INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2013

Public sitting

held on Thursday, 5 September 2013, at 10 a.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President Shunji Yanai presiding

THE M/V "VIRGINIA G" CASE

(Panama/Guinea-Bissau)

Verbatim Record

Present:	President	Shunji Yanai
	Vice-President	Albert J. Hoffmann
	Judges	Vicente Marotta Rangel
		L. Dolliver M. Nelson
		P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Helmut Türk
		James L. Kateka
		Zhiguo Gao
		Boualem Bouguetaia
		Vladimir Golitsyn
		Jin-Hyun Paik
		Elsa Kelly
		David Attard
		Markiyan Kulyk
	Judges *ad hoc*	José Manuel Sérvulo Correia
		Tullio Treves
	Registrar	Philippe Gautier

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as Agent and Counsel;

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and

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and

Mr Rufino Lopes, Lawyer, Assessor to the Government,

as Advisor.

THE PRESIDENT: Good morning. The Tribunal will continue the hearing in the case concerning the vessel *M/V 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. 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.

Examination by MR MENEZES LEITÃO

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 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?

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.

JUDGE AKL *(Interpretation from French)***:** Thank you, Mr President.

You are a legal expert, Mr Mane. Could you be so kind as to provide, on the basis of the legislation of Guinea-Bissau, some clarification about the decision of the Regional Court of Bissau of 5 November 2009 ordering FISCAP and the Interministerial Fisheries Commission to refrain from all measures with respect to the seizure of the vessel *Virginia G* and the products on board? On 13 November 2009 the General Prosecutor of Guinea-Bissau held this decision to be null and void and on the same day informed the Prime Minister that the decision of the Interministerial Commission was correct and concluded (*Continued in English*): "I have no reservation in regard to the use of the fuel that this ship was transacting in our exclusive economic zone."

(Interpretation from French) Would you be so kind as to shed some light on the following points? Does the act of bringing an appeal result *ipso facto* in the suspension of the court's decision? Secondly, what was the date on which the appeal was brought and what was the decision by the court having jurisdiction? Thirdly, was the decision of the Regional Court of Bissau in force or not when the Ministry of Finance ordered the cargo of gas oil to be unloaded "*notwithstanding the judicial order of suspension of the seizure*"*?*

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.

JUDGE AKL *(Interpretation from French)***:** Thank you, Mr Mane, but I was referring to appeal against the court's decision made by the General Prosecutor. Could you please tell us the date of the appeal by the General Prosecutor against the court's decision, and what was the decision by the court having jurisdiction in Guinea-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 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.

JUDGE AKL: Thank you very much, Mr Mane.

THE PRESIDENT *(Interpretation from French)***:** 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. 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.

Examination by MR MENEZES LEITÃO

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 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 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, 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.

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 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.

THE PRESIDENT *(Interpretation from French)***:** Judge Marotta Rangel would like to ask a question.

JUDGE MAROTTA RANGEL *(Interpretation from French)***:** I would like to have some further clarification. Despite the fact that you were extremely clear in your wish to explain the legislation of your country, not solely with respect to fisheries but also with respect to that most recent phenomenon, so-called bunkering, under the legislation of your country, there are a number of points which require further clarification because they have specific consequences for the question here before our Tribunal.

There are a number of more specific points where we see that the legislation of your country is not wholly the same as that of other countries, indeed, of that in my own country. According to what you have said, there is no doubt that the powers of the coastal State with respect to fisheries are not limited only to the waters of the territorial sea but also extend into the exclusive economic zone of the coastal State, although the Convention on the Law of the Sea remains somewhat imprecise, indeed, wholly silent on this particular question. It is on this precise point that I would seek better understanding and where I would like a very precise reply from you.

Within the framework of the EEZ of your country, the jurisdiction of the State regarding fisheries is not confined to the traditional framework of the territorial sea but also extends to a distance of 200 nautical miles from the internal boundary of the

territorial sea; in other words, it appears that there is a broader jurisdiction, which we do not find, at present, at least in the legislation of my country. This is the point on which I would like confirmation in relation to what you have just said, which is essentially that the jurisdiction of your country with regard to fisheries is not confined solely to the traditional framework of the territorial sea, but also extends, in some way, into the exclusive economic zone. I want to be absolutely sure that I have fully understood what you have said.

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.

JUDGE MAROTTA RANGEL *(Interpretation from French)***:** I would like information not only on the jurisdiction of your State over the territorial sea, but also over the exclusive economic zone.

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.

JUDGE MAROTTA RANGEL *(Interpretation from French)***:** Thank you very much.

THE PRESIDENT: Judge Ndiaye.

JUDGE NDIAYE *(Interpretation from French)*: Good morning, sir. Could you please produce for the Tribunal the 1993 Sub-regional Convention? That might possibly help us in resolving this issue. Guinea-Bissau and Senegal are parties. Do you have a copy of the 1993 Convention?

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.

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. 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.

Examination by MR MENEZES LEITÃO

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.

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 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 LEITÁO: 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.

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.

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 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.

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 (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.

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 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 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 transhipment operations) of Decree No. 4/96 provides:

> 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 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) transhipment 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 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-Nagymaros 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, 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.

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.)