

**ADDITIONAL PLEADING OF PANAMA  
RELATING SOLELY TO GUINEA-BISSAU'S COUNTER-  
CLAIM**



**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

**M/V “VIRGINIA G”**

**THE REPUBLIC OF PANAMA v. THE REPUBLIC OF GUINEA-BISSAU**

**Case N° 19**

**ADDITIONAL PLEADING OF THE REPUBLIC OF PANAMA  
TO GUINEA-BISSAU'S COUNTER-CLAIM**

**21 DECEMBER 2012**

**ORIGINAL**

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## CHAPTER 1 INTRODUCTION and PROCEDURE

### I. Introduction

1. This document contains the additional pleadings of the Republic of Panama (“**Panama**”) relating to the counter-claim submitted by the Republic of Guinea-Bissau (“**Guinea-Bissau**”).
2. Panama was authorised by the International Tribunal for the Law of the Sea (the “**International Tribunal**”) to submit these additional pleadings in terms of Order 2012/3 dated 2 November 2012, as explained in further detail in paragraphs 17 to 19 below.

### II. Procedure

3. On 3 June 2011, Panama instituted arbitration proceedings against the Republic of Guinea-Bissau under Article 286 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (the “**Convention**”) in relation to a dispute which had arisen by reason of the arrest, on 21 August 2009, and prolonged detention, by Guinea-Bissau, of the Panama-flagged vessel *M/V VIRGINIA G* (the “**VIRGINIA G**”) its captain and crew, as well as the confiscation of the cargo of gas oil on board (the “**Arbitration Notification**”).<sup>1</sup>
4. Panama requested the Arbitral Tribunal to adjudge and declare in terms of the points listed (a) to (j) of the said Arbitration Notification, which points have already been set out in Panama’s Memorial.<sup>2</sup>
5. In its Memorial, Panama stated that by Exchange of Letters of 29 June 2011 and 4 July 2011 Panama and Guinea-Bissau entered into a special agreement to submit the dispute between the two States relating to the *VIRGINIA G*, and subject to the arbitration proceedings, to the jurisdiction of the International Tribunal in terms of Article 55 of the Rules of the International Tribunal (the “**Special Agreement**”).
6. The Special Agreement was notified to the Registrar of the International Tribunal by the Agent of Panama by letter dated the same day, 4 July 2011. The Registrar of the International Tribunal sent a copy of a *Note Verbale* (as sent to Guinea-Bissau) to Panama, wherein reference was made to Guinea-Bissau’s agreement to “transfer the case to the International Tribunal whose jurisdiction in this case Guinea-Bissau accepts fully”, and to Guinea-Bissau’s statement that the “afore-mentioned proposal and this letter constitute a special agreement between the two Parties for the submission of the case to ITLOS.”
7. The dispute was submitted to the International Tribunal on the 4 July 2011 by Special Agreement between the Parties in terms of Article 24 of Annex VI of the Convention (Statute of the International Tribunal for the Law of the Sea).
8. By Order 2011/3 of 18 August 2011, in accordance with the Special Agreement and in terms of the agreement between the Agents and Counsels for Panama and Guinea-Bissau at a

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

<sup>2</sup> For the avoidance of repetition, reference is made to paragraph 2 of Panama’s Memorial, pp. 3-4.

consultation meeting held on the 17 August 2011, the President of the International Tribunal fixed the 4 January 2012 as the date for the submission by Panama of its Memorial (in accordance with Article 59 and Article 60 of the Rules of the International Tribunal).

9. By letter dated 13 December 2011, addressed to the Registrar of the International Tribunal, the Agent and Counsel for Panama appointed Professor Tullio Treves as *ad hoc* judge for Panama in terms of Article 17(3) and 19(1) of the Statute of the Tribunal, without objection by Guinea-Bissau.
10. By letter dated 3 January 2012, addressed to the Registrar of the International Tribunal, the Agent for Guinea-Bissau appointed Professor José Manuel Sérvulo Correia as *ad hoc* judge for Guinea-Bissau pursuant to Article 19(1) of the Statute of the Tribunal, without objection by Panama.
11. By Order 2011/8, on the request of Panama, the President of the International Tribunal, having asked for the views of Guinea-Bissau, extended the date for the submission by Panama of its Memorial to 23 January 2012.
12. Panama’s Memorial, with its accompanying annexes, was submitted on the 23 January 2012 in electronic format and by electronic mail,<sup>3</sup> followed immediately by transmission of the requested paper format in one original, one certified copy and 65 additional copies.
13. By letter dated 3 April 2012, the Registry of the International Tribunal informed the Agent for Panama that Annexes 22, 32, 44 and 55 were to be re-submitted for want of legibility or otherwise incomplete translation. The Annexes were re-submitted on the 12 April 2012 in electronic format and by electronic mail, followed immediately by transmission of the requested paper format in one original, one certified copy and 65 additional copies.
14. By letter dated 31 May 2012, the Registry of the International Tribunal informed the Agent of Panama of Guinea-Bissau’s submission of its Counter-Memorial and Annexes. By letter dated 11 June 2012, the Registry of the International Tribunal informed the Agent of Panama of Guinea-Bissau’s submission of additions/corrections to Annexes 9, 16 and 19 of its Counter-Memorial, as requested by the International Tribunal.
15. In terms of Order 2011/3 of 18 August 2011, in accordance with the Special Agreement and in terms of the agreement between the Panama and Guinea-Bissau at the consultation meeting held on the 17 August 2011, the President of the International Tribunal fixed the 21 August 2012 as the deadline for the filing of the Reply of Panama.
16. In terms of Order 2012/2, and on the request of Panama, the International Tribunal extended the time-limit for the submission of the Reply by Panama to the 28 August 2012, on which date Panama duly submitted the said Reply.
17. Panama further requested the International Tribunal to consider granting Panama an additional opportunity to submit additional pleadings in relation only to the counter-claim submitted by Guinea-Bissau (as part of its counter-memorial), so as to allow Panama an equal number of written submissions in relation to the counter-claim.

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<sup>3</sup> As permitted in terms of Guideline 10 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

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18. The International Tribunal considered Panama’s request, and by letter dated 6 October 2012, the International Tribunal requested Panama and Guinea-Bissau to submit their observations in relation to the admissibility of Guinea-Bissau's counter-claim, in line with the International Tribunal's prerogative set out in Article 98 of the Rules of the Tribunal.
19. The International Tribunal considered the issue of admissibility of Guinea-Bissau’s counter-claim, as well as Panama’s request to present additional submissions (relating only to the counter-claim). By Order 2012/3 of 2 November 2012, the International Tribunal found (by 18 votes to 4) the counter-claim submitted by Guinea-Bissau to be admissible under Article 98(1) of the Rules of the Tribunal, and unanimously authorised Panama to submit additional pleadings relating solely to the counter-claim submitted by Guinea-Bissau, fixing 21 December 2012 as the time-limit for the filing of such additional pleadings.
20. These additional pleading are, therefore, being submitted in accordance with Order 2012/3 of the International Tribunal.

