Dissenting Opinion of Judge Jesus

1. At the outset, I am glad to underline that this decision of the Tribunal is an important contribution to the development of international law of the sea, in that it clarifies several issues relating to the powers or rights of the coastal State in its exclusive economic zone (hereinafter "EEZ").

2. Amongst these issues are those on which the Tribunal establishes that bunkering of foreign fishing vessels is a fishing-related activity and, as such, may be regulated by the coastal State, under its powers conferred by article 73, paragraph 1, of the Convention, and declares that confiscation of foreign ships involved in fishing activities in the EEZ of a coastal State, whether fishing vessels proper or vessels engaged in fishing-related activities, such as those involved in bunkering of fishing vessels, is a legitimate measure that a coastal State may take in the exercise of its sovereign rights to explore and exploit, conserve and manage the living resources in its EEZ.

3. I, therefore, voted in favour of most of the operative paragraphs of the majority decision.

4. Regrettably, however, I do not share the Tribunal's interpretation of article 73, paragraph 1, of the Convention, on the basis of which the confiscation measure against the *M/V Virginia G* imposed by Guinea-Bissau was considered not necessary and, as a result, the Tribunal held Guinea-Bissau to be in violation of article 73, paragraph 1, in this respect.

5. As this interpretation by the Tribunal is a central issue in the present case, on which the Tribunal relied to grant compensation to Panama, I felt obliged to cast a dissenting vote, for the reasons expounded below. I will also address some other issues in respect of which I do not share the legal reasoning developed in the majority decision.

6. In this opinion I will, therefore, address the following main issues:

(a) The interpretation of article 73 of the Convention;
(b) The issue of a lack of genuine link between ship and flag State as an objection to the admissibility of Panama's claims;
(c) The issue of exhaustion of local remedies;
(d) The counter-claim made by Guinea-Bissau.

(a) On the interpretation of article 73 of the Convention

7. The majority decision concludes, and rightly so, that coastal States have the right to regulate bunkering of fishing vessels in their EEZs and as a result, coastal States in their laws and regulations to conserve and manage the living resources in the EEZ may impose penalties, including confiscation, as reflected in State practice, for violations of such laws and regulations.

8. The Tribunal, therefore, comes to the conclusion that Guinea-Bissau, by arresting the *Virginia G* for bunkering a fishing vessel in the Guinea-Bissau EEZ without a written authorization, as required by its laws and regulations applicable to fishing and fishing-related activities in its EEZ, did not violate the Convention. Conversely, it is therefore to be presumed that, for the Tribunal, the *M/V Virginia G* did violate Guinea- Bissau's laws and regulations on bunkering in its EEZ by providing fuel to fishing vessels in that zone without the required written authorization.

9. In addition, the Judgment acknowledges that, while Guinea-Bissau had the right to arrest the *Virginia G* for bunkering without the required authorization, Guinea-Bissau, in the circumstances of this case, should not have imposed the penalty of confiscation and by doing so imposed a penalty that was not necessary. Therefore, by thus confiscating the *M/V Virginia G*, Guinea-Bissau acted in violation of article 73, paragraph 1.

10. Assuming for the sake of argument that such interpretation by the Tribunal of article 73, paragraph 1, is correct, one comes to the conclusion that, in accordance with this Judgment itself, the two Parties have violated

each other's rights: Panama violated the laws and regulations of Guinea-Bissau on bunkering in its EEZ and Guinea-Bissau violated the rights of Panama by imposing a penalty higher than those that, in the eyes of the Tribunal, Guinea-Bissau should have imposed, therefore violating article 73, paragraph 1, of the Convention.

11. Notwithstanding the conclusions and acknowledgments in the Judgment that each State violated the other's rights, the Judgment disregards totally the sanctions that would derive therefrom against Panama while imposing on Guinea-Bissau the payment of compensation in favour of Panama. And this only because Guinea-Bissau, in punishing the violation of its laws and regulations, a violation which this Judgment itself has established, imposed on the vessel *Virginia G* a penalty which this Judgment considers too burdensome and therefore not necessary.

