INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2013

Public sitting
held on Friday, 6 September 2013, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Shunji Yanai presiding

THE M/V "VIRGINIA G" CASE

(Panama/Guinea-Bissau)

Verbatim Record

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

Panama is represented by:

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as Agent and Counsel;

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as Co-Agent and Counsel;

and

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

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Guinea-Bissau is represented by:

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as Co-Agent and Counsel;

and

Mr Rufino Lopes, Lawyer, Assessor to the Government,

as Advisor.

THE PRESIDENT: Good morning. Today we will hear the second round of oral arguments in the case concerning the vessel *M/V Virginia G*.

Before we begin, I wish to inform you that Judges Wolfrum and Kateka, for reasons duly explained to me, are absent today.

I also wish to inform you of the following: At the end of the afternoon session on 2 September 2013 the Agent of Guinea-Bissau objected to the previous display of photographs by Panama on the grounds of article 71 of the Rules of the Tribunal. Yesterday the Tribunal held deliberations on this issue and decided that only the photographs submitted by Panama in Annex 60 of its Memorial form part of the official file of this case. The Tribunal will not, however, make any modifications to the verbatim records of the hearing.

Finally, I wish to inform you that during the course of today the Registrar will communicate to the Agents of both parties a further list of questions from the Tribunal. The parties are requested to answer those questions in writing and to submit their answers by 6 p.m. on Wednesday, 11 September 2013.

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

MR GARCÍA-GALLARDO: Mr President, distinguished Members of the Tribunal, colleagues, when I opened the case for Panama, I explained why we seek an award for damages. We do so to secure reparation for the losses that Panama has suffered.

Panama has not abandoned any aspect of the claim. If we fail to repeat orally what we have already said in writing, we must not be taken to have withdrawn any part from our written submissions.

Those losses are both tangible and intangible, particularly the last one to Panama as flag State, with a list of arguments against our maritime policies and practices that are simply unacceptable. Some were suffered directly by Panama and others have been indirectly suffered in the person of some individuals and companies for whose protection Panama is responsible.

Panama is defending this case in the interest of its flag, its entities, the vessel *Virginia G* in particular, and all the persons and companies associated with this vessel, some of whom are still affected – the transient and multinational composition of the ship's crew and the multiplicity of interests that may be involved in the cargo on board a single ship like the *Virginia G*. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue (*M/V "SAIGA"*, para. 107).

Panama does not seek damages on the premise that Guinea-Bissau acted lawfully; she claims damages on the premise that Guinea-Bissau acted unlawfully. Guinea-Bissau has violated the rights of Panama.

Any person who suffers interference with a right protected by international law has the right to claim damages. The claimed losses were the consequences of the arrest and the unlawful confiscation of the ship *Virginia G* and its cargo in Bissau over 14 months, including several months of *de facto* detention of the crew members.

This case has to be the second case to start consolidating the right to claim damages under the provisions of UNCLOS and other rules of international law before ITLOS. Beyond the violations of articles 56, 58, probably 73, and other related provisions, there are other very important provisions such as 224, 110, 111, 225, 300, 304, and other general principles of international law that are also the basis for this claim.

Yes, abuse of right and good faith are also important principles already mentioned not just by the doctrine but also by the jurisprudence of the ICJ and some separate opinions of Judges of this Tribunal. The protection of human rights such as those providing for the protection of due process and relevant provisions contained in international instruments for the protection of human rights, as expressed by Judges Mensah and Wolfrum in the *"Juno Trader" Case*, point 3, are also valid.

The case also presents special difficulties, but please let us be clear that this is not a "test" case where bunkering in the high seas and in the EEZ must be put under scrutiny. Those activities do not make the object of this dispute. In point 9 of a Separate Opinion in the *M/V "SAIGA" Case*, Judge Vukas stated: "It appears that both Parties accept as legal the supplying of bunkers to all other type of ships in transit through an EEZ other than fishing vessels."

In this respect, the task is reduced to: (a) the analysis and adjudication of the conflict of the position of the parties with respect to bunkering only to fishing vessels; and (b) the fact that Guinea-Bissau has violated other important provisions of UNCLOS and other rules of international law.

I have to say that most Members of this Tribunal participated in the case of the *Juno Trader*, and this certainly will facilitate your task in relation to your knowledge and scope of the local provisions of Guinea-Bissau in the field of fisheries.