\* \* \*

## CHAPTER 2

## ADDITIONAL SUBMISSIONS TO GUINEA-BISSAU’S COUNTER-CLAIM

21. In Chapter VII (paragraphs 256 to 266) of its Counter-Memorial, Guinea-Bissau submits a counter-claim against Panama alleging Panama’s violation of Article 91 of the Convention, and claiming compensation in the amount of USD 4,000,000 - in Guinea Bissau's words: as *damage caused to the environment, the loss of tax revenue and the plundering of its marine resources*.
22. In Chapter VII (paragraphs 217 to 234) of its Rejoinder, Guinea-Bissau reiterates its counter-claim and attempts to explain the reasoning behind its claim for compensation of USD 4,000,000, for the alleged *damage caused to the environment, the loss of tax revenue and the plundering of its marine resources*.
23. Guinea-Bissau, therefore, claims that:
  - i. Panama violated Article 91 of the Convention; and
  - ii. Panama is to pay in favour of Guinea-Bissau compensation for damages and losses allegedly caused as a result of the aforementioned purported violation of Article 91.
24. Panama acknowledges that the International Tribunal has authorised the submission of these Additional Pleadings only in relation to Guinea-Bissau's counter-claim. Panama highlights, however, that Guinea-Bissau has added little further (in the counter-claim section of its Rejoinder) by way of expanding or elaborating on the counter-claim set out in its Reply. Nevertheless, Guinea-Bissau uses paragraphs 64 to 88 of its Rejoinder to set out some additional arguments related to the very same subject matter/legal basis as that on which its counter-claim is based (unusually, without putting forward the same remarks in its counter-claim section). In this respect, Panama considers it necessary to at minimum be permitted to comment, in these Additional Submissions, on the contents of the said paragraphs, whilst reserving the right to present additional information, arguments and supporting material, as may be necessary.
25. Panama fully contests Guinea-Bissau’s counter-claim, and submits the below Additional Submissions for consideration by the International Tribunal, summarised as follows:
  - I. Guinea-Bissau is estopped from bringing this counter-claim against Panama as Guinea-Bissau did not raise its "genuine link" concerns or allegations until the moment it submitted its Counter-Memorial in these proceedings;
  - II. Subsidiarily, and without prejudice to the above, a genuine link does exist between Panama and her vessel the *VIRGINIA G*, and Panama is not in breach of Article 91 of the Convention;
  - III. In any case, no compensation for *damage caused to the environment, the loss of tax revenue and the plundering of its marine resources* is due by Panama to Guinea-Bissau since Guinea-Bissau has neither fulfilled (perhaps even not attempted to fulfil) the requirements of causality nor is it justified in making such claims for compensation.

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### I. Guinea-Bissau is estopped from bringing this counter-claim against Panama

26. Panama submits that although the International Tribunal decided that Guinea-Bissau's counter-claim is admissible under the Rules of the Tribunal,<sup>4</sup> Guinea-Bissau is estopped from bringing this counter-claim against Panama since Guinea-Bissau did not raise its "genuine link" allegations, or even its concerns, until the very moment it submitted its Counter-Memorial in these proceedings;
27. Guinea-Bissau's apparent concerns as to whether a genuine link exists between Panama and the *VIRGINIA G* were never manifested or raised (by Guinea-Bissau as against Panama), whether before the events of August 2009 (during the *VIRGINIA G*'s previous missions) or at any stage of the arrest and prolonged 14-month detention of the vessel, or, indeed, at any time before Guinea-Bissau submitted its Counter-Memorial on 28 May 2012.
28. The International Court of Justice (“**ICJ**”) has held that estoppel obliges a State ‘to be consistent in its attitude to a given factual or legal situation’.<sup>5</sup> The principle is such that in this instance, Guinea-Bissau should not benefit from its own inconsistency.<sup>6</sup>
29. Panama’s basis for claiming that Guinea-Bissau is estopped from bringing this counter-claim is that Guinea-Bissau’s attitude and conduct meet the fundamental elements of estoppel, that (a) a State must make a representation to another; (b) the representation made must be unconditional and made with proper authority; and (c) the State invoking estoppel must rely on the representation.
30. *A State must make a representation to another*: Jurisprudence of the ICJ shows that estoppel can arise from silence,<sup>7</sup> and it can be seen, from the facts and supporting documents submitted, that the nationality of the *VIRGINIA G* and the existence of a genuine link was not disputed by Guinea-Bissau.
31. Firstly, and at the very earliest, the *VIRGINIA G*'s Panamanian flag and nationality were never contested during the vessel’s previous bunkering missions within the Exclusive Economic Zone (“**EEZ**”).
32. Secondly, upon the arrest of the *VIRGINIA G*, her documents were confiscated and accepted by the Guinea-Bissau Ministry of Fisheries and Maritime Economy/FISCAP officials: *We verified the documents of the ship and we considered that (h) the documents were in order.* (Annex 18 of Guinea-Bissau’s Counter-Memorial).

<sup>4</sup> By Order 2012/3 of 2 November 2012, the International Tribunal found (by 18 votes to 4) the counter-claim of Guinea-Bissau to be admissible under Article 98(1) of the Rules of the Tribunal.

<sup>5</sup> Ian MacGibbon, “Estoppel in International Law” (1957) 7 *International and Comparative Law Quarterly*, 458, 468 as quoted in Alexander Ovchar, “Estoppel in the Jurisprudence of the ICJ: A principle promoting stability threatens to undermine it”, *Bond Law Review*, Vol.21 (2009), Issue. 1, Art.5, p. 1

<sup>6</sup> Alexander Ovchar, “Estoppel in the Jurisprudence of the ICJ: A principle promoting stability threatens to undermine it”, *Bond Law Review*, Vol.21 (2009), Issue. 1, Art.5, p. 3

<sup>7</sup> See (*United Kingdom v Norway*) [1951] ICJ Rep 116 (*‘Fisheries Case’*) 139 in Ovchar, *supra note 5*, p.11-12 : in which the United Kingdom was estopped from objecting to the Norwegian system of delimitation of its coastline along the North Sea on the basis of prolonged abstention from protest, the United Kingdom was now estopped from protesting the system of delimitation. Also see, *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6, 23-24 in Ovchar, *supra note 5*, p.12-13: wherein Thailand was estopped from later claiming sovereignty over a Temple who’s location in Cambodian territory it had not previously contested.

33. During no less than 14 months after the arrest of the *VIRGINIA G*, that is, during her detention, Guinea-Bissau raised no concern of “genuine link”. Indeed, Article 94(6) of the Convention Guinea-Bissau entitled Guinea-Bissau to report its concerns to Panama, and would have obliged Panama to investigate and possibly remedy the matter:

