-Bissau. I will present the position of Guinea-Bissau on six issues: the violation by the *Virginia G* of Guinea-Bissau fisheries legislation; no use of force in the arrest of the *Virginia G* in the exclusive economic zone of Guinea-Bissau; the treatment of the crew of the *Virginia G* during their stay in Bissau; the decisions of the Guinean authorities to confiscate the ship and its cargo; the absence of any injury caused by the decisions of Guinea-Bissau to any Panamanian individual or entity; the damage caused to the State of Guinea-Bissau by the granting of the registration of this ship by Panama.

Firstly, it is clear that the vessel *Virginia G* violated the General Fisheries Law of Guinea-Bissau, because she did not have written authorization for performing the operation of bunkering of oil in the exclusive economic zone of Guinea-Bissau. The fuelling of fishing vessels is considered to be a fishing-related operation in the whole region in which Guinea-Bissau is included, therefore subject to prior authorization by the authorities, which, in this case, is the member of Government responsible for Fisheries (article 23(1) of Decree Law 6-A/2000, and article 39(1) of Decree Law 4/96).

Guinea-Bissau would like to point out that the *Virginia G* was perfectly aware of the need for a formal written document to perform the operations of refuelling fishing vessels, so much so that she had requested these authorizations on two previous occasions and had operated under them in May and June of 2009. The *Virginia G* did not, however, obtain the necessary authorization and the formal written document in August of 2009 to perform fishing vessel refuelling operations.

I will now examine the question of the use of force during the arrest.

As expressed in Case No. 18 (“*Louisa*”), this International Tribunal holds the view that States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances (see “*Juno Trader*” (*Saint Vincent and the Grenadines v. Guinea-Bissau*), *Prompt Release, Judgment*, and “*Tomimaru*” (*Japan v. Russian Federation*)). Guinea-Bissau entirely upholds this view and argues that there was no use of excessive force during the arrest of the *Virginia G*. Therefore, there was no violation of human rights or violation of the due process of law. The best proof of this assertion is the fact that there were no physical injuries during the operation or during the journey of the *Virginia G* to the port of Bissau.

The arrest of the *Virginia G* was made in accordance with current domestic law and the enforcers used only the force they considered appropriate and proportional to the danger of the operation.

All the officials and members of FISCAP confirmed here that there was no torture or threat of the use of force. That was also confirmed by the crewmen presented by Panama. The officials merely arrested the *Virginia G*, not its crew, and ordered it to go to the port of Bissau without any danger during the voyage, as was confirmed by the navy pilot, and as can be seen from the photographs that were presented.

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For that reason, Guinea-Bissau stresses that it did not violate articles 224 or 110 of the Convention, as the *Virginia G* was arrested by uniformed officials in conformity with its rights as a coastal State to monitor illegal activities in its exclusive economic zone.

Guinea-Bissau also reaffirms that it did not violate article 225 of the Convention as it did not endanger the safety of shipping, nor did it create any risk to the *Virginia G*, which remained safely moored in the port of Bissau. When a risk occurred, which was due to the poor condition of the ship and the lack of maintenance by the shipowner, Guinea-Bissau immediately decided to release the vessel, even with the loss of an asset which was already public property according to the laws of Guinea-Bissau.

Now I will examine the question of the treatment of the crew of the *Virginia G* during its stay in Bissau.

Guinea-Bissau upholds that the conditions in which the crew of the *Virginia G* were kept in the port of Bissau did not constitute a violation of their human rights. Again the best proof of this assertion is the fact that there were no claims of any physical harm during the time the crew stayed in the port of Bissau. No one asked for medical assistance at any time in Guinea-Bissau.

There was never any imprisonment and, much less, any corporal punishment of the vessel's crew, the only "arrest" declared being that of the vessel *Virginia G*. The members of the crew could have left Guinea-Bissau whenever they wished to, as the guards were simply preventing the vessel from leaving and were not holding the members of its crew, who were always free to leave when they wanted.

As was clear from the statements by Mr Gamez Sanfiel and Alfonso Moya, the shipowner had a lot of financial problems at the time. He owed the wages due to the workers on another ship, the *Iballa G*, from January 2009. The crew therefore appealed for intervention by a non-governmental organization, Stella Maris. There is news on the internet referring to €189,000 in unpaid wages since the beginning of 2009.

I must now say that I was personally touched by the information from our esteemed colleague that the *Virginia G* and *Iballa G* were named after the names of the daughters of Mr Gamez Sanfiel, but I am much more impressed with this debt to the workers not being paid since January in this situation. That is because of the financial problems of the shipowner, that he was unable to post a bond to release the ship or even to pay for supplies for her. Of course, this situation has nothing to do with Guinea-Bissau's authorities. Guinea-Bissau's authorities have only arrested the ship; they are not liable to pay for the supplies of the owner.

The fact that the crew decided to stay on board cannot be considered Guinea-Bissau's responsibility. The reason that they did not leave the country is very clear from the statement of Chief Mate Fausto Ocaña Cisneros. The true reason for the crew staying on board is clear: "I was told that the vessel would hopefully be released and that no ticket funds were allocated for the time being". (Panama's Memorial, Annex 1). Therefore, the only reason the crew did not leave Guinea-Bissau immediately was precisely that the shipowner had no funds to pay for tickets for them to leave.

Guinea-Bissau stresses that it did not violate article 73, paragraph 3, of the Convention, inasmuch as it did not use any measures involving prison or corporal punishment on the crew of the *Virginia G*. It is absurd that Panama should wish to classify the temporary apprehension of passports as a *de facto* prison sentence.

As Mr Carlos Nelson Sanó said here, the passports were taken only for security purposes, such as for the purpose of identification and control of the crew within the territory, but the passports are returned to their owners at the request of the captain or the shipowner's representative whenever they want to leave the vessel or the country. It is perfectly normal

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for a coastal State to want to control the movements in its country of foreigners who have not applied for a visa and are only in the country due to the arrest of the vessel on which they were operating. The normal situation after the confiscation of the vessel would be for the crew to leave the country, in which case the passports would be returned immediately.

There was no evidence presented of any delay in the return of the passports. In any case, Guinea-Bissau reaffirms that a delay in the return of a passport can never be considered equivalent to a period of imprisonment. It is therefore clear that there was no violation of article 73, paragraph 4, of the Convention.

Now I will examine the decisions of the Guinean authorities to confiscate the ship and its cargo.

According to article 52 of Decree Law 6-A/2000, with the wording of Decree Law 1-A/2005, the offence of unauthorized fishing-related operations, in this case fuel transfer, is punished by the maximum sanction of confiscation of the vessel, gear and all the product aboard. Thus Decision No. 7/CIFM/2009 of the Interministerial Commission for Maritime Supervision regarding the *Virginia G* is absolutely legal.