12. To reach this conclusion, the Tribunal interpreted article 73, paragraph 1, of the Convention in isolation, disregarding the text and the context of article 73 as a whole, in which this provision is inserted. In my view, article 73, paragraph 1, should not be interpreted separately, as done in this Judgment. Article 73 has to be interpreted as a whole. The whole of the article is based on an interplay and protection of different interests representing a balanced legal approach to the issue of enforcement powers of the coastal State vis-a-vis the interests of third States, aimed at inducing compliance with its fishing laws and regulations in force in its EEZ. The content of this article can only be properly understood if its several, but interdependent, provisions are interpreted conjointly.

13. The Judgment relies on the expression "as necessary" found in article 73, paragraph 1, of the Convention to conclude that the Tribunal has the power to deny the coastal State's authority to confiscate ships if and when the Tribunal believes that the measure of confiscation imposed by the coastal State for violation of its fishing laws and regulations is not necessary in the circumstances of a given case.

14. I beg to disagree with such a conclusion. It is my view that, contrary to the approach taken by the Tribunal, this article has to be interpreted as a whole and article 73, paragraph 1, of the Convention therefore has to be interpreted in conjunction with the remaining provisions of the same article, including the provision of paragraph 3.

15. As I see it, paragraph 1 of article 73 of the Convention establishes the general policy in accordance with which a coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage its living resources in the exclusive economic zone, take such measures as may be necessary to ensure compliance with its laws and regulations adopted in accordance with the Convention.

16. This provision does not indicate, explicitly or implicitly, any exception to the measures that can be taken by the coastal State in this regard. Instead, the exceptions to the measures that may be taken pursuant to paragraph 1 are to be found in paragraph 3. This paragraph is quite clear in establishing the exceptions imposed by the Convention to the general policy expressed in the provision of paragraph 1. Indeed, paragraph 3 states that coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment or any other form of corporal punishment. These are the only two measures that coastal States are not allowed to take against violators of their fishing laws and regulations in force in their EEZs.

17. Had the framers of the Convention intended to consider some form of confiscation of ships as an exception to the measures that may be taken under paragraph 1, they would have said so in paragraph 3, whose sole object is to lay down exceptions to the general policy of paragraph 1 by specifying penalties or measures that cannot be imposed by the coastal State.

18. The interpretation made in the Judgment in accordance with which the Tribunal holds that the confiscation of the *M/V Virginia G* and the gas oil was not necessary and therefore was in violation of article 73, paragraph 1, of the Convention, amounts in fact to creating a third exception to the general policy of paragraph 1, this time not by decision of the framers of the Convention but rather by the constructive interpretation made in this Judgment.

19. Besides, telling a coastal State that it cannot impose confiscation for violations of its laws and regulations in the EEZ because the penalty, in the circumstances of the case, is not necessary in the eyes of the Tribunal, is tantamount to conferring a power on the Tribunal that is nowhere to be found in the Convention. This interpretation may create serious difficulties for coastal States in their effort to achieve proper and effective implementation of their fishing laws and regulations in their EEZs.

20. In the future a coastal State may refrain from ever imposing the penalty of confiscation on ships caught in violation of its fishing laws and regulations in the EEZ, afraid that the Tribunal, acting on the basis of an arbitrary and subjective yardstick to measure the gravity of a given violation, may call upon it to pay compensation in favour of the violator of its fishing laws and regulations.

21. At a time of growing global concern for the conservation and sustainability of fishing resources in all oceans of the world, a concern shared by all States, regional and international organizations, including FAO, as well as by world civilian populations at large, the Judgment has embarked upon a restrictive interpretation of article 73 of the Convention, one that has no clear basis in that article, and one that may create serious difficulties for States in enforcing their fisheries laws and regulations against increasing numbers of violators.

22. A decision to restrict the rights of the coastal State in enforcing its laws and regulations in the EEZ against violators may only be justified when it is based on provisions of the Convention that clearly and unequivocally establish such restrictions, such as those referred to in article 73, paragraph 3, and not on subjective assumptions of judges about the necessity or non-necessity of a given measure that may be imposed by the coastal State.

(b) On compensation for damages to the ship that may be attributed to the lack of maintenance

23. On the basis of its conclusion that Guinea-Bissau violated the rights of Panama by imposing too high a penalty on the *M/V Virginia G*, the Tribunal grants Panama compensation for damages to the *M/V Virginia G*.