I would like to dedicate some minutes to the definition of logistic support ships. According to the jurisprudence of the Tribunal, the content and the consequences of the law of a State applicable in proceedings before the Tribunal is a question of fact. (Judges Wolfrum and Mensah, point 6, *"Juno Trader"*).

In the framework of the interpretation to be given to article 73, paragraph 1, and the scope of "related fishing operations", it is critical to conduct in this case a founded analysis of the definition of "supply ships, or logistical support ships" to fishing vessels within an EEZ. Can any type of those ships be defined as fishing vessels? Do they carry out related fishing operations? Bunkering activities to fishing vessels within an EEZ is a very ancillary activity that cannot be considered as a related fishing activity.

As confirmed by different witnesses and experts proposed by Panama and me during the first round, and by some witnesses represented by Guinea-Bissau, a

supply or logistics ship can provide very different services and products to fishing vessels. As explained, a supply or logistics ship is able to provide more than one of the following: food, victuals; potable water; new crews; replacement of fishing observers; medical assistance – there are also ships that operate in West Africa dedicated as hospitals to attend fishing fleets in the area, and the vessel *Esperanza del Mar* is a good example that was mentioned in the case of *Juno Trader*; cold storage capacity; fishing gear; FADs (fish aggregating devices employed in the tuna sector; equipment for the fishing vessel (spare parts, chemical products); re-labelling, packaging, cartons; transfer of catches; processing vessels (filleting, slicing, freezing and processing); and of course gas oil;

Subject to fishing regulatory approvals, there is a list of vessels recorded in the regional fisheries organizations. This also has to be taken into account because in these regional fisheries organizations mainly there are only additional vessels to traditional fishing vessels, called reefers or logistic/auxiliary vessels. There are vessel monitoring systems to control their movements into an area, such as the reefers.

It is our opinion that a wise approach would be to consider that if a ship can provide several services and products to a fishing vessel, such as the ones I have mentioned, then, effectively, it is arguable that it is a vessel conducting fishing-related operations that could enter in the scope of the sovereign rights of a coastal State in the framework of article 73, paragraph 1, because of the close link to the fishing operations of the “traditional” fishing vessels; it would be an activity directly and intrinsically related to fishing operations. On the contrary, when the ship is able only to supply a service or provide a product, it would be extremely disproportionate to consider it as a vessel related to fishing activities. The mere supply of gas oil, it is not a serious argument to consider it as a related fishing activity.

One other element that could be considered is the exclusivity of the activity. A tanker such as the *Virginia G* normally supplies bunkering not only to fishing vessels but to a wide range of merchant shipping vessels. A reefer, or a tuna auxiliary vessel on the contrary, can operate only with fishing vessels. Therefore, I think that only ships dedicated exclusively to supporting fishing activities could be entered into the definition of related fishing activities to a fishing vessel.

Another final way is to consider whether or not the activity is essential to operate as a fishing vessel. In this respect, I would say that most transport modes, whether by air, sea or road, using vehicles, aircraft or ships, need, for the moment at least, energy, and for this they need gas oil, benzenes, independent of the place where they operate, so it does not seem to be essential or inherent to fishing activities. A fishing vessel also consumes gas oil when it goes to port; it runs the auxiliary engines to keep power on board and cold storage.

In the end, we firmly think that the supplying of gas oil to fishing vessels can be considered as merely an ancillary activity to the fishing activity. An ancillary activity is not a related activity. Certainly it has different meanings: in French, *activités liées*; in English, *ancillary* is an adjective, meaning providing necessary support to the primary activities or operation of an organization or system – for instance, ancillary staff, in addition to something else but not as important – a person whose work

provides necessary support to the primary activities of an organization or system, the employment of a specialist.

To consider a wide definition of "related fishing activities" would be like considering that for the work undertaken by your Honours in this Tribunal power or heating are essential activities to operate and to work on a daily basis. Certainly it is not the case. It could certainly affect your activity but it is not essential to the activity; it is absolutely ancillary.

To finalize this, I have another point. Judge Vukas, in the Separate Opinion (point 13), expressed the position of Guinea-Conakry, which is a neighbouring country of Guinea-Bissau and also a Party that signed the regional convention in the field of fisheries. On this point, Judge Vukas reproduced the position of Guinea-Conakry in this case in relation to these activities.