Article 52 of Decree Law 6-A/2000, in the wording of Decree Law 1-A/2005, provides for a judicial appeal against that decision on condition of payment of a bond. In the meantime, pursuant to article 65 of Decree Law 6-A/2000, the shipowner can judicially appeal with the purpose of releasing the vessel and the crew upon payment of a bond: “At the request of the ship owner, the vessel is immediately released before trial provided a sufficient bond is paid.” (article 65(1)).

In this case the shipowner had no money to pay the bond. Therefore, he wanted to get the prompt release of the vessel from the Guinean authorities without any payment through a proceeding that is considered inadequate, as was explained by the experts Mussa Mane and Carlos Pinto Pereira. That is why he brought a preliminary injunction seeking the suspension of Decision 7/CIFM/2009 and requested a waiver of a preliminary hearing by FISCAP and the Interministerial Commission on Maritime Supervision.

THE PRESIDENT: Mr Leitão, I am sorry to interrupt. Would you please slow down? Our interpreters have some difficulty following you.

MR MENEZES LEITÃO: I am sorry. The presiding judge of the case ended up deciding hastily to that effect, without hearing the opposing party or the prosecutor, who should have a say in the proceedings, which means that this decision is invalid and therefore void under Guinean procedural law. As the experts stated yesterday, it is totally against the case law of the highest court of Guinea-Bissau to admit that the State itself can be found guilty *in absentia*. In this case the hearing of the other party is mandatory, according to article 400(2) of the Civil Proceedings Code, so the decision of the court was null and void. This was why the Public Prosecutor, who is an independent authority whose job is to ensure legality in the legal system of Guinea-Bissau, informed the Government that it could disregard the order, as an appeal with suspensive effect would be presented by him, which in fact he did.

My esteemed colleague has claimed today that the appeal has no suspensive effect, based on a communication from his colleagues of Bissau. He decided not to present any expert before this International Tribunal. He even decided not to cross-examine the experts presented by Guinea-Bissau, but now he claims that the appeal has no suspensive effect, only based in evidence not produced.

The documents submitted by Panama prove that the appeal was admitted. In fact, although the judge, in an *obiter dicta*, stated that the deadline had been exhausted, he decided

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to submit the case to the Superior Court of Bissau. This was the correct decision, as the deadline to appeal was not exhausted. You can see in front of you article 279 of the Guinea-Bissau Civil Code, which is identical to the Civil Code of Portugal – but in some parts the version of Guinea-Bissau is on a website of the Law Faculty of Bissau – and which provides that in calculating any period neither the day nor the hour is included if the time is expressed in hours from the event from which the period begins to run. So when we present an appeal after a notification we do not count the day of the notification. If the notification was on the 11th, the 19th would be the last day for appeal. As you can see from article 296 of the Civil Code of Guinea-Bissau, they say that the rules in article 279 shall apply in the absence of a specific provision to the contrary, the terms and conditions laid down by law, by the courts or by any other authority. So, as you can see, this is how the deadline to an appeal is counted, and it is perfectly clear that the appeal was in time at that decision. It was so much so that it was admitted by the Court, although with the reference because it sent the appeal to the Superior Court of Bissau.

Therefore, as the Public Ministry, and it is clear according to the laws of Guinea-Bissau, the article, now that we are passing to the Civil Proceedings Code, this is article 401 of the Civil Proceedings Code of Bissau, which says when an interim measure is inactive, and you can see in number 2 the applied may aggravate, or appeal – we have two kinds of appeals, the *apelação* and the *agravo*, this is the case of an *agravo* – may appeal the order that grants the interim measures or imposes embargos to this applicability clause. So there is surely a possibility of appealing this decision.

What are the consequences of that appeal? That appears in article 740, which is the reference in this case to the situation of the appeal of an *agravo*, which was the one that established, which says in paragraph 1, “The appeals that come up immediately in their own cases have suspensive effect.” So it was this situation. The appeal came up in the own case, so it has a suspensive effect immediately when it is presented.

Clearly, that is the situation according to the laws of Guinea-Bissau. My colleague stated that today, based on, he says, the expert opinion from colleagues in Bissau, but I prefer to exhibit the precise text of the statutes of Guinea-Bissau. From a reading of the statutes it is very clear that in this case they have a suspensive effect.

The appeal was present, as results from the evidence submitted by Panama yesterday, from 19 November. Therefore, on 30 November, when the decision was made to discharge the cargo, the judicial order was already suspended by the immediate automatic effect of the appeal. The lawyers in Bissau decided to make another suspensive order because they knew perfectly that the previous one was already suspended due to the effect of the appeal.

The Public Prosecutor informed the Government of the appeal he will present, and the Government acted in conformity with this information. Contrary to what Panama asserts, this is not the substitution of a judicial order by an internal opinion, but instead an official indication of the illegality of a decision and the fact that it would be suspended, as clearly indicated in the law.

After that preliminary injunction, the owner of the *Virginia G* brought his main suit against the State, according to the internal law of Guinea-Bissau. These proceedings were suspended by the court because, in that system, an interim measure is dependent on the main action, and so if a main action is brought and there is no continuation the interim measure also loses its effect. That is what happened. When the main action was presented, the shipowner decided not to pay the judicial costs established by the tribunal. Therefore the main action and the interim measures were suspended; and in this situation the action is still pending in the courts of Bissau awaiting the shipowner to pay the costs that are necessary for this action to continue.

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It is therefore clear that the authorities of Guinea-Bissau applied its law and that local remedies in Guinea-Bissau were not exhausted.

Therefore the Tribunal should consider that there was no previous exhaustion of local remedies, so these claims cannot be presented according to article 295 of the Convention. But in any case, it is clear that there was no violation of the UNCLOS Convention.

I will now examine the question of the damage allegedly caused by the decisions of Guinea-Bissau to any Panamanian individual or entity.

We claim that no damage was caused by the authorities of Guinea-Bissau to any Panamanian individual or entity. In fact Penn Lilac Trading S.A. cannot be regarded as being a Panamanian company, as it has no substantive link with Panama whatsoever, but is rather of Spanish origin and has Spanish management. Even Panama indicates that in its certificates. Even here, the official representative of the shipping register industry in Panama said that he has no knowledge of activity in Panama but only in the office in Seville, Spain. It is a Spanish company.

The financial situation in which the company found itself is of no interest to the State of Guinea-Bissau, this being no reason for the regulations on the EEZ ceasing to apply due to concern over the financial health of foreign companies that own vessels that operate illegally in that area. In fact, if the shipowner of the *Virginia G* chooses not to pay the fee established by law, he has to be prepared to suffer the consequences if the ship is discovered performing unauthorized operations. It would therefore be clear that it misses totally a link of causality in the damage claim by Panama against Guinea-Bissau.

Furthermore, Panama states that Penn Lilac entered into an agency commission agreement with Gebaspe SL, a Seville-based Spanish company (like Penn Lilac), and Gebaspe SL chartered the ship to Lotus Federation, an Irish company.