*Article 94*

*6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.*

34. Thirdly, during the 12 months preceding the initiation of arbitration proceedings, Panama made its views and claims abundantly clear (letters dated 28 July 2010, 15 September 2010, 4 October 2010 and 19 October 2010). Likewise, in its letters of the 15 February 2011 (Exchange of views), Panama communicated its position and claims unequivocally, and encouraged Guinea-Bissau to agree to arbitration proceedings. On the 3 June 2011, Panama formally initiated arbitration proceedings, annexing a full statement of claim, containing the relevant facts and arguments. It was only when Guinea-Bissau saw that Panama was serious in protecting the interests of its flag, its vessel and her owners and crew, that Guinea-Bissau finally reacted on the 29 June 2011 by accepting to submit the dispute to the International Tribunal.
35. At no point during, or in between, the pre-International Tribunal proceedings did Guinea-Bissau raise its concerns as to “genuine link”.
36. It is relevant to highlight that the proceedings currently before the International Tribunal were brought by special agreement between Panama and Guinea-Bissau; they did not therefore come as a surprise to Guinea-Bissau. As such, Guinea-Bissau was fully aware of the claims being raised by Panama in relation to the *VIRGINIA G* matter well before proceedings were instituted before the International Tribunal.
37. All required documents (including a full statement of claims) was sent to the Minister of Foreign Affairs of Guinea-Bissau and, simultaneously, to the Office of the Prime Minister of Guinea-Bissau, to the Permanent Representation of Guinea-Bissau to the United Nations and to the Embassy of Guinea-Bissau in Belgium. Acquiescence from the side of Guinea-Bissau to the transfer of the dispute to the International Tribunal was received by Panama on 29 June 2011.
38. Of particular relevance are the consultations with the President of the Tribunal (at the time, President José Luis Jesus) held on 17 August 2011 at the premises of the Tribunal (attached as Annex 1(61) of Panama’s Reply). The purpose of the proceedings was to ascertaining the views of the parties with regard to questions of procedure in respect of Case No.19.
39. In this respect, the Tribunal corresponded with the parties at least five times in relation to the Hamburg consultation meeting between the parties and the President of the Tribunal, that is: on the 8 July 2011, on the 20 July 2011, on the 28 July 2011, on the 5 August 2011 and on the 10 August 2011.

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40. In its letter of the 20 July 2011, the Tribunal stated:

**The President wishes to underline the fact that these consultations will give an opportunity to the agents of both parties to request clarification on procedural issues as well as to express their views regarding the conduct of the case and the time-limits to be fixed for the submission of written pleadings.**

41. In its letter of the 5 August 2011, the Tribunal (Registrar) stated:

**I transmit to you attached a draft agenda for the consultations between the President and the representatives of the parties to be held on 17 August 2011 at 11.30 a.m. at the premises of the Tribunal.**

**The President wishes to address the issues mentioned in the draft agenda. Your comments on those issues will be appreciated. You are also most welcome to raise any question regarding the further conduct of the case which you deem appropriate.**

42. Despite Guinea-Bissau having had ample opportunity, the agenda and communications from the Tribunal make no reference to any sort of request by Guinea-Bissau to discuss – as part of the consultations – the submission of a counter-claim, much less the argument of “genuine link”. On the basis of the several communications regarding the draft agenda – which included sufficient time for the parties to make their observations – the following items were discussed during the consultations:

- (a) Institution of the proceedings;
- (b) Name of the case;
- (c) Order and number of written pleadings;
- (d) Fixing of time-limits for written pleadings;
- (e) Judge ad hoc;
- (f) Appointment of Agents;
- (g) Other matters.

*7. Concerning the number of pleadings, both Agents agreed that the written pleadings should start with a memorial to be submitted by Panama, followed by a counter memorial to be submitted by Guinea-Bissau. Both Agents also agreed that Panama would file a reply and Guinea-Bissau would file a rejoinder.*

43. Following discussions on the remaining points of the agenda, a further opportunity was given to the parties to raise further matters related to the conduct of the case:

*15. The President inquired from both Agents if they would like to make and other comment or raise any question related to the conduct of the case. Both Agents stated that they had no additional comment or question in this regard.*

44. The minutes were signed by the President of the Tribunal, José Luis Jesus, by the Agent for Panama, Ramón García-Gallardo, and by the Agent for Guinea-Bissau, Luis Menezes Leitão.
45. Nowhere in the proceedings of the Hamburg consultation meeting is it mentioned that Guinea-Bissau had such purported clear and grave concerns as to the existence of a genuine link between Panama and her vessel, the *VIRGINIA G*, and that Guinea-Bissau would submit a counterclaim challenging the exercise of Panama's sovereignty on this very doctrine.

46. *The representation made must be unconditional and made with proper authority:* The ICJ has continually held that a representation is unconditional when not subject to express conditions or reservations and if made by an organ competent to bind the State.<sup>8</sup>
47. The practice of the ICJ<sup>9</sup> therefore supports the fact that the representations made by the FISCAP officials, acting in accordance with the instructions of the Ministry of Fisheries and the Ministry of Finance of Guinea-Bissau, are such that they constitute organs capable of binding Guinea-Bissau, since ministries are considered to have the power to engage a State internationally.<sup>10</sup>
48. *The State invoking estoppel must rely on the representation:* Panama relied on the assumption, based on Guinea-Bissau’s silence, or tacit acceptance, that Guinea-Bissau considered the *VIRGINIA G* to be a *bona fide* ship under the flag of Panama.
49. There is no requirement under international law<sup>11</sup> that Panama make known its acceptance of Guinea-Bissau’s position. In fact, the contrary can be said to be true: that it is on the doubting State to raise its concerns with the flag State, failing which (for instance, in accordance with Article 94(6) of the Convention) the flag State may infer, and rely upon, acceptance by the other State. Panama, therefore, was correct to consider that the *VIRGINIA G*’s nationality was not in dispute - at any point before, during or after the arrest of its vessel.
50. Panama vehemently contests Guinea-Bissau’s ability to claim a lack of genuine link. Guinea-Bissau had ample opportunity to raise concerns in this regard:
- i. Firstly, in the years preceding the arrest during which the *VIRGINIA G* (at all times registered under the flag of Panama) rendered bunkering activities to fishing vessels in the EEZ of Guinea-Bissau without objection from the state of Guinea-Bissau as to the legitimacy of the vessel’s ties with the state of Panama;
  - ii. Secondly in the period post-of arrest and detention of the vessel and up until the current proceedings. Between the 21 August 2009 (the date of the *VIRGINIA G*’s arrest) up until Guinea Bissau’s submission of its Counter Claim on 28 May 2012 (a period amounting to almost three years) Guinea Bissau at no point contested the validity of the vessel’s flag, despite the numerous opportunities it had.
51. Finally, it is worth noting the reasoning of the International Tribunal in the *Saiga No.2 case*:<sup>12</sup> [69]. *As far as Guinea is concerned, the Tribunal cannot fail to note that it did not challenge or raise any doubts about the registration or nationality of the ship at any time until the submission of its Counter-Memorial in October 1998. Prior to this, it was open to Guinea to make inquiries regarding the registration of the Saiga or documentation relating to it. For example, Guinea could have inspected the Register of Ships of Saint Vincent and the*

<sup>8</sup> Ovchar, *supra note 5*, p.16-17

<sup>9</sup> See (*Denmark v Norway*) (Merits) [1993] PCIJ (serA/B) No 53 (“*Legal Status of Eastern Greenland*”) 71 in Ovchar, *supra note 5*, p.17, where the ICJ was concerned with whether or not the Minister in question was given the power to engage the State internationally.

<sup>10</sup> The ICJ has held that a Minister of Foreign Affairs is capable of binding a state and that the increasing technicality of government business has meant that ministries other than the ministries of foreign affairs have been given the power to engage the State internationally (see: V.Lowe “How and Why is the Community Bound by its Statements on Questions of International Law?”, *International Law Aspects of the European Union*, 1998, Kluwer Law International p.158-159)

<sup>11</sup> See: (*Australia v France*) (Merits) [1974] ICJ Rep 253, 267 (“*Nuclear Tests case*”) in Ovchar, *supra note 5*, p.21

<sup>12</sup> *The M/V Saiga (No.2)* (Saint Vincent and the Grenadines v. Guinea), International Tribunal for the Law of the Sea, judgement of 1 July 1999.