24. I disagree on two counts with this decision to grant compensation to Panama: firstly, as stated above, I do not agree with the interpretation of the Tribunal that the confiscation measure taken by Guinea-Bissau violated article 73, paragraph 1 and, as a result, there should be no compensation to be paid by Guinea-Bissau for having imposed a penalty that, in my view, is allowed under

article 73 of the Convention; and secondly, I do not agree that Guinea-Bissau is responsible for the damage caused to *M/V Virginia G* by lack of maintenance during the period it was detained in the port of Bissau.

25. The conclusion of the Tribunal to the effect that the measure of confiscation against the *M/V Virgina G* was not necessary and therefore Guinea-Bissau violated article 73, paragraph 1, is obviously unbalanced and punishes Guinea-Bissau for taking measures to secure compliance with its fisheries laws and regulations in the EEZ, while, at the same time, compensating the violator of those laws. Curiously, this approach turns the victim into the violator and the violator into the victim. An appeal or review of the confiscation measure imposed by Guinea-Bissau, if made in the domestic court of any country, would not have this illogical effect. Instead, the measure of confiscation, if found to be too heavy a penalty under the applicable law, would have been replaced by a lighter penalty by the domestic court, but the victim would remain the victim and the violator would remain the violator.

26. It is obvious from the record in this case and from the conclusions reached in this Judgment that, if injury was inflicted on Panama, Panama itself contributed to it. Had the *M/V Virginia G* not engaged in bunkering vessels fishing in the EEZ of Guinea-Bissau without the required written authorization, a violation of the fishing laws and regulations of Guinea-Bissau otherwise acknowledged by this Judgment itself (see paragraphs 266 and 267) the *M/V Virginia G* would not have been arrested and subsequently confiscated. This fact alone would have required from this Judgment a more balanced approach to the issue of compensation, as advised by article 39 of the Draft Articles on State Responsibility.

27. Draft article 39, referred to above, "recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extension of reparation". This was, for example, the position taken by the International Court of Justice in the *LaGrand* case. In that case, the Court stated that "Germany may have been criticized for the manner in which the proceedings were filed and for the timing" and that the Court would have taken this factor,

among others, into account "had Germany's submission included a claim for indemnification".[1]

28. The owner of the *M/V Virginia G* contributed twice to the injury inflicted upon the ship and on those involved or interested in its operation: by permitting the ship to embark on bunkering activities in the EEZ of Guinea-Bissau without the required authorization and by not maintaining its ship operational during the detention period as it should have. The evidence produced in the present case does not indicate that Guinea-Bissau did anything to impede the captain or the ship-owner from carrying out the maintenance of the ship. Had the owner provided the means to do the routine maintenance work on the ship, the condition of the ship would not have deteriorated, or at the least not to the extent it did. The deterioration of the ship may have been caused by the ship-owner's avowed lack of funds to do the ship-maintenance work.

29. As we are reminded in the elucidating commentaries to draft article 39:[2]

> if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

30. This rule may apply, *mutatis mutandis*, in this case.

31. The Judgment grants to Panama € 146, 080.80 as compensation for repairs to the vessel resulting from damage suffered from lack of maintenance during its stay in the port of Bissau. The Judgment fails to establish the causal nexus underlying this compensation. Even if a ship is detained, damage to the ship resulting from lack of proper maintenance may not occur if those who are supposed to secure the maintenance of the ship undertake the required maintenance work. It is not because of the detention of a ship that *per se* damage to the ship necessarily follows with the passing of time. Damage may result from lack of maintenance.

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1 Quoted by James Crawford, "The International Law Commission's Articles on State Responsibility-Introduction, Text and Commentaries, page 240, Cambridge University Press, 2002.

2 *Ibid*., pp. 240–241.

32. It would appear to me that, while a ship is under arrest or detention, awaiting the outcome of the internal judicial appeal against its confiscation, the ship is to be considered as detained. In the jurisprudence of this Tribunal as reflected in its case law on prompt release, namely the *"Tomimaru" Case* (*Japan* v. *Russian Federation*)*, Prompt Release*, a ship that has been confiscated for violations of fishing regulations in the EEZ is considered by the Tribunal to have been "arrested" or "detained" until the decision to confiscate can no longer be appealed. And if the ship is considered as arrested or detained until the exhaustion of the appeal procedure, then no compensation is due for damages since in this case the detention of the ship is considered by the Judgment to have been legal.