As, in this case, there is not a single person or entity related to the *Virginia G* who is of Panamanian nationality, Panama is not entitled to present claims for damages in respect of anyone. No State may claim protection of persons under international law who are not its own nationals without having any link with this case.

In any case, the damages claimed by Panama are totally unsubstantiated, insofar as they have been amended several times during these proceedings. In its Memorial Panama claimed €4,065,409.23, but in the Rejoinder increased its value to €5,636,222.54. *Virginia G* was bought for €600,000, as has been testified, and its current value should be around €500,000. Therefore, the amount of the claim is more than ten times the value of the ship from Guinea-Bissau. It has to be considered as a fruitless claim in that matter.

These damages don't result from the arrest of the *Virginia G* which is the only case over which the Tribunal has jurisdiction. In fact, the only direct losses resulting from the arrest of the *Virginia G* are those allegedly caused to the ship, its owner and the crew. Panama, however, has claimed damages for losses allegedly suffered by other entities, such as Gebaspe and Penn World, which have nothing to do with the *Virginia G*.

Panama cannot make claims during the proceedings that it has not mentioned in the application. As the Tribunal decided in Case No.18 ("*Louisa*"), paragraph 143:

In this context, the Tribunal wishes to draw attention to article 24, paragraph 1, of its Statute. As noted earlier, this provision states, inter alia, that when disputes are submitted to the Tribunal, the 'subject of the dispute' must be indicated. Similarly, by virtue of article 54, paragraph 1, of the Rules, the application instituting the proceedings must indicate the 'subject of the dispute'. It follows from the above that, while the subsequent pleadings may elucidate the terms of the application, they must not go beyond the limits of the claim as set out in the application. In short, the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character.

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In this case the formal owner of the ship, Penn Lilac, is a ghost company. Mr Gamez Sanfiel writes in his statement provided by Panama as Annex 5 that, "In January 1998 the company Penn Lilac Trading was created for the operation of the *Virginia G.*"

The intention is therefore clear. When a company is created solely for the purpose of having an oil tanker, its real owner gets a bullet-proof shield against claims related to the activity of that tanker, including claims for environmental liability or non-payment of wages to the crew. The creditors would therefore have only one asset to seize: the vessel itself. As a result, it makes no sense that when the intention is to claim damages on behalf of the owner, the ownership that is established is ignored and damages are claimed on behalf of third parties that are not owners of the ship.

Mr Moya Espinosa confirmed in his report that the alleged €8,400,000 sales figure of the company (as in the translation) was actually a reference to the whole group of companies including, naturally, Gebaspe and probably the Lotus Federation. He was not able to state, when I asked, the sales figure of Penn Lilac before this Tribunal. It might even be zero, so not one single piece of evidence of losses actually suffered by the shipowner has been submitted to this Tribunal.

Contrary to the reports provided by Panama, there is not one single piece of evidence of losses, expenses paid and damage suffered by Penn Lilac. Panama failed to exhibit one single invoice of Penn Lilac's costs or losses to these proceedings. What it has attached to the reports presented in Annex 4.2 of the Reply of Panama are "invoices of Penn Lilac", which are internal documents, irrelevant for any public body, such as the tax authorities. It is therefore clear that an international tribunal cannot rely on such documents in a decision about damages. Therefore we have just received questions from the Tribunal asking for the invoices from the parties.

The Moya Report (page 1 of the translation) affirms that the group's billing was done by Lotus Federation of Ireland. The real invoices therefore could only come from this company, which never appeared before this Tribunal. The so-called "invoices" presented are therefore mere declarations by the claimant, which cannot be the basis for any report.

Therefore the reports presented do not warrant credibility. Mr Moya Espinosa is not an independent reporter, as he works for this group of companies, and Mr Ken Arnott limited himself to confirming the figures in Mr Moya's report. But it is clear that these figures are not correct and in many cases have even been totally invented.

For instance, the value of the ship is considered to be €1,000,000 when it is actually half that. On this basis, the reports consider that Guinea-Bissau has to pay €50,000 a month for the depreciation of the ship. That makes no sense at all as the depreciation of a ship is a cost that the shipowner always bears. The same applies to the salaries of the crew, and even to the company personnel, as well as travel expenses of the board and even the legal fees for these proceedings. According to the reports, all these expenses have to be paid without a single invoice being presented.

Panama also claims losses due to termination of the contract with Lotus Federation but has not provided this court with any evidence why this contract ended. The Tribunal will recall that this contract involved two ships, including the *Iballa G*, which was already immobilized for non-payment of the crew since January. The reason why the contract with Lotus Federation ended has not been presented to the Tribunal; there was not a single piece of evidence submitted on that and therefore there is no causal link between this termination and the arrest of the *Virginia G*.

In any case, we must read clause 4 of the contract, which sets out the consequences in the event of immobilization of the ship, which have nothing to do with the losses claimed by Panama. Clause 4 of the contract sets out the consequences, should the ship be immobilized and it is nothing to do with the losses claimed by Panama.

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As to the losses to the crew resulting from the immobilization of the ship, Guinea-Bissau has no liability at all for them

What happened to the workers is exclusively due to the fact that the shipowner had no money to apply for a bond, so he decided to leave his workers in Bissau without payment, precisely the same thing as he did in Las Palmas. There is therefore no link of causality between the actions taken by Guinea-Bissau, which were totally legal, and the damages claimed by Panama. As my colleague stated this morning, to receive the compensation there must have been an injury and a link of causality between the injury and the loss. No proof of anything like that has been presented to this Tribunal.

Therefore Panama is not entitled to claim damages.

Let us now examine the damage caused to the State of Guinea-Bissau by the granting of the registration of this ship by Panama.

The *Virginia G* was built in 1982 and after that she had a number of different names and previous registrations before being registered in Panama. There is reference to this in my Counter-Memorial to the reference to the ship on a website. Panama has not presented any evidence that the previous registration has been cancelled. It could present it immediately in the Reply with a certificate, proving cancellation of the previous registration. No evidence was presented at all so we do not know whether the ship has other registrations. However, we understand that dual registration in Panama is only so that it has the advantage of a flag of convenience, as the ship has no genuine link with Panama.

In fact, although sailing under the flag of Panama, the vessel is Spanish, as it belonged to a Spanish company, which was stressed to the Guinea-Bissau authorities by the continuous diplomatic intervention of the Spanish Ambassador about the issue and the release of the vessel.

The control that Panama actually exerts over ships sailing under its flag is commonly described as corresponding to a flag of convenience. In the advertising that I exhibited it is stated that Panamanian ship registration is a mere formality and does not require any substantial link to that State. That is in the annex to the Counter-Memorial.

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

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

In this case we have reference to the previous registration of the ship. We did not receive any evidence of the cancellation of the previous registration. I cannot confirm that the ship has two registrations but, as I say, this situation is very similar to the one under the Convention.