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*Grenadines. Opportunities for raising doubts about the registration or nationality of the ship were available during the proceedings for prompt release in November 1997 and for the prescription of provisional measures in February 1998.*

52. Guinea-Bissau cannot, therefore, now be permitted to raise such a serious challenge to the exercise of Panama’s sovereignty. Panama, therefore, submits that in line with norms of international law Guinea-Bissau should be estopped from claiming that Panama violated Article 91 of the Convention.

**II. There does exist a genuine link between the VIRGINIA G her flag State, Panama, and Panama is not in breach of Article 91 of the Convention**

53. Subsidiarily, and without prejudice to the above, Panama submits that a genuine link did, and does exist between Panama and its vessel the *VIRGINIA G*, and Panama submits that Guinea-Bissau’s argumentation and entire legal basis of its counter-claim is unfounded, disproportionate and vexatious.
54. At the outset, Panama refers to the *Saiga No.2* judgement of the International Tribunal, particularly paragraphs 62 *et. seq.*

*62. The question for consideration is whether the Saiga had the nationality of Saint Vincent and the Grenadines at the time of its arrest. The relevant provision of the Convention is article 91, which reads as follows:*

*Article 91  
Nationality of ships*

*1. Every State shall 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. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.*

*2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.*

*63. Article 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.*

*64. International law recognizes several modalities for the grant of nationality to different types of ships. In the case of merchant ships, the normal procedure used by States to grant nationality is registration in accordance with domestic legislation adopted for that purpose. This procedure is adopted by Saint Vincent and the Grenadines in the Merchant Shipping Act.*

*65. Determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State. Nevertheless, disputes concerning such matters may be subject to the procedures under Part XV of the Convention, especially in cases where issues of interpretation or application of provisions of the Convention are involved.*

*66. The Tribunal considers that the nationality of a ship is a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties.*

*67. Saint Vincent and the Grenadines has produced evidence before the Tribunal to support its assertion that the Saiga was a ship entitled to fly its flag at the time of the incident giving rise to the dispute. In addition to making references to the relevant provisions of the Merchant Shipping Act, Saint Vincent and the Grenadines has drawn attention to several indications of Vincentian nationality on the ship or carried on board. These include the inscription of “Kingstown” as the port of registry on the stern of the vessel, the documents on board and the ship’s seal which contained the words*

“SAIGA Kingstown” and the then current charter-party which recorded the flag of the vessel as “Saint Vincent and the Grenadines”.

68. The evidence adduced by Saint Vincent and the Grenadines has been reinforced by its conduct. Saint Vincent and the Grenadines has at all times material to the dispute operated on the basis that the Saiga was a ship of its nationality. It has acted as the flag State of the ship during all phases of the proceedings. It was in that capacity that it invoked the jurisdiction of the Tribunal in its Application for the prompt release of the Saiga and its crew under article 292 of the Convention and in its Request for the prescription of provisional measures under article 290 of the Convention.

69. As far as Guinea is concerned, the Tribunal cannot fail to note that it did not challenge or raise any doubts about the registration or nationality of the ship at any time until the submission of its Counter-Memorial in October 1998. Prior to this, it was open to Guinea to make inquiries regarding the registration of the Saiga or documentation relating to it. For example, Guinea could have inspected the Register of Ships of Saint Vincent and the Grenadines. Opportunities for raising doubts about the registration or nationality of the ship were available during the proceedings for prompt release in November 1997 and for the prescription of provisional measures in February 1998. It is also pertinent to note that the authorities of Guinea named Saint Vincent and the Grenadines as civilly responsible to be summoned in the schedule of summons by which the Master was charged before the Tribunal of First Instance in Conakry. In the ruling of the Court

#### A. The nationality of the VIRGINIA G

55. It is not contested that the *VIRGINIA G* was, at all relevant times, fully registered under the flag of Panama, and that the *VIRGINIA G*'s registered owner is the Panamanian company, Penn Lilac Trading S.A. (“**Penn Lilac**”). In this respect, Guinea-Bissau’s reference to the separate opinion of Judge Treves to the International Tribunal’s judgement in the *Grand Prince*<sup>13</sup> case (at paragraph 66 of its Rejoinder), indeed the reference and reliance on the *Grand Prince* case itself is not applicable to (or can be distinguished from) the circumstances of the current case, and the question presently before the International Tribunal. Guinea-Bissau has incorrectly relied upon the statements of Judge Treves and Judge Wolfrum, but taken out of its context.
56. In that case, doubts were raised as to whether the vessel was duly registered in Belize. In the words of Judge Treves himself: *The second aspect of the reasoning of the Tribunal on which I would like to make some observations concerns the crucial question of whether in fact Belize was the flag State at the relevant time. The analysis of the documents available to the Tribunal, as set out in the Judgment, seems adequate to satisfy me that, on the relevant dates, Belize was not the flag State of the Grand Prince.*
57. While in his Declaration, Judge Wolfrum outlined that “*the registration of ships has to be seen in close connection with the jurisdictional powers which flag States have over ships flying there flag*”.<sup>14</sup> As such the judge’s reference to genuine link in this respect was made in the context of registration requirements of ships pursuant to Article 91 of the Convention, such that “*subjection of the high seas to the rule of international law is organised and implemented by means of a permanent legal relationship between ships flying a particular flag and the State whose flag they fly. This link not only enable, but, in fact, obliges States to implement and enforce international as well as their national law governing the utilization of the high sea.*”<sup>15</sup>

<sup>13</sup> *The Grand Prince (Belize v. France)*, International Tribunal for the Law of the Sea, judgment of 20 April 2001.

<sup>14</sup> Declaration of Judge Wolfrum in relation to *The Grand Prince (Belize v. France)*, International Tribunal for the Law of the Sea, judgment of 20 April 2001, Paragraph 3.

<sup>15</sup> *ibid*

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58. Panama will seek to demonstrate (in the following paragraphs) how, in fact the *VIRGINIA G* was fully and effectively registered under the Panamanian flag, and how Panama effectively exercises its jurisdiction and control in administrative, technical and social matters the *VIRGINIA G*. Indeed, to use the same statement of Judge Treves highlighted by Guinea-Bissau: [...] *it is only this kind of registration that makes a State a flag State for the purposes of article 92 of the Convention.*
59. In line with national and international laws currently in force, the registration of the *VIRGINIA G* is regulated by rules, regulations and formalities to which Panama adheres, as a world leader in ship registration and a principal member within the largest international maritime and regional organisations.
60. Panama’s flag is subscribed to by almost 23% of the world’s tonnage. It is not listed on the Organisation for Economic Co-operation and Development (OECD) “black list” of uncooperative tax havens by the Committee on Fiscal Affairs, and fully respects anti money laundering and tax treaties. In addition Panama is also listed on the Paris MOU White List and on the IMO STCW White List.
61. Panama sets out, in its legislation, the requisites and conditions for granting Panamanian nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Indeed, registration under the Panamanian flag consists of a number of stages involving the owners and the owners' representatives (who are required to submit specific and substantial information and undertake considerable commitments) in fulfilment of all registration requirements, and in line with Panama’s international obligation.
62. The *VIRGINIA G* was, at all material times, in possession of all valid certificates and documents. This documentation was found to be in order when confiscated by the same officials who boarded the vessel. The certificates pertaining to the *VIRGINIA G*, as indicated below, have already been provided as Annex 2 (62) to Panama’s Reply.
63. Vessels which are successfully registered in Panama are issued with the below documents, as was the case with the *VIRGINIA G* at the material time:
- Permanent Registration Certificate
  - Radio Licence
  - International Tonnage Certificate
  - Continuous Synopsis Record
  - International Ship Security Certificate
  - Minimum Manning Certificate
  - Other certificates issued by Recognised Organisations (Ship Classification Societies) on behalf of Panama.
64. In addition, Panama monitors its ships to verify their fulfilment of the requirements under Panamanian law and international law by means of an Annual Safety Inspection.
65. Moreover, as with all countries that have ratified the International Convention for the Safety of Life at Sea (SOLAS), 1974 – to which Guinea-Bissau is not a State party<sup>16</sup> – in order to be constantly aware of the identity of the companies involved in the ship’s operation, a

<sup>16</sup> <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>

Continuous Synopsis Record (CSR) is strictly required, and is governed by stringent rules as to when and how a CSR can be amended or updated.