33. It is to be noted that, in this case, the confiscation of the *M/V Virginia G* was challenged by the owner, by filing an appeal with the competent Bissau Court and, as noted in the Judgment several crew members were allowed to remain and live on-board of the *M/V Virginia G* during its stay in the port of Bissau until its release. These crew members could have done the maintenance work on the ship had it not been for the owner's lack of funds. Guinea-Bissau would have been responsible for the damage to the ship caused by the lack of maintenance if it had impeded the work or refused to authorize the captain or the owner to undertake the required maintenance, facts that were not established in the course of the proceedings.

(c) On the issue of a genuine link

34. It is common to have ships registered in and flying the flag of a State with which their owners or operators do not have the usual connections. In common parlance this is known as ships carrying a flag of convenience. The use and abuse of the so-called flag of convenience by ships of all sorts have been seen by many as an umbrella to cover up illegal activities at sea, or to evade the obligations of ship-owners and operators. IUU fishing, for example, is seen by many as being boosted by ships flying a so called "flag of convenience", as a number of flag States appear not to exercise very effective control over some such ships.

35. No wonder therefore that the debate about how to curb the pernicious effects caused by the illegal activities carried out by some ships under the so-called "flag of convenience" has always been a hot debate. This debate, which continues and has brought out different opinions and hinted at different solutions, hovers over the interpretation of articles 91 and 94 of the Convention, dealing with the nationality of ships and the duties of the flag State, respectively. To date, international courts and tribunals have not made a thorough interpretation and pronouncement on this issue that could have clarified the understanding of the applicable law.

36. The Tribunal, in addressing this issue in the *M/V "SAIGA"* (*No. 2*) *Case*, did however make a significant contribution to clarifying some aspects of the interpretation of articles 91 and 94. It did not however go as far as one would have expected it to do.

37. In the present case (Case No. 19), the Tribunal was once again confronted with a similar issue, as Guinea-Bissau argued that the lack of a genuine link between the *M/V Virgina G* and Panama was a cause for the inadmissibility of the claims of Panama and also a basis for a counter-claim against Panama for compensation.

38. In dealing with the issue of a genuine link in the present case, the Tribunal attempted to answer two questions:

(a) The first dealing with the relationship between the right of a State to grant its nationality to ships and a genuine link between the State and the ship; and
(b) The second enquiring whether a genuine link existed between the *M/V Virginia G* and Panama at the time of the incident.

39. To answer the first question, the Tribunal, while observing that under article 91, paragraph 1, of the Convention a State enjoys the right to grant its nationality to ships, recalls that in the *M/V "SAIGA"* (*No. 2*) *Case*, it stated that "[a]rticle 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines 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. These matters are regulated by a State in its domestic law. Pursuant to article 91, paragraph 2, Saint Vincent and the Grenadines is under an obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law."

40. The Tribunal recalls that it also stated in the *M/V "SAIGA" (No.2) Case* that

> the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and 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.

41. This last conclusion of the Tribunal in the *M/V "SAIGA" (No. 2) Case* is further clarified in the present case when the Tribunal considers that

> article 91, paragraph 1, third sentence of the Convention, requiring a genuine link between the State and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships.

42. These quotations from the Tribunal's *M/V "SAIGA" (No. 2) Case* already represent a major contribution by the Tribunal to the clarification of the law on the issue of the grant of nationality to ships and on the issue of a genuine link between the ship and the State whose flag it is entitled to fly. From these conclusions, it is clear therefore that:

(a) The issue whether a State should or should not grant its nationality to a ship is a matter totally reserved to that State, which, under its own laws, may prescribe the conditions for that grant, for the registration of such ships in its territory and for the right to fly its flag;
(b) The genuine link that should exist between a ship and its flag State is not a prerequisite or condition for the granting of nationality to the ship and therefore it does not condition the validity of the nationality or registration of such ship.

43. If this is a correct interpretation of international law, as reflected in article 91 of the Convention, as I believe it is, then the question arises: at what stage should the issue of the existence of a genuine link be taken into consideration, bearing in mind that, in accordance with this article on nationality of ships, "[t]here must exist a genuine link between the State and the ship"?