Therefore we must consider that Guinea-Bissau had no obligation to notify the flag State, contrary to what my esteemed colleague said this morning.

However, an official of the Panama registry was in Guinea-Bissau in September, shortly after the arrest of the ship, and he chose to take no provisions whatsoever with reference to the ship, just an inspection. I question if this is the way a flag State should act even when it did not receive any communication.

Guinea-Bissau considers that by granting a flag of convenience to the *Virginia G*, without there being the least connection between this vessel and Panama, Panama facilitated fishing-related operations by an unseaworthy vessel in [Guinea-Bissau's] waters.

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The testimony of Mr Pedro Olives presented by Panama was very clear about the way Panama exercised its control as a flag State over the *Virginia G*. It delegated its authority to a private company, Panama Shipping Registry Inc., and inspections are performed in Las Palmas or even Guinea-Bissau by a single person, of Spanish nationality, who also has interests in the shipping transport industry. In fact, he is a member of the board of the Transworld Canarias SA, which is a private entity in maritime transportation. This is clearly not the way a flag State should exercise control over ships flying its flag, especially in this case when it is a very old oil tanker, bought in a public auction a long time ago, which still has a single hull, and was constantly being repaired. In fact, as was said by the witnesses of Panama, the last repair occurred in Las Palmas in July, just before the arrest of the *Virginia G* in a situation, we must recall, where the owner also had a lot of financial problems. It is therefore clear that the ship could not have been in good condition when she was arrested in the waters of the exclusive economic zone of Guinea-Bissau.

Panama produced reports from Mr Pedro Olives, which are attached to its Reply, but what we can see from these reports is that they do not look like official reports at all. They have not even been signed and I question if any official authority would hand over an official report without even signing it. In fact, it is impossible to believe that the ship was in a marvellous condition when she was repaired in Las Palmas in July and was in such bad condition just one year after staying in Guinea-Bissau according to the description of Panama. It is clear that these reports are not evidence for attributing the bad condition of the ship to the authorities of Guinea-Bissau. It is very likely that the bad condition of the ship was previous, as it needed constant repairs. But in any case, if the ship stayed in Bissau, with its crew on board, it was for them to provide the maintenance.

When Guinea-Bissau decided to arrest this vessel in conformity with its laws, it was obliged to keep her under surveillance in the port of Bissau, which had high occupation costs, both of berthing and of its official and military personnel. The ship was in such a poor condition that the risk of it sinking in the port of Bissau arose.

Guinea-Bissau was therefore prevented from auctioning the ship, as was its right, due to the poor condition it was in, caused by the inefficient supervision by Panama of the vessels to which it grants flags of convenience. Guinea-Bissau was obliged to release it without obtaining the adequate revenue as payment against the plundering of its marine resources, which the operation of the *Virginia G* led to, its high environmental costs, and loss of fishing resources. We must stress also that the ship was confiscated by a definitive decision, so the ship was, at the time she was liberated, an asset that already belonged to the Republic of Guinea-Bissau.

Your Honours, you now have elements that permit you to evaluate the losses suffered by Guinea-Bissau due to the behaviour of Panama. We therefore ask the Tribunal to adjudge a compensation for the losses caused, damage caused to the environment and the plundering of the marine resources of Guinea-Bissau.

Mr President, learned Members of the International Tribunal, thank you very much for your attention. I will now pass the floor to my colleague Mr Loureiro Bastos.

THE PRESIDENT: Thank you very much, Mr Leitão.

I now give the floor to the Co-Agent of Guinea-Bissau, Mr Bastos.

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CO-AGENT AND COUNSEL OF GUINEA-BISSAU
[ITLOS/PV.13/C19/8/Rev.1, p. 10-21]

MR LOUREIRO BASTOS: Thank you very much.

Mr President, distinguished Members of the International Tribunal for the Law of the Sea, esteemed colleagues, after five days of sessions Guinea-Bissau considers that it is important to summarize what divides the two parties in this dispute.

It is not possible to say what still divides the two parties, and I underline “still”, as, in fact, there are no points of contact between the versions of the same facts and the same applicable international law of the sea and domestic law of Guinea-Bissau that must be considered in this case.

The difference of positions between Guinea-Bissau and Panama can be dealt with by considering twelve issues where their positions do not coincide.

These twelve issues are:

- a) Jurisdiction of the International Tribunal for the Law of the Sea about claims related to the bareboat chartered *Iballa G*;
- b) The lack of a genuine link between Panama and the vessel *Virginia G*;
- c) The exercise of diplomatic protection by Panama in respect of entities or persons that do not have a real connection with that State;
- d) The use of internal mechanisms of dispute resolution;
- e) The objectives of the fisheries laws of Guinea-Bissau;
- f) The regulation of the activity of bunkering under international law;
- g) The violation of the rights of enforcement under the Convention by Guinea-Bissau;
- h) The use of force during the arrest of the vessel *Virginia G*;
- i) The treatment of the crew of the vessel *Virginia G* during its detention in the Port of Bissau;
- j) The physical condition of the vessel *Virginia G* at the moment of arrest;
- k) Compensation for damages and losses;
- l) The presentation and content of the counter-claim.

It is important to reiterate the position of Guinea-Bissau regarding some of these issues.

Firstly, Guinea-Bissau argues that it does not agree with the jurisdiction of the International Tribunal with regard to considering any claims related to the *Iballa G*, even as a side-effect of the damages and losses caused by Guinea-Bissau to the detriment of the owners of the *Virginia G* as a result of the arrest and prolonged detention of the *Virginia G*, in

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relation to the fact that the arrest and detention affected the operations and solvency of the owners in respect of both the *Virginia G* and of the chartered bareboat *Iballa G*.

Secondly, Guinea-Bissau argues that the request made by Panama to the International Tribunal is not admissible because there is no genuine link between the vessel *Virginia G* and Panama, in violation of article 91, paragraph 1, of the Convention.

The vessel *Virginia G* was built in 1982, and, after that, it had a number of different names and previous registrations before being registered in Panama in 2007. These name changes and various registrations were effected, naturally, in order to have the advantages of a flag of convenience, considering that Penn Lilac Trading SA cannot be regarded as being a Panamanian company. The company owning the vessel *Virginia G* has no substantive link with Panama whatsoever, but it is, rather, of Spanish origin and has Spanish management.

For these reasons, Guinea-Bissau stresses that it has never recognized the *Virginia G*'s connection with Panama because, although sailing under the flag of Panama, the vessel is Spanish, as it belonged to a Spanish company. This opinion was reinforced, in the view of the Guinea-Bissau authorities, by the continuous diplomatic intervention of the Spanish Ambassador about the issue and the release of the vessel.