> Yet, notwithstanding the link of its arguments with fishing, Guinea-Conakry insists that bunkering of fishing vessels in the EEZ is not relevant to the sovereign rights of the coastal State provided for in article 56(1)(a) of the Convention. It claims that 'although the bunkering activities are ancillary measures of a considerable importance for the fishing vessels concerned, they constitute neither fishing nor conservation or management activities with respect to the living resources themselves' (Counter-Memorial, paragraph 106).

We could continue for hours looking at related fishing activities. When researching the internet to look for a list of countries that has definitions of fishing vessels, I found a variety of definitions, and I even found, just for information, guidance on environmental assessments of fishing-related activities, in this case in Australia. If I were to read to you the list of fishing-related activities, you would see that it has nothing at all to do with the discussions that we are having in this case.

Just to give you an example, examples of fishing-related activities to which these guidelines apply include the use of non-prescribed fishing gear, the use of prescribed fishing gear requiring permits, taking fish in excess of FAD limits, and taking and possessing fish for charity auctions. Therefore, you can see a logical way to open the debate, that it is and was absolutely clear when UNCLOS was ratified by a lot of States.

I will also dedicate some minutes to the argument of the conservation and management of the living resources in the EEZ. This part is also critical to determine the scope of any activities covered by article 73, paragraph 1, to exploit, protect and manage living resources in the EEZ. The different arguments raised by Guinea-Bissau are really very vague and unfounded. I have the highest esteem for professors of international law, and in particular for those who on a daily basis dedicate part of their time to drafting articles and position papers on new cases and jurisprudence. Without them it would be impossible to advance the development of the international law of the sea before you, the Judges whom I have the honour to address.

Yesterday's presentation by Professor Bastos was really interesting, but I honestly have to say that I can agree with only half of it. Environmental concerns affecting

living resources and sustainable fisheries are fine and fair principles, but it is our opinion that they do not apply to support this case.

The supporting experts and witnesses presented by Guinea-Bissau have also launched the argument of sustainable fisheries. However, their position on paper during the administrative investigation in Guinea-Bissau seems to contradict what they said in the witness box during their examination.

On the contrary, we have been unable to find a solid reason in the different provisions of Guinea-Bissau legislation to justify the need for an authorization for refuelling operations of fishing vessels in the EEZ based on grounds of environmental or fisheries laws, and concretely on the need to exploit, to conserve or to manage the living resources in the EEZ.

We are just practitioners of international law of the sea, but I will try to explain why we consider that Guinea-Bissau's position on this point is weak:

First of all, it is surprising that a State that claims sustainability of fisheries in the Atlantic when it is not even a signatory contracting party of ICCAT, the regional fisheries management organization of Atlantic tuna. "Only" 48 States and one international organization, the European Union, are contracting parties of this organization, but Guinea-Bissau is not on the list.

In the ICCAT regional fisheries organization (and the same I could say in regard to other RFMOs such as IOTC or CCAMLR), it is only forbidden to make transhipments of fish at sea. The reefers are allowed to supply all types of services and products, including tankers doing bunkering, except the transfer of fishing products. It is mandatory to conduct these operations in the ports or anchored in the port and with the presence of fishing observers.

This is the same in Guinea-Bissau. Without any express authorization, any unloading of fish has to take place in the port of Bissau.

ICCAT Recommendation 12-03, which I put in our legal bundle, also contains a large list of types of vessels related to fishing operations in the tuna sector (please see my verbatim on day one): fishing vessels (including catching vessels, fish-processing vessels, support vessels, towing vessels, vessels engaged in transhipment and transport of tuna products, auxiliary vessels except container vessels). As I said, ICCAT is an organization with 48 contracting parties, including the European Union, and they do not ban bunkering activities to fishing vessels either in the high seas or in the EEZ. The word "bunkering" does not even appear.

The fact that some West African countries have a Regional Convention on Access and Exploitation of Fishery Resources like the one signed in 1993 by five West African countries including Guinea-Bissau, allowing them to regulate bunkering at sea, is fine, but this is not the international rule; it is not in UNCLOS, which, in the end, is the Convention on the Law of the Sea.

In the same way that Guinea-Bissau has presented examples, certain aspects – we have not seen the subsequent part of the text – of local legislation from other

neighbouring countries, the situation is very different, for instance in Guinea-Conakry. I will not come back to that. I have already textually mentioned the position of Guinea-Conakry on this point.