44. The Tribunal did not address this question in the *M/V "SAIGA"* (*No. 2*) *Case* and, regrettably, does not address it in the present case either. I believe this case offered the Tribunal a good opportunity to clarify the law in this respect, a clarification that is much needed, especially in the light of the arguments advanced by Guinea-Bissau questioning the existence of a genuine link between Panama and the *M/V Virginia G*. I shall therefore state my own understanding of this issue.

45. While it is to be concluded that at the time a State grants its nationality to a ship, it is totally free to do so and is not bound by any prerequisite and condition, including that of a genuine link, other than those it may freely impose on itself, the State, once it has granted its nationality to a ship, nonetheless has a duty to ensure that, as mandated by the Convention, "there must be a genuine link" between it and the ship flying its flag. In order for the State to secure a genuine link between itself and the ship, the State is required to exercise effective jurisdiction and control over the ship flying its flag.

46. The Convention, in its article 94, outlines the duties to be observed by the flag State so as to ensure that it "effectively exercise[s] its jurisdiction and control in administrative, technical and social matters over ships flying its flags". In other words, it is through the performance by the flag State of the duties referred to in article 94 in relation to a given ship that the test of whether there is a genuine link between the State and the ship is to be applied.

47. The fulfillment of these duties comes as a result of the granting by the State of its nationality to the ship and not the other way around. The granting of the nationality precedes the flag-State duty to take measures to secure the genuine link.

48. From the above it seems clear that the pronouncements of the Tribunal are correct but fall short of clarifying other important aspects of the interpretation of articles 91 and 94 of the Convention, namely whether the nationality granted to a ship may be denied effect by an international court or tribunal seized of a case in which the issue of lack of a genuine link is argued.

49. Though in the present case this question was prompted by the objection raised by Guinea-Bissau to the admissibility of the claims of Panama on grounds that there was no genuine link between the *M/V Virginia G* and Panama the Tribunal does not quite address this concern, as it should have. Instead it quotes its findings in the *M/V "SAIGA"* (*No. 2*) *Case* where it stated that

> [t]here 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.

50. What kind of remedy is then left to a State to challenge the absence of proper jurisdiction and control by the flag State over the ship, especially bearing in mind the clear stipulation in article 91 of the Convention that "[t]here must be a genuine link between the State and the ship".

51. Admittedly, a third State may not, by its own direct action, as stated by the Tribunal in the *M/V "SAIGA"* (*No. 2*) *Case*, "refuse to recognize the right of the ship to fly the flag of the flag State", exception being made, I might add, to the case referred to in article 92, paragraph 2 of the Convention. However, if a third State whose interests may have been, or are thought to have been, affected by the ship's activities "discovers evidence indicating the absence of proper jurisdiction and control by the flag State over a ship", that third State may challenge the absence of a genuine link between the flag State and the ship before an international court or tribunal.

52. While it is for the flag State to decide freely whether to grant its nationality to ships and to decide on their registration in its territory or the right to fly its flag, the issue of whether there is a genuine link between a ship and its flag State may legitimately be raised in a case before an international court or

tribunal with a view to deriving the relevant legal effects. One such effect could be, for example, that, if a ship is found in a specific case before an international court or tribunal not to have a genuine link with its flag State, the issue of inadmissibility of the claims of the flag State, amongst others, may be successfully challenged before the international court or tribunal.

53. While it is not for the international court or tribunal to deny a ship nationality or the right to fly the flag of the flag State, exception being made, as stated above, to the case referred to in article 92, paragraph 2 of the Convention, it is nonetheless for such court or tribunal, in the context of a specific case before it, to assess, when so requested by a party to the dispute, whether a genuine link exists between the ship and its flag State in order to derive the necessary legal effects that may be relevant to the case.

54. Turning now to the present case, Guinea-Bissau indeed argued the non-existence of a genuine link between the vessel *M/V Virginia G* and Panama and, on this basis, contested the admissibility of Panama's claims and filed a counter-claim for compensation against Panama.