The control that Panama actually exerts on ships sailing under its flag is commonly described as corresponding to a flag of convenience. Guinea-Bissau highlights the fact that the Panamanian authorities advertise that Panamanian ship registration is a mere formality and does not require any substantial link to that State.

Any position that may be taken by the International Tribunal on the matter of the genuine link should take into account the fight against the "sponsoring States of convenience" in the exploitation of mineral resources in the area that was expressed in the Advisory Opinion of 1 February 2011.

In the Advisory Opinion of 1 February 2011, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea decided that:

Equality of treatment between developing sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States of 'convenience' would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.
(paragraph 159)

On the issue of the fight against flags of convenience, Robin Churchill commented on possible future action of the International Tribunal after the *M/V "SAIGA" Cases*, and the "*Grand Prince*" Case, in the following terms: "It is thus possible that if given the opportunity, the Tribunal may in future help make article 91 more effective".

Guinea-Bissau believes that, after the strong position taken in relation to "sponsoring States of convenience", the International Tribunal is now also able to start the battle against flags of convenience. The existence of flags of convenience is very harmful in general terms, and its perverse effects are manifest in this case.

Thirdly, the exercise of diplomatic protection by Panama in respect of entities or persons that do not have a real connection with that State is not possible from an international law perspective. Guinea-Bissau reaffirms that there is no genuine link between the nationality of the owner of the vessel *Virginia G* and Panama. Guinea-Bissau also argues that no crew member of the vessel *Virginia G* has any connection with Panama.

Fourthly, Guinea-Bissau argues that the request made by Panama to the International Tribunal is not admissible because the persons or entities involved in this case have not

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exhausted all internal mechanisms of dispute resolution, contrary to what is stipulated in article 295 of the Convention.

Fifthly, Guinea-Bissau reaffirms that its national fisheries law has, in addition to other provisions, the objective of the protection and conservation of natural resources, employing a precautionary approach and, for that reason, bunkering is regulated as a fishing-related activity.

Guinea-Bissau reaffirms that prior authorization to conduct refuelling operations in its national fisheries law is not a customs duty or other tax in disguise, and it was not intended to extend a customs-type radius beyond the territorial seas and the contiguous zone, but is merely a payment for a service rendered by its administration.

Sixthly, Guinea-Bissau states that the regulation of bunkering is included in the rights of the coastal State to regulate the capture of biological resources in its exclusive economic zone, according to article 61 of the Convention, because off-shore bunkering of fishing vessels is an activity that goes against, or otherwise hinders, the conservation of living resources.

Guinea-Bissau asserts, in its exclusive economic zone, an exclusive competence in relation to the conservation and exploration of its natural resources, living or non-living, and, as a consequence, an exclusive competence over certain “fishing-related operations”, which include refuelling services of fishing vessels provided at sea, employing a precautionary approach.

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

In seventh place, Guinea-Bissau argues that it had no obligation to notify Panama, as the flag State, through the appropriate channels, of action taken and of any penalties subsequently imposed on the vessel *Virginia G*, according to article 73, paragraph 4, of the Convention because there were no genuine links between the vessel *Virginia G* and Panama, nor any genuine links between the shipowner and Panama.

The eighth point is that Guinea-Bissau argues that there was no use of excessive force during the arrest of the vessel *Virginia G*.

Finally, the ninth point, Guinea-Bissau argues that the conditions in which the crew of the *Virginia G* was kept in the port of Bissau did not constitute a violation of their human rights.

Trying to observe high levels of environmental protection, applying a precautionary approach, Guinea-Bissau considers bunkering to be a fishing-related operation. The International Tribunal asked, before starting these oral proceedings, on 30 August, about “the risks posed to marine environment by bunkering”. Panama replied during the first round that there were no risks to the marine environment resulting from this activity, without giving any example or relevant practice or specific cases about it.

Guinea-Bissau would like to give a more detailed answer, using two sources related with the bunkering industry: the *International Tanker Owners Pollution Federation* and the online journal *Ship & Bunker - News and Intelligence for the Marine Fuels Industry*.

The International Tanker Owners Pollution Federation Limited provides information gathered from both published sources, such as the shipping press and other specialist publications, as well as from vessel owners and their insurers. According to the booklet *Oil Tanker Spill Statistics 2012*, published by The International Tanker Owners Pollution Federation Limited, ITOPF maintains a database of oil spills from tankers, combined carriers and barges. That database contains information on accidental spillages since 1970 and 1974, apart from those resulting from acts of war. Oil spills are generally categorised by size:

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<7 tonnes, 7-700 tonnes and >700 tonnes, although the actual amount spilt is also recorded. The International Tanker Owners Pollution Federation Limited have information on nearly 10,000 incidents, the vast majority of which (81%) fall into the smallest category (<7 tonnes).

Data on oil spills from bunkering are the following: (i) below 7 tonnes, 564 cases, between 1974 and 2012; (ii) between 7 and 700 tonnes, during the period of 1970 to 2012, 33 cases; and (iii) above 700 tonnes, between 1970 and 2012, 1 case.

Most of the reported cases of oil spills caused by bunkering occurred in developed states: Australia, 18 cases; France, 15 cases; Germany, 14 cases; Italy, 22 cases; Japan, 56 cases; Netherlands, 31 cases; United Kingdom, 28 cases; and United States of America, 180 cases. In this database there are no reported cases that occurred in West African countries.

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

The type of fuel spilled in the seas is not important for the living species. Whether gas oil or any other type of diesel fuel, fish cannot survive in an environment polluted by any kind of oil.

Three recent cases can be given as examples of oil spills caused by bunkering operations.

The first oil spill caused by bunkering operations occurred in Gibraltar. According to *Ship & Bunker: News and Intelligence for the Marine Fuels Industry* of Tuesday, 12 June 2012, with the title “Bunkering Accident Confirmed Responsible For Spill”, it was reported that:

A “bunkering accident” was responsible for a spill off the North Mole, Gibraltar at approximately 7 p.m. Friday evening, Her Majesty’s Government of Gibraltar (HMGOG) and Gibraltar Port Authority (GPA) has confirmed in a joint press release.

“The source of the oil was a bunkering accident which is being investigated and followed up with the relevant parties”, the statement said.

Local media reported around three tonnes of fuel had been spilt and the incident had involved the refrigerated vessel *Frio Dolphin* and the bunker tanker *Vermaoil XX*.

(...)

Gibraltar’s Environmental Safety Group (ESG) said it recognized the spill was ‘minor’ but nevertheless served ‘as a reminder of Port impact on the marine environment’.

“With bunkering taking place at four separate ports in the Strait of Gibraltar all minor oil spills add up and impact on the natural environment stressing the need for utmost vigilance and practice to be applied on all such activity”, the ESG statement said.

ESG also suggested the location of the incident had a role in the speed and effectiveness of the authorities’ response, and “had bunkering operation taken place at a greater distance to shore, the results could have been very different”.