66. The CSR is a crucial document in monitoring the ship’s ownership and operations status, especially in light of global maritime traffic, and the fact that companies who operate ships can be located anywhere in the world.
67. In the words of Guinea-Bissau “the function of the genuine link is to establish an international minimum standard for the registration of ships [...]”<sup>17</sup> Indeed, at the time of arrest, the *VIRGINIA G* was in possession of all statutory and technical certificates attesting its Panamanian nationality. Guinea-Bissau cannot claim ignorance of the certificates carried by the *VIRGINIA G*, or, indeed, their validity, as these were confiscated by the authorities of Guinea-Bissau at the time of the arrest of the *VIRGINIA G* (as confirmed by Guinea-Bissau in Annex 18 to its Counter-Memorial) and only returned on the day of her release.
68. Panama did not neglect its duties as a flag State in respect of the *VIRGINIA G*, and has fully taken up this matter to defend the interests of its nationals, related entities and of its own flag; first via diplomatic exchanges, then via arbitration proceedings, and, currently, before the International Tribunal. Panama has proceeded in this manner despite Guinea-Bissau’s complete (and admitted) failure to promptly notify Panama, as the flag State, through the appropriate channels, of the action taken and of any penalties subsequently imposed, in terms of Article 73(4) of the Convention.
69. Panama states that the *VIRGINIA G* was, at the material time, fully entitled to fly the flag of Panama, and only the flag of Panama. Panama never suggested that the *VIRGINIA G* had a right to fly another flag; neither was the vessel ever accused of it. Yet Guinea-Bissau insists on making a series of unfounded and frivolous suggestions and reiterates such unfounded allegations in much the same language – and without further supporting evidence – in its Rejoinder, Chapter VII.

### B. Duties of the flag State

70. Article 94 of the Convention states (with added emphasis):

*Duties of the flag State*

1. Every State shall **effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.**
2. In particular every State shall:
  - (a) **maintain a register of ships** containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
  - (b) **assume jurisdiction under its internal law over each ship flying its flag** and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
3. Every State shall take such measures for ships flying its flag as are necessary to ensure **safety at sea** with regard, *inter alia*, to:

<sup>17</sup> Counter-Memorial, paragraph 30, last sentence.

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- (a) the construction, equipment and seaworthiness of ships;
  - (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
  - (c) the use of signals, the maintenance of communications and the prevention of collisions.
4. Such measures shall include those necessary to ensure:
- (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
  - (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;
  - (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.
5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.
6. **A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.**
7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.
71. Panama *does*, and did, effectively exercise its jurisdiction and control in administrative, technical and social matters over the *VIRGINIA G*.
72. Somewhat conversely to paragraph 30 of its Counter-Memorial, Guinea-Bissau in paragraph 230 of its Rejoinder appears to lower the threshold of the “genuine link” by stating that there is not *the least connection between [the VIRGINIA G] and Panama*. This is an entirely contestable claim to put forward, since Panama not only meets the basic requirements of establishing a genuine link with the *VIRGINIA G*, but irrefutably goes beyond such criteria.
73. Panama submits that in meeting its international maritime obligations and commitments it deems of utmost importance, it goes above and beyond the international minimum standards for the registration of ships by imposing additional conditions and requirements on the *VIRGINIA G* and her owner by requiring:
- Issuance of a Document of Compliance, following the carrying out of an initial audit. This document remains valid throughout successive annual audits conducted in all the offices from which the vessel is operated (in our case in Seville, Spain);
  - Issuance of Continuous Synopsis Record;
  - Issue of International Ship Security Certificate;

- Annual tax payments.

74. Regarding Guinea-Bissau’s reference to Paris MOU statistics for 2009, Panama replies that such numbers are disingenuously reproduced by Guinea-Bissau without explanation and without taking into account that Panama has the greatest share of the world’s tonnage registered under its flag. In any case, Guinea-Bissau does not make the necessary link between the figures listed and the circumstances surrounding the *VIRGINIA G* in and after August 2009.
75. Nonetheless, Panama comments that flag States with the largest fleets necessarily have a higher number of inspected vessels, and a higher incidence of reported problems. Panama, however, recognises the necessity to strive for improved status, and highlights what Guinea-Bissau failed to quote from the opening page of the Paris MOU 2009 Annual Report, that: *Panama can be congratulated for its efforts, which have resulted in moving from the Black to the Grey List. Unfortunately some other flags do little or nothing to improve their safety record and remain listed as “very high risk” black listed flags.*
76. Panama is now in the Paris Memorandum of Understanding on Port State Control list of States which meet the flag criteria for a low risk ship, effective as of 1 July 2012,<sup>18</sup> as well as in the IMO STCW<sup>19</sup> “White List” of countries assessed to be properly implementing the revised STCW Convention.<sup>20</sup>
77. In relation to Guinea-Bissau’s interpretation of paragraphs (3) and (4) of Article 94 of the Convention, Panama indicates that:
- In compliance with 94(3), Panama has delegated, to Recognised Organisations, the control and issuance of technical certification of the *VIRGINIA G*, such that the vessel is required to be inspected by qualified inspectors.
  - Panama monitors the audits carried out by Recognized Organisations. In the case of the *VIRGINIA G* technical documentation of the vessel was issued by the Recognised Organization PANAMA SHIPPING REGISTRAR INC., and was in force at the material time. This is confirmed by FISCAP (on behalf of Guinea-Bissau) in Annex 18 to the Counter-Memorial. Guinea-Bissau’s position that PANAMA SHIPPING REGISTRAR INC. is not an organ of the State of Panama, and that Panama delegates this task to a company thus neglecting its flag State obligations, demonstrates Guinea-Bissau’s unawareness of the international norms and practices. Panama, indeed, sub-contracts these functions to a number of recognised organisations specialising in such inspections, of which Panama Shipping Registrar Inc. is one; and this is permitted under Chapter 1, Part B, Regulation 6 SOLAS,<sup>21</sup>:

*The inspection and survey of ships, so far as regards the enforcement of the provisions of the present Regulations and the granting of exemptions therefrom, shall be carried out by officers of the State whose flag the ship is entitled to fly, provided that the Government of each State may entrust the inspection and survey either to surveyors nominated for the purpose or to organizations recognized by it. In every case the Government concerned fully guarantees the completeness and efficiency of the inspection and survey (added emphasis).*

<sup>18</sup> [http://www.parismou.org/inspection\\_efforts/inspections/ship\\_risk\\_profile/flags\\_meeting\\_low\\_risk\\_criteria/](http://www.parismou.org/inspection_efforts/inspections/ship_risk_profile/flags_meeting_low_risk_criteria/)

<sup>19</sup> International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978.