The legislation that Guinea-Bissau unlawfully applies with the argument that neighbouring countries have similar provisions is not a good argument. Indeed, there are 166 States which have ratified UNCLOS and only quite a few have decided unilaterally to make a different interpretation to the others that are in the majority. I could start enumerating the list of States that, with the tool of the internet again, we have been able to check. I can tell you that across the world the majority of them – starting by a variety of countries – Brazil, Spain, Canada, Australia, Namibia, Mexico, plenty, including Ghana, Nigeria, Kenya – I have a list – do not have the consideration as fishing vessels making related fishing activities. In most of the cases, even the related fishing activities are not defined, and certainly many of them apart from China – and I have only found China – mention tankers. I have not found one other single country mentioning the activity as a fishing vessel apart from China.

This Tribunal is currently working on the Request for an Advisory Opinion formulated by the Sub-Regional Fisheries Commission (SRFC) in preparation of the amendments to this Convention - Case No. 21. It may be a good opportunity to remember again the entire Declaration of Judge Kolodkin in the *"Juno Trader" Case*. I will not read it now.

Yesterday, Judge Marotta Rangel in some ways, but very clearly in the end, tried to suggest to Guinea-Bissau's expert the same (page 10, day 4). What is the concept of "maritime waters of Guinea-Bissau"? Two days ago, the Tribunal heard my cross-examination of the current Secretary for Fisheries and I am sure that quite a few of us in this room were surprised by the way that someone wrongly advised years ago the drafting of a fisheries law in Guinea-Bissau contrary to essential principles of UNCLOS.

Furthermore the reading of our learned colleague yesterday is not accurate. Judge Vukas, in a Separate Opinion in *M/V "SAIGA" (No. 2)*, was very clear on this. The position of Guinea-Conakry indicates:

> Although the bunkering activities are ancillary measures of a considerable importance for the fishing vessels concerned, they constitute neither fishing nor conservation or management activities with respect to the living resources themselves.

It is clear that this case hides other types of activities when interpreting the provisions of the contentious provision of Guinea-Bissau on logistic support - these "hidden" customs or tax/fiscal laws in the EEZ, outside the territorial sea, of course internal waters and why not the contiguous zone, no doubt. Yesterday, the Agent of Guinea-Bissau mentioned that the income generated for these authorizations was needed to cover any risk of casualty. Mr Djabulá (pages 7 and 8, day 3) stated:

> Our law takes account of the aspect of conserving resources, the environment, because as this activity causes environmental damage because of fuel spillages, waste that may occur during the transfer, and the time that fishing vessels actually remain in the fishing area means that they

> fish more because they do not interrupt their fishing activity to go to port to refuel and therefore they catch more fish, which has environmental effects.

The argument that, with bunkering, a fishing vessel can catch more fish is anachronistic; it is old-fashioned. Normally, the licences, more and more, are granted under various strict conditions. I am talking of the fishing permits. They take into consideration total allowable quotas. They take into consideration the power/energy of the engines of a fishing ship; they take into consideration the price or the levy to pay per tonne. Those considerations leave me a little bit indifferent.

The expert from the Fisheries Department, Mr Djabulá, stated in regard to the Joint Order that Guinea-Bissau attached as Annex 5: "It says that we must take account of the environmental aspect, and this activity must be conditioned".

When reading this Joint Order from the Minister of Finance – not only from the Fisheries Department - it says mainly that: "Considering the Government's Policy of encouraging and promoting private initiative in order for the private sector to make a positive contribution towards the country's economic and social development ...".

I am unable to find a reference to sustainable fisheries or to environmental reasons. "This charge takes into account the principle of environmental protection … to fund environmental policies, and remedying the damage … it can be raised if it is not enough to deter this kind of activity."

That Order of 2001 and also the new Order of 2013, attached to our written document, do not say that - not even the one adopted this year, I repeat.

Can those arguments be taken seriously?

As I said during my previous intervention before this Tribunal, a lot of merchant ships daily traverse the EEZ of Guinea-Bissau navigating with good and bad weather conditions, with no limitation by type or category of ships; most of them are huge, big megaships, container ships – the same that we can see on the river here – oil tankers that themselves employ more heavy fuel oil (capacity even much bigger than what the *Virginia G* can store on board – more than 1000 tonnes) than small oil tankers like the *Virginia G* can supply.