HMGOG says it will now consider the lessons learnt from the spill in order to “improve procedures even further to both prevent and deal with oil spills and liability for them”.

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The second oil spill example caused by bunkering operations occurred in Algeciras, Spain. According to *Ship & Bunker: News and Intelligence for the Marine Fuels Industry* of Monday, 18 June 2012, with the title “Bunker Spill in Algeciras Reported”, it was reported that:

“A spill resulting from bunkering has been reported off Algeciras”, the Government of Gibraltar (GOG) has said in a statement.

The GOG said they were alerted to what was reported as a 50 litre spill during the bunkering of the 10,545 dwt Cook Islands registered reefer *Fegulus* by the Spanish press, but ‘the size of the slick would indicate considerably more.

(...)

The spill could potentially affect beaches and marine life in the Southern Waters of Gibraltar, which under the EU Habitats Directive are a dual marine Special Area of Conservation (SAC) and Special Protected Area (SPA).

The third oil spill example caused by bunkering operations is one related to one of the United Arab Emirates, the Emirate of Ras Al-Khaimah. According to *Ship & Bunker: News and intelligence for the Marine Fuels Industry* of Tuesday, 30 April 2013, with the title “Unusually High” Number of Bunker Spills at UAE’s Sarq Port”, it was reported that:

Sarq Port in the UAE emirate of Ras Al-Khaimah has had “an unusually high number of bunker spills” lately, the West of England P&I club told its members.

The club said the spillage has mainly occurred when ships were disconnecting road tankers’ hoses from the vessels’ bunkering manifolds.

“The local Port Authority imposes fines of AED 10,000 (\$2,700) or more for such a spill on both the supplier and receiver regardless of fault in the accident”, the club said, “and one owner was recently ordered to pay just over \$ 40,000 before the vessel was released”.

“Members planning to bunker vessels at Sarq Port are advised to ensure that crew members are alerted to the circumstances surrounding the recent spills”, the club said.

“When preparing to disconnect bunker lines the crew should check that the supply hose is fully drained prior to disconnection, and they should not rely solely on the supplier’s assertions that the hose is ready to be disconnected”.

The club also urged members to position drip trays to collect any residue remaining in the supply hose and secure overboard scuppers and gaps in fish plates to avoid any spillage.

“As far as practicable Members should also consider including suitable clauses in the bunker supply contract to protect their interests”, the club said.

Guinea-Bissau argues that the freedom of navigation of ships with the flag of third States through the exclusive economic zone of coastal States should not include the right to be involved in the economic activity of bunkering of fishing vessels, according to an evolutionary interpretation of articles 58 and 61 of the Convention, given that the activity has a much stronger connection to the exercise of fishing than with the freedom of navigation.

David Anderson, a former Judge of this International Tribunal, states that:

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[I]n my analysis, bunkering at sea in the EEZ can be subject to different legal regimes, depending on the circumstances. What is required is a case-by-case approach. Bunkering is a service: when it serves navigation, the rules on navigation in the EEZ apply; when it serves fishing, the rules on fishing and fisheries operations in the EEZ apply. Leaving aside the environmental aspects, the applicable legal regime is determined by the nature of the recipient vessel's activity in the EEZ at the relevant time.

In the same sense, Donald Rothwell and Tim Stephens advocate that:

[I]n its decision on the merits in *M/V Saiga* (No 2), ITLOS concluded that a coastal state is entitled to apply customs laws and regulations in its territorial sea, and that it also has enforcement jurisdiction in the continuous zone to ensure that these laws are complied with. In the EEZ, however, there was no such entitlement. Guinea had argued that under article 58(3) it could apply "other rules of international law" not incompatible with LOSC, which enabled it to apply and enforce domestic laws directed at securing the "public interest" of Guinea, which extends to preventing economic activities including bunkering, which has impacts on fisheries and environmental matters. The Tribunal rejected this argument, finding that reference to a principle of "public interest" to justify laws within the EEZ would "curtail the rights of other States" and would be incompatible with articles 56 and 58 of the LOSC. Once again the Tribunal did not, however, venture a definitive view as to whether bunkering within the EEZ could be regulated by coastal states, holding that it was unnecessary to consider the issue because of the particular circumstances of the case. Nonetheless, despite this equivocal analysis, both state practice and a plain reading of the LOSC suggests coastal state powers of fisheries regulation do extend to include incidental matters such as bunkering or processing fish caught within the EEZ.

Mr President, distinguished Members of the International Tribunal for the Law of the Sea, esteemed colleagues, the essence of this case, from the perspective of the international law of the sea and international law, is to know what the current extent of the powers of a coastal State is in its exclusive economic zone.

Using an evolutionary interpretation of the Convention that takes into due account the developments of environmental law in past decades and the progressive relevance of a precautionary approach, Guinea-Bissau argues that the regulation of fishing-related activities, like bunkering of fishing vessels, is an integral part of the powers of coastal States in their exclusive economic zone.

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

In fact, as the International Tribunal decided in the *M/V "SAIGA" (No. 2) Case*:

the article applies to an objection "the decision upon which is requested before any further proceedings on the merits". Accordingly, the time-limit in the article does not apply to objections to jurisdiction or admissibility which are not requested to be considered before any further proceedings on the merits. (paragraph 53).

This interpretation of the Tribunal is totally in conformity with the wording of article 97 of the Rules of the Tribunal. It appears evident that Panama is acting in bad faith by invoking article 79 of the Rules of the International Court of Justice, but without referring to the fact that the jurisprudence of this same Tribunal clearly indicates that exceptions to admissibility may be presented in the Counter-Memorial, as demonstrated in the *Avena Case* of 2004.

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In paragraph 24 of the Judgment of that case, the International Court of Justice expressly stated that:

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

The legal writers also confirm this position. In fact, as Christian Tomuschat says:

In other words, a respondent remains free to come up with its preliminary objections in its counter-memorial. This alternative strategy has the advantage of saving time. No separate incidental proceedings, which necessarily entail a delay of many months as a minimum, will then take place. Once a respondent has filed its counter-memorial without raising preliminary objections, it will in any event be deemed to have acquiesced to the jurisdiction of the Court.

It is therefore clear that even in the jurisprudence and doctrine of the International Court of Justice it is well established that Guinea-Bissau could present its objections in its Counter-Memorial.

To finalize my statement it is necessary to reaffirm that Guinea-Bissau totally rejects the allegations of Panama that it has violated the Convention or general international law.

Firstly, Guinea-Bissau reaffirms that it has not violated article 58 of the Convention as bunkering is an economic activity, which is not included in freedom of navigation or other international lawful uses of the sea.

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

Secondly, contrary to what Panama asserts, Guinea-Bissau reaffirms that there was also no violation of articles 56, paragraph 2, and 73 of the Convention.