55. The Tribunal, in responding to the second question it posed to itself as to whether a genuine link existed between the *M/V Virginia G* and Panama at the time of the incident, relies on a number of pieces of evidence presented by Panama and concludes that: "a genuine link existed between the *M/V Virginia G* and Panama".

56. While I do not question this finding, I believe that Guinea-Bissau should have been precluded from raising the objection to the admissibility of the claims presented by Panama on the ground of absence of a genuine link between Panama and the *M/V Virginia G*, as Guinea-Bissau, stated that the *M/V Virginia G*, while under the Panamanian flag, had been authorized on a number of occasions to bunker fishing vessels in Guinea-Bissau's EEZ. Though, as stated above, the coastal State has no right to refuse to recognize the flag of the flag State, these authorizations issued by the competent authorities of Guinea-Bissau are an implicit recognition and acceptance of Panama as the legitimate flag State of the ship.

57. For these reasons, I find unconvincing the objection to the admissibility of the claims of Panama argued by Guinea-Bissau on this ground.

(d) Exhaustion of local remedies

58. Guinea-Bissau contested the admissibility of certain claims of Panama in the interest of individuals or private entities, because these individuals or private entities had not exhausted the local remedies available to them in Guinea-Bissau (see paragraph 131).

59. The Tribunal, in responding to Guinea-Bissau's objection, followed an approach to this issue which does not seem to me to be the correct one. Regrettably, I do not share the legal reasoning of the Tribunal in this regard.

60. The Tribunal's main line of reasoning on this issue is twofold:

(a) This case is not a case of diplomatic protection and therefore local remedies need not be exhausted as a precondition for referring it to this Tribunal for settlement;
(b) The Tribunal considers that the damage to the persons and entities with an interest in the ship or its cargo arises from violations of alleged rights of Panama. When the claim contains elements of both injury to a State and injury to an individual, for the purposes of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant.

61. The Tribunal continues its reasoning by stating that the principal rights that Panama alleges have been violated by Guinea-Bissau include rights that belong to Panama under the Convention and, in conclusion, finds that

> Given the nature of the principal rights that Panama alleges have been violated by the wrongful acts of Guinea-Bissau, the Tribunal finds that the claim of Panama as a whole is brought on the basis of an injury to itself.

62. As it considers that the damage to the persons and entities with an interest in the ship or its cargo arises from the violations referred to in the preceding paragraph, the Tribunal concludes that the claims in respect of such damage are not subject to the rule of exhaustion of local remedies.

63. While I agree with the conclusions of the Tribunal that, contrary to the arguments of Panama, the special agreement on the basis of which the case was referred to the Tribunal "does not preclude Guinea-Bissau from raising objections to the admissibility of the claims by Panama", as the agreement does not impose any restrictions on the possibility for a Party to raise objections to admissibility, I take exception to the legal reasoning and the two conclusions of the Tribunal referred to in the preceding paragraph for the following reasons:

(e) On the issue of whether the present case can be characterized as one of diplomatic protection

64. Panama could not be clearer in characterizing the nature of this case when it states in its Memorial (see paragraph 15) that

> Panama is bringing this action against Guinea-Bissau within the framework of diplomatic protection. Panama takes the cause of its national and the vessel *Virginia G* with everything onboard, and every person and entity involved or interested in her operations, which it is claimed has suffered injury caused by Guinea-Bissau.

65. Panama further justifies its characterization of the case as one of diplomatic protection in paragraph 16 of its Memorial by stating that

> [I]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights, its right to ensure, in the person of, its subjects, respect for the rules of international law.

66. Convinced as it is that its action is to be framed as a diplomatic protection case, Panama in paragraph 17 of its Memorial proceeds to remind us of the notion of diplomatic protection, by stating that "[t]he (UN) Draft Articles on Diplomatic Protection (2006), in Article 1, state that diplomatic protection consists of the invocation by a State through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".

67. These three passages from the Memorial of Panama are a clear indication that Panama advisedly characterized the case brought before the Tribunal as one of diplomatic protection. This is further confirmed by Panama, when it states that

> the remedy available to the owner of the *M/V Virginia G* in Guinea Bissau was rendered ineffective by virtue of 'the forceful and unjust manner in which Guinea-Bissau's acts above the law', the only viable option was for Panama to submit the matter to international arbitration or to the Tribunal (see para. 149 of this Judgment).