<sup>20</sup> [http://www.imo.org/blast/contents.asp?topic\\_id=67&doc\\_id=1026](http://www.imo.org/blast/contents.asp?topic_id=67&doc_id=1026)

<sup>21</sup> (Source: <http://www.unhcr.org/refworld/publisher,IMO,,46920bE32,0.html>)

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- In compliance with Article 94(4) Panama also has its own teams of inspectors appointed for the specific purposes of carrying out Annual Safety Inspections, followed by the issuance of an inspection report, which is kept on board and is also sent to the Panama Maritime Authority. At the time of the arrest of the *VIRGINIA G*, the captain provided the corresponding report of the Annual Safety Inspection. This document was, in effect, held by the authorities of Guinea-Bissau for the period of detention of the ship.
  - Panama was conscientious in the fulfilment of its duties as a flag State in this respect, having commissioned inspections of the *VIRGINIAG on board the vessel* and not in Seville, although separate audits commissioned to inspect/audit the Company where it is based, that is, in Seville. This was done in accordance with international guidelines, which provide that such inspections should be carried out in the same place as the seat of Management, that is, in Seville. Guinea-Bissau appears to confuse the two.
  - In relation to the argument submitted by Guinea-Bissau regarding the requirement to comply with rules and regulations concerning the management of vessels, the working conditions on board and training of crews (in terms of Article 94(3)), and that the flag State must also exercise jurisdiction over the owners or operators, Panama has already demonstrated how Penn Lilac is subjected to Panama’s jurisdiction, and, therefore, subject to statutory controls. It is also relevant to note that Penn Lilac’s vessel, the *VIRGINIA G*, operates in international traffic, meaning that in addition to the inspections carried out by Panama, the vessel is also subject to inspection by the port authorities as and when the *VIRGINIA G* visits (Port State Control). These controls verify compliance with international conventions by both the ship and the shipowner or operator. Panama has already demonstrated in its Memorial (Annex 22) that the *VIRGINIA G* underwent a Port State Control inspection on 5 August 2009 in the port of Las Palmas, Canary Islands, (Spain) by an official of the Panamanian registry.
78. Whilst completely denying Guinea-Bissau’s claim that Panama does not exercise full and proper jurisdiction and control with respect to the *VIRGINIA G* – Panama claims that Guinea-Bissau never manifested its concerns by reporting its doubts to Panama in accordance with Article 94(6) of the Convention despite the fact that Guinea-Bissau held the *VIRGINIA G*’s documents for so many months.
79. Indeed, Article 94(6) of the Convention states:
- A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.
80. If, indeed, Guinea-Bissau was convinced that Panama did not carry out its duties as a flag State, or that there was no genuine link between Panama and the *VIRGINIA G*, then Guinea-Bissau raising the objections at this stage in the proceedings before the International Tribunal can only put into severe doubt Guinea-Bissau’s good faith, especially considering that all the *VIRGINIA G*’s documents were held by Guinea-Bissau throughout the full detention period of detention, without Guinea-Bissau once raising any “genuine link” concerns, or, indeed, manifesting its concern in terms of Article 94(6).

81. Furthermore, Guinea-Bissau never raised this in the framework of the notification imposed by Article 73(4) of the Convention (notification of an arrest) since Guinea Bissau, contrary to such requirements, failed to communicate the arrest of the *VIRGINIA G* to the vessel’s flag State, Panama.

### C. Additional duties of the flag State

82. Regarding the arguments made by Guinea-Bissau in relation to Article 217 of the Convention, Panama draws the attention of the Tribunal to the following:
83. Article 217(1) provides that: *States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards [...] and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.*
84. In compliance with international standards on the prevention of pollution, as set out in the MARPOL Convention – to which Guinea-Bissau is not a State party – the *VIRGINIA G* meets all international standards for protection of the marine environment, and possesses the following certificates (all in force at the material time), issued on the basis of compliance with this Convention:
- International Oil Pollution Prevention Certificate (IOPP);
  - International Air Pollution Prevention Certificate (IAPP);
  - International Sewage Pollution Prevention Certificate (ISPP)
85. In terms of Panama’s MARPOL obligations, Penn Lilac (as owner) was also obliged to adopt the following measures on board the *VIRGINIA G* in respect of contamination prevention:
- an **oil water separator** installed in the engine room;
  - an **oil discharge and monitoring equipment** installed on the bridge to prevent discharges of water contaminated by fuel and oil from the bilge of the room machines; and
  - water vessel cleaning cargo tanks;
  - the use of low sulphur fuel (gas oil) to reduce air pollution;
  - water holding tank to prevent dirty discharge into coastal waters (within 12 miles) from sewage;
  - liability policy to cover pollution damage (P & I).

86. From the foregoing, and pursuant to the first and second sentences of paragraph (3) of Article 217 of the Convention, Panama can be said to comply fully with the requirements of the Convention.
87. The third sentence of Article 271(3) allows Guinea-Bissau to verify the condition of the *VIRGINIA G* against the documents she held, and to establish whether or not there was any doubt as to her condition. Indeed, “*These certificates shall be accepted by other States as evidence of the condition of the vessels and shall be regarded as having the same force as certificates issued by them, unless there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates*”.
88. Throughout all the months of detention, Guinea-Bissau held the *VIRGINIA G*'s documents and certificates. They are proven to have been accepted by FISCAP on behalf of the Republic of Guinea-Bissau (Annex 18 to the Counter-Memorial of Guinea-Bissau). During the full detention period, Guinea-Bissau raised not one objection to the validity of the certificates in question, or to the condition of the *VIRGINIA G*, as stated on her certifications.

#### **D. The nationality of the crew**

89. The argument that the *VIRGINIA G*'s crew were foreigners is not a valid argument. In today's reality, the vast majority of the crews of ships are multi-national, and it is logically unsound to argue that this would involve the abandonment of the link with the flag State of the vessel. Every crew member on board the *VIRGINIA G* held their respective qualifications and licences, which licences are endorsed by the flag State of Panama.
90. At the time of the arrest of the *VIRGINIA G* the crew had their licences in force and endorsed by the Government of Panama (examples included as Annex 3 (63) of Panama's Reply). The licences were retained by the Guinea-Bissau authorities during the detention of the ship.
91. Guinea-Bissau, nevertheless, presents additional arguments and proposes standards that go beyond what is required in terms of the Convention, even suggesting that the provisions of the United Nations Convention on the Conditions for Registration of Ships should be given full effect. This particular UN Convention was adopted 26 years ago and is not yet in force; moreover, Guinea-Bissau and Panama are not signatories.