Also, all the cargo vessels entering and traversing the Canal of Bissau, the EEZ and the territorial sea, arriving to call at the port of Bissau, are in a critical marine conservation area where the risks in an operation of bunkering can be much higher. Even now the *Virginia G* regularly traverses this area to navigate to Cap Vert, to Senegal, and does not pay any tax. The *Virginia G* was 60 miles off the boundary lines of the territorial sea. The entry to the Canal of Bissau is not precisely the best place to navigate. We asked the First Officer of the *Virginia G* about the circumstances surrounding the traversing of this canal on the night of 21 August. They could have really provoked a serious accident and that is why Panama is claiming the violation of article 225.

Furthermore, vessels like the *Virginia G* do not supply heavy fuel oil but just gas oil. You do not need to be an oil expert to confirm that gas oil (a clean and volatile product) has not caused relevant marine environmental problems.

Another point is that there are quite a few fishing vessels in the area of the EEZ of Guinea-Bissau (supertrawlers operate in Mauritania for the catch of mackerel) that use heavy fuel; tankers like the *Virginia G* only supply gas oil. The EEZ is not so big as to operate with supertrawlers. It is tuna and shrimp, mainly done with relatively small fishing vessels. You can see the list of the licences granted in the agreement between the European Union and Guinea-Bissau.

Any risk to the marine environment in the case of an incident: in the written answer to the questions that this Tribunal sent to the Parties, we have sufficiently explained, with the support of marine, oil and bunkering experts, in a detailed answer confirming that the risks during the bunkering operations are minimal. It is outrageous and unfair to compare this activity with the oil spills/big casualties such as the *Erika* or the *Prestige* mentioned by my esteemed colleagues.

The risks during the bunkering operations are minimal, because these operations are studied and prepared in advance and executed following security protocols set up in international conventions. The statistics provided by my esteemed colleague showed that yesterday, because 95 per cent of the total related to a spillage below a very low amount of tonnage – I cannot remember whether it was five or six.

I refer to the rest of the comments I put in the written questions.

Certainly it will be important not to consider the bunkering spills mentioned by the representative of Guinea-Bissau as similar to the spillage in maritime accidents such as the *Erika* or the *Prestige* cases. In addition, it must be noted that the oil spilled in the case of major accidents was crude oil, whereas the bunkering operations to fishing vessels performed in the EEZ are made with gas oil.

Last but not least, it is also questionable to give seriousness to Guinea-Bissau's argument to justify the counter-claim of US$4 million mainly related to "Adequate compensation caused to the environment and the plundering of its marine resources".

Could we finally see any evidence of such damage? As a minimum, the legal costs of the defence of this part of the dispute would need to be borne by Guinea-Bissau.

I have been making some inquiries in relation to environmental damages, particularly the article of Mr Gautier. I cannot see in the article on "Environmental damage and the United Nations Claims Commission: New directions for future international environmental cases" any reference to prospective claims for potential damages. Have they provided one single piece of evidence about any potential risk related to the vessel?

The other hidden reasons: it definitively seems to be a hidden tax/fiscal measure that only applies in the EEZ to benefit the Government of Guinea-Bissau.

In the administrative files of the Interministerial Commission deciding on the confiscation (Annex 15 of Guinea-Bissau's Counter-Memorial), it is mentioned: "It was taken into consideration the ecological danger of the fuel sale in our EEZ ...". The fuel oil is gas oil. "The tax evasion and the unfair competition with the oil companies operating in the country."

As has been stated before, there is enough publicly available information proving that the top officers of the Government of Guinea-Bissau during the period that some tankers were arrested were beneficial owners of the largest oil distribution company in Guinea-Bissau, the company Petromar. The annual accounts of the Portuguese company GALP (www.galp.com) prove that recently the former Prime Minister sold 80 per cent of the company Petromar. It seems that the *Virginia G* was a case of absolute interest for the Prime Minister. As stated by one Member of the Tribunal yesterday, the Attorney General's legal opinion on the order suspending the confiscation was sent directly to the Prime Minister. He did not send a copy to the officers of the Fisheries Department in charge of the case. Does a Prime Minister need to be personally involved in this type of case?

It seems to be a fiscal measure to benefit the local oil companies that later normally paid more taxes to the State for the import of gas oil (Annex 6 of the Rejoinder), when Guinea-Bissau has repeatedly argued that bunkering to fishing vessels is damaging the national economy (in the local appeals, the Coordinator of FISCAP mentioned that, and also in Annex 14 of our Memorial, the press release where they call Panama a pirate State).