In relation to article 56, paragraph 2,) of the Convention, Guinea-Bissau behaved appropriately by demanding the authorization established by the law, which the oil tanker *Virginia G* did not have, and decreed the sanction accordingly allowed for in its law for this violation, which does not collide with the rights of other States or with the Convention.

Guinea-Bissau's actions were also in full conformity with article 73, paragraph 1, of the Convention, which expressly legitimizes its action, and there was no abuse of discretion in applying its law.

Guinea-Bissau did not violate article 73, paragraph 22 of the Convention by applying the sanction of confiscation allowed for in its law.

The seizure of the fuel was therefore perfectly legal, with regard to Guinea-Bissau's domestic legislation. Contrary to what Panama states, it is evident that fuel is covered in the seizure of the ship, something which is permitted by article 52 of Decree Law 6-A/2000, which allows for the seizure of the vessel with all of its fixtures, fittings and fishing products.

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

Regarding the setting of the security deposit, this has to be requested from the competent entity, something that the owners of the vessel *Virginia G* never did.

In fact, article 65(1) of Decree Law 6-A/2000 expressly states, in conformity with article 292 of the Convention, that:

Upon the decision of the competent court, the fishing vessels or craft and their crew will be immediately released, upon the request of the ship owner, the captain, or the master of the vessel or craft or of its local representative, before the trial, provided that the payment of sufficient security deposit is made.

Guinea-Bissau did not violate article 73, paragraph 3, of the Convention inasmuch as it did not apply any measures involving prison or corporal punishment to the crew of the *Virginia G*, it being absurd that Panama should wish to classify the temporary apprehension of passports or the failure to provide a security deposit as *de facto* prison.

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

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

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

Thirdly, it is totally false that Guinea-Bissau violated other rules of the Convention or other rules of international law, contrary to what Panama states in this dispute.

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

There was no excessive use of force, as the officials merely arrested the vessel and ordered it to go to the port of Bissau, there being no danger on this journey, thus making it absurd to consider this situation as an excessive use of force.

Fourthly, Guinea-Bissau did not violate articles 224 and 110 of the Convention, as the ship was arrested by uniformed officials in conformity with its rights, as a coastal State, to monitor activity in the exclusive economic zone.

Fifthly, Guinea-Bissau did not violate article 225 of the Convention as it did not put the safety of navigation in danger nor did it create any risk for the ship, which could remain perfectly moored in the port of Bissau.

Finally, sixthly, Guinea-Bissau did not violate article 300 of the Convention as it always exercised its rights in good faith and in a non-abusive manner.

Mr President, learned Members of the International Tribunal, thank you very much for your attention.

THE PRESIDENT: Thank you, Mr Bastos.

M/V "VIRGINIA G"

I understand that this was the last statement made by Guinea-Bissau during this hearing. Article 75, paragraph 2, of the Rules of the Tribunal, provides that, at the conclusion of the last statement made by a party at the hearing, its Agent, without recapitulation of the arguments, shall read that party's final submissions. A copy of the written text of these submissions, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other party.

I now invite the Agent of Guinea-Bissau to take the floor to present the final submissions of Guinea-Bissau.

STATEMENT OF MR MENEZES LEITÃO - 6 September 2013, p.m.

STATEMENT OF MR MENEZES LEITÃO
AGENT AND COUNSEL OF GUINEA-BISSAU
[ITLOS/PV.13/C19/8/Rev.1, p. 21-22]

MR MENEZES LEITÃO:

Case No. 19 *Virginia G*;
ITLOS Hamburg, 6 September.

Submissions in relation to the claim

For the reasons given in writing and in oral argument, or any of them, or for any other reason that the International Tribunal deems to be relevant, the Government of the Republic of Guinea-Bissau respectfully requests the International Tribunal to adjudge and declare that:

1. The International Tribunal has no jurisdiction about claims related to the vessel *Iballa G*.
2. The claims submitted by Panama are inadmissible due to the nationality of *Virginia G*, the absence of a right of diplomatic protection concerning foreigners, or the lacking exhaustion of local remedies, and should therefore be dismissed.

Alternatively that:

1. The actions of the Republic of Guinea-Bissau did not violate the right of Panama and of the vessels flying her flag to enjoy freedom of navigation and other internationally lawful uses of the sea, as set forth in terms of article 58(1) of the Convention.
2. Guinea-Bissau laws can be applied for the purpose of controlling the bunkering to fishing vessels in the exclusive economic zone.
3. Guinea-Bissau did not violate article 56(2) of the Convention.
4. Guinea-Bissau did not violate article 73(1) of the convention.
5. Guinea-Bissau did not violate article 73(2) of the Convention.
6. Guinea-Bissau did not violate article 73(3) of the Convention.
7. Guinea-Bissau did not violate article 73(4) of the Convention.
8. Guinea-Bissau has not used excessive force in boarding and arresting the *Virginia G*.
9. Guinea-Bissau did not violate the principles of articles 224 and 110 of the Convention.
10. Guinea-Bissau did not violate neither article 225 of the Convention nor the SUA convention, not even the principles of safety of life at sea and collision prevention.
11. Guinea-Bissau did not violate article 300 of the Convention.

M/V "VIRGINIA G"

12. The Republic of Guinea-Bissau has no obligation to immediately return to Panama the discharged gas oil or to pay any compensation for it.
13. The Republic of Guinea-Bissau has no obligation to pay in favour of Panama, the *Virginia G*, her owners, crew and any persons or entities with an interest on the vessel's operations any compensation for damages and losses.
14. The Republic of Guinea-Bissau has no obligation to give apologies to the Republic of Panama.
15. The Republic of Guinea-Bissau has no obligation to pay any interest.
16. The Republic of Guinea-Bissau has no obligation to pay costs and expenses incurred by Panama.
17. The Republic of Guinea-Bissau has no obligation to pay any compensation or relief to Panama, the *Virginia G*, her owners, charterers or any other persons or entities with interest in the vessel's operation.

Submissions in relation to the counter-claim

The Government of the Republic of Guinea-Bissau respectfully requests the International Tribunal to adjudge and declare that:

- A. Panama violated article 91 of the Convention.
- B. Panama is to pay in favour of Guinea-Bissau compensation for damages and losses caused as a result of the aforementioned violation, in the amount quantified and claimed by Guinea-Bissau in paragraph 266 of its Counter-Memorial, or in an amount deemed appropriate by the International Tribunal.
- C. Panama is to reimburse all legal and other costs the Republic of Guinea-Bissau has incurred with this case.

Luís Menezes Leitão, Fernando Loureiro Bastos, Agents and Counsels for the Republic of Guinea-Bissau. Hamburg, 6 September 2013.

THE PRESIDENT: Thank you, Mr Leitão.

CLOSURE OF THE ORAL PROCEEDINGS - 6 September 2013, p.m.

Closure of the Oral Proceedings

Clôture de la procédure orale

[ITLOS/PV.13/C19/8/Rev.1, p. 22-23]

THE PRESIDENT: Thank you, Mr Leitão.