#### **E. Nationality of the owner of the vessel - Penn Lilac**

92. Guinea-Bissau also questions the nationality of the company which owns the *VIRGINIA G*, despite it being clear from the vessel's certificates that Penn Lilac is fully registered in Panama, and legally represented by in Panama. In turn, this information is fully supported by the Continuous Synopsis Record, which provides, inter alia, that the ship was registered in Panama on 3 January 2003, and that the vessel's safety management is performed from Seville, Spain.
93. The performance of Safety Management operations and procedures from a State other than that of the State in which the vessel is registered does not imply the neglect of the flag State in the exercise of its jurisdiction and control. For a company to exercise Safety Management

operations, it must be in possession of a Document of Compliance, which is obtained by following a successful initial internal audit in the offices where they are located, followed by annual audits on the basis of which the Document of Compliance maintains its validity, or otherwise.

94. It is reiterated that at the time of arrest of the *VIRGINIA G* by the Guinea-Bissau authorities, the *VIRGINIA G* had available on board all valid documentation, which were found to be in order during the inspection of documents made by FISCAP on behalf of Guinea-Bissau (Annex 18 to the Counter-Memorial of Guinea-Bissau).
95. Panama submits, therefore, that it exercised, at the material time, effective jurisdiction and control over the *VIRGINIA G* and over Penn Lilac in line with its obligations as a flag State under international law.

#### **F. The *VIRGINIA G*'s P&I Club**

96. Protection and Indemnity Companies (P&I Clubs) do not form part of the State, but are private insurance companies that guarantee the civil liability of shipowners for third party claims.
97. The arrest of the *VIRGINIA G* was communicated to the P&I Club Spanish broker and the central P&I Club Navigator, in England, for reporting of the incident to the Guinea-Bissau correspondent, such that the vessel, captain, crew and the company could be attended to in their relations and communications with the Guinea-Bissau government and its agencies.
98. P&I insurance is not issued by the flag State; it is only the requirement of insurance that is imposed by the flag State, in line with a flag State's obligations under international conventions, and in line with requirements of all ports in which a vessel enters, such that the vessel and its owners can meet any liability they may have towards third parties, and to be able to rely on bank guarantees and liability insurance to meet potential claims for breach of international conventions.
99. Guinea Bissau demonstrates an absolute lack of knowledge regarding P&I practice worldwide, since it is commonly known that protection and indemnity insurance historically has its roots and commercial links in the city of London, while these days Clubs are based variously in London, Bermuda, Scandinavia, Luxembourg, the United States and Japan.<sup>22</sup> It is therefore absurd for Guinea-Bissau to suggest that a non-Panamanian P&I Club membership is an element that points towards the absence of a genuine link between Panama and the *VIRGINIA G* cannot be accepted.

#### **G. The clarification of the meaning of "genuine link" by ITLOS (Saiga No.2) and by the European Court of Justice**

100. Finally, Panama refers to the finding of the International Tribunal in the *Saiga No.2* Case, that “*The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the*

<sup>22</sup> <http://www.northedge.no/index.php/products/insurance-broking/25-produkter/120-pai-the-market-and-history.html>

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*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”.* (Added emphasis)

101. In *Commission v. Kingdom of the Netherlands*<sup>23</sup> The Court of Justice of the European Union agreed with the International Tribunal in the *Saiga No.2 Case*, and confirmed the judgement in the *Factortame* cases,<sup>24</sup> where the court referred to the concept of genuine link (albeit indirectly). The Court of Justice of the European Union stated that legislation in European Member States requiring the participation of nationals in ownership and/or manning as a precondition to registration is not necessary for meeting obligations under international law.

### *Conclusion*

102. Panama reiterates that it:

- i. is a State party to the most important international treaties in the maritime sector (including, for the purposes of this matter, MARPOL and SOLAS – to which Guinea-Bissau is not a State party), and requires the *VIRGINIA G* to hold an International Oil Pollution Prevention Certificate (IOPP), an International Air Pollution Prevention Certificate (IAPP) and an International Sewage Pollution Prevention Certificate (ISPP);
- ii. requires the *VIRGINIA G* to adopt certain measures in respect of contamination prevention, including an oil water separator installed in the engine room; an oil discharge and monitoring equipment installed on the bridge to prevent discharges of water contaminated by fuel and oil from the bilge of the room machines; and water vessel cleaning cargo tanks; the use of low sulphur fuel (gas oil) to reduce air pollution; water holding tank to prevent dirty discharge into coastal waters (within 12 miles) from sewage; liability policy to cover pollution damage (P & I);
- iii. obliges its vessels to hold valid compliance certificates (Permanent Registration Certificate, Radio Licence, International Tonnage Certificate, International Ship Security Certificate, Minimum Manning Certificate);
- iv. maintains control over Panamanian vessel-owning companies, their vessels and the individuals and entities involved in their operation (Continuous Synopsis Record);
- v. requires the issuance of a Document of Compliance, following an initial audit of the owning company, as well as annual audits conducted in all the offices from which the vessel is operated;
- vi. requires the issuance of an International Ship Security Certificate;
- vii. carries out technical control of its vessels through Recognized Organisations and its own inspectors (certificates issued by Recognised Organisations (Ship Classification Societies) on behalf of Panama);

<sup>23</sup> Judgment of the Court (First Chamber) of 14 October 2004. *Commission of the European Communities v Kingdom of the Netherlands* in Case C-299/02.

<sup>24</sup> JUDGMENT OF THE COURT of 5 March 1996 in Joined Cases C-46/93 and C-48/93 (references for a preliminary ruling from the Bundesgerichtshof and from the High Court of Justice, Queen's Bench Division, Divisional Court): *Brasserie du Pêcheur SA v. Federal Republic of Germany and the Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others*.

- viii. controls the qualifications of the crew in its vessels, in accordance with the STCW provisions;
  - ix. monitors its ships to verify their fulfilment of the requirements under Panamanian law and international law by means of an Annual Safety Inspection;
  - x. is listed in the Paris Memorandum of Understanding on Port State Control List of States which meet the Flag Criteria for a Low Risk Ship, effective as of 1 July 2012;
  - xi. is listed in in the IMO STCW “White List” of Countries Assessed to be Properly Implementing the Revised STCW Convention;
103. A State that fulfils the above criteria in respect of its vessels cannot be accused of lacking a genuine link. The *VIRGINIA G* was, for all intents and purposes, a Panamanian vessel. She was recognised as such by the Guinea-Bissau authorities. Her documents attesting her Panamanian nationality were examined by the Guinea-Bissau authorities and were found to be in order. Guinea-Bissau never raised any objection as to the *VIRGINIA G*’s nationality.
104. Against the above background, and contrary to Guinea-Bissau’s allegations, it is Panama’s submission that Panama has and maintains a genuine link with the *VIRGINIA G*, with the *VIRGINIA G*’s owner and with the *VIRGINIA G*’s operator, and that Panama exercises full and effective jurisdiction over the *VIRGINIA G*.

**III. No compensation is due to Guinea-Bissau in relation to its claim of alleged damage caused by Panama since Guinea-Bissau has not fulfilled the requirements of causality.**

105. Panama submits that Guinea-Bissau’s counter-claim has been brought in an invalid and insufficient format such that Panama’s ability to present a fully informed reply and defence has been prejudiced.
106. Guinea-Bissau has not fulfilled (perhaps even not attempted to fulfil) the requirements of causality. As the party bringing the counter-claim, Guinea-Bissau is bound by the principle *onus probandi incumbit ei qui dicit*. Nevertheless, Guinea-Bissau has failed to provide any evidence whatsoever (a) as to the alleged damage to the environment, the loss of tax revenue and the plundering of its marine resources by the Panamanian vessel *VIRGINIA G*; (b) the damages and losses suffered therefrom, and (c) the causal link to the *VIRGINIA G*.
107. Guinea-Bissau merely repeats the insubstantial statements made in its Counter-Memorial, then states that it is entitled to claim damages caused by the *VIRGINIA G* as a result of Panama’s alleged breach of Article 91 of the Convention.
108. Guinea-Bissau presents neither its legal arguments nor any proof as to how Panama might have granted its nationality to the *VIRGINIA G* without any genuine link to Panama; the causal link between the alleged lack of genuine link and the alleged resulting damage; the quantification of damages allegedly caused to the environment, the loss of tax revenue and the plundering of Guinea-Bissau’s marine resources apparently attributable to the *VIRGINIA G*.