In case of conflict regarding the attribution of rights and jurisdiction in the EEZ, who can benefit? The coastal State or other States? The interpretation of article 59. Yesterday the first expert for Guinea-Bissau advised the Tribunal that he had prepared a Masters dissertation (page 11, day 4) on his wrong interpretation of article 59, which reads that it plays, in case of doubt, in favour of the coastal State. There is no debate on this point. If there is a debate, it will play in favour of the rest of the States. There is enough jurisprudence on this, and debates on the preparations *(travaux préparatoires*) of the UNCLOS Convention.

A few words on the need for authorization. We have deeply explained this point and also we have submitted to this Tribunal a written answer to the questions raised in relation to this matter.

I would simply like to highlight two points, one highlighted yesterday by Mr Loureiro Bastos (page 24, day 4) on article 39 of Decree 4/96 on industrial fisheries in Guinea-Bissau, which states that*:*

> logistical support operations for vessels that operate in waters under national sovereignty and jurisdiction, such as provisioning with victuals, fuel, the delivery or receipt of fishing, materials and the transfer of crews…

It does mention fuel, but not gas oil. Someone could understand that heavy fuel is dangerous for the marine environment in case of a casualty; certainly it is not the case of the gas oil.

I continue reading:

> …the authorizations … should include the following:
>
> (c) Identification of the vessels that will benefit from operations of logistical support or transhipment of catches.

I invite the honourable Members of the Tribunal to review the copies of the said authorizations provided by Guinea-Bissau, and you will never find the name of the fishing vessels in the authorization. You will only see the name of the local agent, the local agent of the local companies, or the companies that have a charter for foreign fishing vessels to local companies. That is the scope of the Joint Order.

Then I wonder: if the fee to pay did not depend on the number of bunkerings to be made during the period of the authorization, why did they need to know the name of the fishing vessels? Why was the *Virginia G* accused of supplying other vessels if the authorization did not reflect the name of the vessels? Why did they accuse the *Virginia G* that the authorization granted to the local agent Afripêche in June 2009 did not have the name of the fishing vessels to be refuelled?

What has the practice of Guinea-Bissau been in implementing article 23? I do not want to lose any more time on this, so I refer you to the written answer.

Is this abuse of right? Is this abuse of procedure? Is this a violation of the principles of good faith of article 300? During the past few days I have tried to be respectful – I have probably not always been respectful, and for that I apologize, but certainly I have been trying to be respectful with some of the Guinea-Bissau witnesses. I have tried to avoid using hard words on the way some top officers of Guinea-Bissau's Fisheries administration and other members of the Government operated.

It is not very difficult to understand the way that the *Amabal* vessels were released and left the port of Bissau in the vicinity of the night of 20 August, which is more than suspicious. The two *Amabal* vessels were accused of refuelling operations with the *Virginia G* in the month of June, but they were also arrested on 12 August. The two vessels were eventually released "without any formality" (Statement of the former Minister of Defence and member of the Interministerial Committee, who was sitting in the witness box), without the payment of any fine, just with a credit granted by the Government in the form of an alleged postponement of the payment when the vessels restarted the fishing operations.

More than probably the *Amabal* vessels towed the vedettes of FISCAP that went to arrest the *Virginia G* the day after in the vicinity of the position that had been communicated in advance by the local agent of the shipowner of the *Amabal*s.

The witness Nunes Cá (page 15, day 3) confirmed in this witness box before this Tribunal that the inspection team spent exactly 11 hours and 40 minutes. Is it normal that a person, three or four years after the events, can give the exact number of minutes it took from the port of Bissau to the place where they were arresting the vessel, having left at 6.30?

In the afternoon session, the coordinator for FISCAP explained that the vedettes have a speed of 34 miles an hour with 400 HP. There is something that does not fit: they would not have got so far without bunkering. You have seen the size of the vedettes. They were travelling by night. Indeed, the position where the *Virginia G* was arrested was just 5 nautical miles from the position provided by the local agent to FISCAP when applying for the authorization.

The *Amabal* vessels were also arrested. Regardless of the fact of three infringements in June, and two in August, they were released on 30 August for the second time, and this time for free. This is written in the decision of the Interministerial Commission.

We textually copied in the Memorial where the money was paid: in Lisbon. The *Virginia G* shipowner firmly refused to pay any ransom, and then the Interministerial Committee confiscated the ship and the cargo.

Some months later, the Coordinator of FISCAP, together with other top officers, including the Director of Industrial Fisheries, was detained and sent to jail.