This brings us to the end of this hearing. On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both Panama and Guinea-Bissau. I would also like to take this opportunity to thank both the Agent of Panama and the Agent of Guinea-Bissau for their exemplary spirit of cooperation.

The Registrar will now address questions in relation to documentation.

THE REGISTRAR: Thank you, Mr President.

Pursuant to article 86, paragraph 4, of the Rules of the Tribunal, the parties may, under the supervision of the Tribunal, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the meaning and scope thereof. These corrections relate to the verified versions of the transcripts in the official language used by the party in question. The corrections should be submitted to the Registry at the latest by Wednesday, 18 September at 5.00 p.m. Hamburg time.

Mr President.

THE PRESIDENT: Thank you, Mr Registrar.

The Tribunal will now withdraw to deliberate. The judgment will be read on a date to be notified to the Agents. The Tribunal currently plans to deliver the judgment in spring 2014. The Agents of the parties will be informed reasonably in advance of the precise date of the reading of the judgment.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the judgment.

The hearing is now closed.

(The sitting was closed at 4.30 p.m.)

M/V “VIRGINIA G”

PUBLIC SITTING HELD ON 14 APRIL 2014, 2 P.M.

Tribunal

Present: President YANAI; Vice-President HOFFMANN; Judges MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; Judges ad hoc SÉRVULO CORREIA, TREVES; Registrar GAUTIER.

Panama is represented by:

Mr Ramón García-Gallardo,
King & Wood Mallesons LLP, Brussels, Belgium,

as Agent and Counsel;

Mr Alexander Mizzi,
King & Wood Mallesons LLP, Brussels, Belgium

as Co-Agent and Counsel;

Mr Francisco Denis,
Consul General of Panama in Hamburg, Germany,

Ms Jana Smolkina,
Ship Registration Officer, Consulate General of Panama, Hamburg, Germany,

as Counsel;

Ms Veronica Anzilutti,
Administration Department, Consulate General of Panama, Hamburg, Germany,

as Advisor.

Guinea-Bissau is represented by:

Mr Luís Menezes Leitão,
Full Professor, Faculty of Law, University of Lisbon, Portugal

as Agent and Counsel;

Mr Fernando Loureiro Bastos,
Professor, Faculty of Law, University of Lisbon, Portugal, and Fellow, Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria, South Africa,

14 April 2014, p.m.

as Co-Agent and Counsel;

Mr João André da Silva,
President, Interministerial Commission for Management and Monitoring of the Virginia G
Case,

Mr Rufino Lopes,
Lawyer, Assessor to the Government;

as Advisor.

NAVIRE « VIRGINIA G »

AUDIENCE PUBLIQUE DU 14 AVRIL 2014, 14 H 00**Tribunal**

Présents : M. YANAI, *Président*; M. HOFFMANN, *Vice-Président*; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK, *juges*; MM. SÉRVULO CORREIA, TREVES, *juges ad hoc*; M. GAUTIER, *Greffier*.

Le Panama est représenté par :

M. Ramón García-Gallardo,
SJ Berwin LLP, Bruxelles, Belgique,

comme agent et conseil;

M. Alexander Mizzi,
SJ Berwin LLP, Bruxelles, Belgique

comme co-agent et conseil;

M. Francisco Denis,
Consul général du Panama à Hambourg, Allemagne,

Mme Jana Smolkina,
Chargée de l'immatriculation des navires, Consulat général du Panama, Hambourg,
Allemagne,

comme conseil;

Mme Veronica Anzilutti,
Service de l'administration, Consulat général du Panama, Hambourg, Allemagne,

comme conseiller.

La Guinée-Bissau est représentée par :

M. Luís Menezes Leitão,
Professeur titulaire à la Faculté de droit de l'Université de Lisbonne, Portugal,

comme agent et conseil;

M. Fernando Loureiro Bastos,

14 avril 2014, après-midi

Professeur à la Faculté de droit de l'Université de Lisbonne, Portugal, et membre de l'Institut de droit international et de droit comparé en Afrique, Faculté de droit de l'Université de Prétoria, Afrique du Sud,

comme co-agent et conseil;

M. João André da Silva,
Président, Commission interministérielle chargée de la gestion et du suivi de l'affaire du navire « Virginia G »,

M. Rufino Lopes,
juriste, légiste auprès du Gouvernement,

comme conseiller.

M/V "VIRGINIA G"

Reading of the Judgment

[ITLOS/PV.14/C19/1/Rev.1, p. 1; TIDM/PV.14/A19/1/Rev.1, p. 1]

LE GREFFIER : Le Tribunal rend aujourd'hui son arrêt dans l'*Affaire du navire « Virginia G »* entre le Panama et la Guinée-Bissau. La procédure a été introduite devant le Tribunal le 4 juillet 2011 et l'affaire a été inscrite au rôle des affaires du Tribunal en tant qu'affaire No. 19. L'audience en l'affaire s'est tenue devant le Tribunal du 2 au 6 septembre 2013. A l'issue de la procédure orale, les Parties ont soumis leurs conclusions finales et celles-ci sont reproduites dans les comptes-rendus de la procédure orale, pour le Panama dans le procès-verbal No. 7 du 6 septembre 2013 aux pages 29 à 32 et pour la Guinée-Bissau dans le procès-verbal No. 8 du 6 septembre 2013 aux pages 23 à 25.

M. le Président.

THE PRESIDENT: At the outset, I wish to note that Judge Wolfrum, by reasons duly explained to me, is prevented from being present today.

I note the presence at the hearing of Agents, Co-Agents, Counsel and Advisors of the parties. Therefore, I call on the Agent of Panama, Mr García-Gallardo, to introduce the delegation of Panama.

[Mr García-Gallardo introduces the delegation of Panama.]

THE PRESIDENT: Thank you, Mr García-Gallardo.

I now call on the Agent of Guinea-Bissau, Mr Menezes Leitão, to introduce the delegation of Guinea-Bissau

[Mr Menezes Leitão introduces the delegation of Guinea-Bissau.]

THE PRESIDENT: Thank you very much, Mr Menezes Leitão.

I am now going to read the text of the Judgment delivered by the Tribunal. In view of the length of the text, I will read extracts of the Judgment followed by the operative provisions thereof.

[The President reads the extracts, beginning in French and continuing in English.]

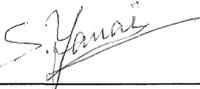
Thank you very much. The sitting is now closed. Have a nice afternoon.

(The sitting closed at 3.45 p.m.)

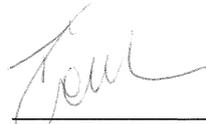
These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*.

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire du navire « Virginia G » (Panama/Guinée-Bissau)*.

Le 31 mars 2016
31 March 2016



Le Président
Shunji Yanai
President



Le Greffier
Philippe Gautier
Registrar