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109. As to Guinea-Bissau’s arguments (paragraph 233 of its Rejoinder), that the amount claimed *would have constituted adequate compensation for the damage caused to the environment, the loss of tax revenue and the plundering of its marine resources*, Panama replies as follows, whilst reserving its rights to provide additional arguments:

#### I. Damage to the environment

110. Neither Panama nor the *VIRGINIA G* were faced with claims, for damage to the environment resulting from the operation of the *VIRGINIA G*. In any such event, however, the vessel had the required P&I cover to make good for any such claims proven to be attributable to it. However, no such claims were ever made and no evidence has since been presented by Guinea Bissau to substantiate such allegations.

#### II. Loss of Tax Revenue

111. Guinea-Bissau’s loss of tax revenues concerns (allegedly arising from non-fishing activities, carried out by non-fishing vessels, in the EEZ) have no basis in the Convention, as Panama has already set out in paragraphs 38 to 43 and 315 to 332 of its Reply, dated 28 August 2012. This counter-claim by Guinea-Bissau is further support for Panama’s contention that Guinea-Bissau is unilaterally extending the scope of the Convention to include rights not attributed to the coastal State in restriction of the freedoms granted to States in terms of Article 58 of the Convention (and as already expressly not permitted by the International Tribunal in the *Saiga No.2 Case*).

#### III. Plundering of Marine Resources

112. The *VIRGINIA G* is not a fishing vessel; the crew is not a fishing crew; the vessel has no fishing equipment, and the vessel at no time had any fisheries products on board. It is entirely erroneous of Guinea-Bissau to state that the *VIRGINIA G* “plundered” its marine resources and that Panama should, therefore, indemnify Guinea-Bissau for this amount, since it has provided no evidence to support such accusation and thereby substantiate its claim for compensation in this respect.
113. In its counter-claim Guinea-Bissau confidently states that, based on the above alleged infringement, it would have obtained US\$ 4.000.000 had it auctioned the *VIRGINIA G*, which would have constituted adequate compensation, and which, therefore, is Guinea-Bissau’s basis for its quantification of the counter-claim against Panama.
114. In this respect, Panama submits that:
- i. It is unacceptable for Guinea-Bissau to claim damages for a situation it persisted in maintaining itself, meaning that any costs that may have been incurred by Guinea-Bissau (of which no proof is submitted) are solely attributable to Guinea-Bissau’s violations of the provisions of international law and of the provisions of the Convention (as fully set out in Panama’s Memorial) and are in no way attributable to Panama, the *VIRGINIA G*, her owners, crew or any related individual or entity;

- ii. Guinea-Bissau failed to notify Panama, as the flag State, through the appropriate channels, of the action taken and of any penalties subsequently imposed on the vessel (in terms of Article 73(4) of the Convention), thus prohibiting the possibility of a timely intervention by the flag State, as is its right under international law;
  - iii. The value of USD\$ 4,000,000 attributed to the VIRGINIA G by Guinea-Bissau is unsubstantiated. Nevertheless, Panama submits that this amount may be of guidance as to the quantification of damages due to Panama under the main claim.
115. Against the above background, Panama maintains that it is not liable in respect of the claims made by Guinea-Bissau since the latter has failed to establish the existence of a fundamental tenant of tort law – the causal link, as between the "granting of the flag of convenience to the ship by Panama" and the damages Guinea-Bissau claims to have suffered as a direct result. Guinea-Bissau's allegations are not substantiated by any proof in the form of evidence or expert report by which to legitimise the basis of its claims and the value of damages it seeks to obtain. As such, Panama not only questions Guinea-Bissau's claims, it challenges the very origin, legal basis and proportionality of its claims. Indeed, as Judge Treves stated in his Dissenting Opinion to Order 2012/3 (dated 2 November 2012) of the International Tribunal: *To challenge the exercise of the sovereign right of Panama to grant its flag to a vessel because such a vessel has allegedly caused damage and losses to the challenging State is in my view disproportionate and devoid of a direct connection with Panama's claims.*
116. It is clear that in its compartment and approach, Guinea-Bissau has acted in a vexatious and malicious manner. It has not followed the rules of presenting and justifying claims, and has, effectively, denied Panama the opportunity of presenting a fully informed reply and defence to the counter-claim, first as part of its Panama's Reply, and now as part of these Additional Submissions.
117. Panama, therefore, vehemently denies the claims and statements submitted by Guinea-Bissau in its counter-claim (as set out in its Counter-Memorial and in its Rejoinder). Moreover, Panama reserves all its rights to present additional evidence, confirmatory reports, opinions and facts, as the International Tribunal may deem necessary.

\* \* \*

Reply of Panama – “VIRGINIA G” – ITLOS Case No. 19

**CHAPTER 3  
SUBMISSIONS**

118. For the abovementioned reasons, or for any of them, or for any other reason that may be submitted during the procedure, or that the International Tribunal deems to be relevant, and in addition to Panama’s submissions presented in Chapter 5 of its Memorial and Chapter 8 of its Reply:

**PANAMA RESPECTFULLY REQUESTS THE INTERNATIONAL TRIBUNAL TO:**

- A. Declare, adjudge and order** that Guinea-Bissau is estopped from claiming that Panama violated Article 91 of the Convention;
- B. Declare, adjudge and order that** Panama did not violate Article 91 of the Convention and that a genuine link does exist, as between Panama and the *VIRGINIA G*;
- C. Dismiss, reject or otherwise refuse** Guinea Bissau’s counter-claim on the basis that Guinea Bissau has presented an unsubstantiated, invalid, frivolous, disproportionate and vexatious claim absent of any evidence, reasoning, legal argumentation or facts on the basis of which (a) the International Tribunal is validly able to consider the counter-claim and (b) Panama is able to adequately present a defence in this respect.
- D. Dismiss, reject or otherwise refuse** each and all of the submissions of Guinea-Bissau, as set out in Chapter IX of Guinea-Bissau’s Counter-Memorial, and Chapter IX of Guinea-Bissau’s Rejoinder, and **declare, adjudge and order** that Panama is not responsible for, and is not to pay in favour of Guinea-Bissau, (i) compensation for damages and losses as claimed by Guinea-Bissau in its counter-claim as set out in Chapter VII of its Counter-Memorial, and (ii) legal costs and other costs that Guinea-Bissau has incurred in relation to this case.
- E. Declare, adjudge and order** that Guinea-Bissau is to bare legal costs and other costs that Panama has incurred in relation to this case and this counter-claim.

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

21 DECEMBER 2012



Ramón García-Gallardo  
Agent for Panama



Alexander Mizzi  
Co-Agent for Panama