68. In fact, the operators and owner of the *M/V Virginia G*, as the facts of this case demonstrate, acted in the same manner and with the same conviction in the court system of Guinea-Bissau, pursuing, extensively, the local remedies available there. The owners of the ship filed several appeals, including the appeal before the Regional Court of Bissau to have the measure confiscating the ship repealed until, as stated by Panama in its Memorial, they were convinced that "the remedy available" to them in Guinea-Bissau "was rendered ineffective by virtue of 'the forceful and unjust manner in which Guinea-Bissau acts above the law' " **(para. 148 of the Judgment).**

69. From the above, there can be no doubt that Panama's intention and action were not aimed at bringing a case before the Tribunal to vindicate its own rights that may have been violated by Guinea-Bissau, rights that were distinct from those of its subjects it wanted to protect. The rights vindicated by Panama in its Memorial, for the protection of which it instituted the case, are clearly rights of its subjects which it, as the flag State, wanted to protect. That is what can be read in paragraph 16 of its Memorial, stating that "[b]y taking the case of one of its subjects and by resorting to diplomatic action or

international judicial proceedings on his behalf", Panama was "in reality asserting its own rights – its rights to ensure, in the person of its subjects respect for the rules of international law". In other words, Panama was consciously and confessedly exercising its right of diplomatic protection.

70. Facts are facts and they cannot be changed. And the fact here is that Panama, at least when it submitted its Memorial to the Tribunal, was convinced that this was clearly a case of diplomatic protection. Panama's arguments in embracing the cause of its ship *M/V Virginia G*, together with that of the entities and private individuals involved in the operation of that ship, bringing a case "on their behalf" to the Tribunal, could not have framed a better case of diplomatic protection than this one. There is no doubt that Panama is entitled to bring such a case to an international court or tribunal such as this Tribunal. However, international law also requires that the local remedies first be exhausted before the case may be brought to an international court or tribunal.

71. The Tribunal's reasoning in this respect does not square with the facts of this case and the conclusion it reaches in this regard amounts to changing the nature of the case, contrary to the clear characterization made by Panama of its case as explained above.

72. The change introduced by the Tribunal in the characterization of the case is based on the argument of the preponderance of rights. To assess the reasoning of the Tribunal in this regard, two issues must be clarified, namely:

(a) Whether this Tribunal may change the characterization of the nature of the claims brought before it by Panama;
(b) And whether in the factual circumstances of this case the claims of Panama were preponderantly claims based on violations of its own rights or claims relating to the ship-owner or other private persons.

73. Regarding the first of these issues, I believe that it is not for the Tribunal to change the characterization of the nature of the subject matter presented by a party to a dispute before it. When it comes to issues of admissibility of claims it is for the parties to demonstrate that their case is well founded in fact and law.

74. For Panama, as the relevant part of its Memorial reflected in the preceding paragraphs amply demonstrates, the case was clearly and unequivocally brought as a case of diplomatic protection, brought, according to Panama, only after the ship-owner had come to the conclusion that it had exhausted the possibility of obtaining a remedy in the court system of Guinea-Bissau. Panama made an effort to demonstrate that its argument in favour of this being a diplomatic protection case was well founded in law and fact, as reflected in its Memorial **(see paragraphs 15 to 17 of its Memorial).**

75. The Tribunal, however, felt that it was its role to change that characterization of the case as one of diplomatic protection to a characterization as one of protection of rights belonging to Panama, acting as the wronged party as such and not "on behalf of its subjects".

76. Curiously, in the *M/V "Louisa" Case* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), the Tribunal seems to have taken a different direction. Paragraph 143 of the Judgment in that case states:

> 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.

77. To prove the point that the subject matter of the case may not be changed, the Tribunal in the *M/V "Louisa" Case* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*) includes several quotations from international courts' jurisprudence in paragraphs 145 to 147 of that Judgment.

78. To justify the change it effected in the nature of the case, the Tribunal, relying on its finding set out in paragraph 156 of the present Judgment that "most provisions of the Convention referred to in the final submissions of Panama confer rights and duties mainly on States", brought into play the

argument of preponderance of rights, to justify altering Panama's own characterization of the subject matter of the case. At times one is even confused about the real reason for the Tribunal's conclusion that this case is not one of diplomatic protection. In one line of reasoning the Tribunal gives the preponderance of Panama's rights as a justification and in another instance it states that "[g]iven the nature of the principal rights that Panama alleges have been violated by the wrongful acts of Guinea Bissau, the Tribunal finds that the claim of Panama as a whole is brought on the basis of an injury to itself".

79. Even if the Tribunal, by applying the preponderance-of-claims argument, could change *proprio motu* the nature of the claims presented by a Party, the facts in the present case indicate that the preponderance of Panama's claims were, as Panama itself clearly asserted in the Memorial, aimed at protecting the ship and the persons interested in its operations. This is a fact that also clearly emerges from the final submissions of Panama. An accurate assessment of the preponderance of Panama's claims would also have led the Tribunal to characterize this case as one of diplomatic protection.

80. I am therefore of the view that this was a clear case of diplomatic protection – after all, it was brought as such by Panama – and, accordingly, the requirement of the exhaustion of local remedies as reflected in article 295 of the Convention should have been observed.

81. Though I disagree with the reasoning of the Tribunal, I am of the view that the ship-owner, under the circumstances prevailing in Guinea-Bissau at that time, could no longer effectively find a local remedy. Having assessed the evidence presented by the two Parties in respect of the reason why the appeal launched by the ship-owner in the Criminal Court of Bissau, challenging the legality of the measure confiscating the *M/V Virginia G*, did not proceed, I came to the conclusion that the available local remedy was not an effective one. The contradictory explanations given by Guinea-Bissau of the reason why the appeal in the Criminal Court of Bissau did not proceed – sometimes said to be the failure by the ship-owner to pay initial judicial fees (*preparos*), sometimes justified for reasons that have to do with the appeal that allegedly was extemporaneously filed, sometimes because the *M/V Virginia G* was meanwhile released – led me to conclude that there was no longer any effective local remedy for the ship-owner to rely on.

82. In my view, when the internal conditions governing the operation of local remedies in the territory of a party do not allow for effective recourse to those remedies, as in the present case, then the requirement of exhaustion of local remedies is to be considered satisfied for the purposes of bringing a case of diplomatic protection to an international court or tribunal.

83. In conclusion and summarising my opinion on this issue: This was a clear case of diplomatic protection, as claimed by Panama, that required the exhaustion of local remedies. The owner of the *Virginia G* did have recourse to local remedies to challenge the confiscation measure against its ship. The lack of effectiveness of the local remedies available in Guinea-Bissau made it impossible for the ship-owner's appeal to be fully considered, thereby justifying referral of the case to arbitration and later to the Tribunal, as ineffective response on the part of the local remedies is to be equated to the exhaustion of such remedies.

(f) Guinea-Bissau counter claim for compensation

84. I joined the unanimous decision of the Tribunal in voting against the counter-claim for compensation presented by Guinea-Bissau, for the following reasons:

85. Guinea-Bissau presented a counter-claim against Panama for compensation on the argument that the absence of a genuine link between the *M/V Virginia G* and Panama as its flag State facilitated the violation by that ship of the Guinea-Bissau laws and regulations in the EEZ.

86. My view on the issue of nationality of ships and the genuine link has been expressed above in this opinion and, like the Tribunal, I concluded that the evidence and facts presented in the context of this case do not establish the lack of a genuine link.

87. Even if the absence of a genuine link between the ship and Panama could have been proven in this case, it would not necessarily follow that it was because of the lack of a genuine link that there was a violation of the Guinea-Bissau fishing legislation in the EEZ. Damage to Guinea-Bissau might have

been caused by bunkering without the required written authorization regardless of the existence or not of a genuine link. A ship with an unquestionable genuine link could have violated the same laws on bunkering for lack of the required authorization, as well. I find therefore that there is no nexus between the *M/V Virginia G* violation of Guinea-Bissau fishing laws in the EEZ by bunkering without authorization and the obligation of the flag State to indemnify or compensate Guinea-Bissau for possible damage brought about by such violation. The international responsibility of a State requires that an act or omission attributable to such State be found to constitute a breach of an international obligation. That does not seem to be the case here.

(*signed*) José Luís Jesus