Let us move to another point, the local remedies. What are the local remedies available under the legal system of Guinea-Bissau against the confiscation of a vessel, its cargo and its equipment?

Yesterday in the written answer I tried to provide the best answer. I requested advice from the lawyers who attended the shipowner in Guinea-Bissau, from the reputed Miranda law firm, with offices in the largest former Portuguese colonies, and also in Bissau. If you read my written answer, the situation is very simple. When I read the verbatim of the three experts, I become very confused. First of all they say that the shipowner decided not to lodge a prompt release action, but the wording of the first paragraph of article 65 is very good; it almost reflects the provision that you have in the UNCLOS treaty, but if you continue reading the subsequent paragraphs, which not one expert and not one representative of Guinea-Bissau read in this room, they simply say yes, release upon the deposit of a bond. A bond of what? Of the amount of the fine? If the vessel and the fishery products – there is no reference to the products because the law was not made for tankers – you need to add the value of the vessel, the value of the cargo and the value of any equipment.

Is this a fair and proportionate way to allocate interim measures, even by a local court? The local court sticks to this provision; it cannot reduce the amount of the bond. So this mechanism is useless. They even mentioned, and I was glad to hear it, that there was a case where five years elapsed before the recovery of the bond. The system certainly does not work.

There were also administrative measures. Yes, of course, I should meet it with evidence in the Memorials and Reply. Three or four written letters, observations, on the first decision of confiscation are attached. I will find the reference later. Surprisingly, in the second decision of confiscation, which is a kind of confirmatory decision of confiscation number 1 of 2009, it states: “Because of lack of action of the ship owner, we confirm the confiscation of the ship, the cargo and the equipment.”

So what is the way to use the administrative way, if they considered in writing, like they later considered with the unloading of the cargo, that no allegations were made? The unloading of the cargo, similar, was taken with opportunism. It was taken on a Sunday to avoid getting a judge to allow them to get a second order suspending the unloading operations.

This is at provisional level, but certainly we are all persons working in the legal area, and certainly there were very key questions raised by honourable Members of this Tribunal yesterday with the experts. This seems not to be considered very well, the answers provided by them. Of course, there have been main actions requesting the annulment of the confiscation orders. We have mentioned that. We have provided additional information yesterday, and we see in the documents submitted by Guinea-Bissau not any single reference to the interim measures – apart from a comment I will make later – or to the merits of the main case. The interpretation provided by the three experts yesterday was completely confused, and I will elaborate later.

In relation to the suspension, already in the *"Juno Trader" Case* there was this confusion, and if you read the questions that you raised with the parties on the local remedies on the confiscation, it is the same question that you raised in the *"Juno Trader"*, textually the same. Why? Because, again, Guinea-Bissau is not clear. Hopefully the Separate Opinions of Judge Wolfrum and Mensah in that case, *"Juno Trader"*, tried to summarize what was the understanding of the suspension provoked by an order of a judge against a confiscation decision while the decision on the merits is pending and while the potential appeal of the Government in this case is pending.

This question was raised yesterday by one of the honourable Members of the Tribunal, and certainly it has an answer, but the answer is not that the Attorney General suddenly wakes up and decides "Ah, I will make a letter. No, I will make a legal opinion. I will not make an appeal. I will draft a letter and I will state that this order is illegal and I will send this to the Prime Minister and I will put pressure on the judge." That is what really happened but it is very funny – I am sorry to be so colloquial on this point – if you read the legal opinion of the Attorney General of Guinea-Bissau. There are two main errors. First of all, it does not mention at all the arrest of the vessel *Virginia G* on 21 August. It just mentions the alleged infringements that occurred in June 2009. There is not one single reference to the reasons for the order. The second point, when reading the second page – and I do not want to lose too much time – he says, the highest legal authority of the State, that the decision was not subject to appeal. He was reading the version of the law that some of you had the pleasure to read in 2004, when the *"Juno Trader" Case* occurred. At that moment the possibility to challenge the confiscation order was not possible. It was even forbidden in the law of 2000. In our attachment No. 9 in 2005, and certainly provoked by the decision taken by this Tribunal in the *"Juno Trader"*, it amended the law and it allowed the possibility to challenge by judicial means confiscation under article 52. Who can imagine that an Attorney General drafting a legal opinion for the attention of the Prime Minister – are we talking seriously or not – can draft an opinion stating textually that the decision is unappealable?

They lodged an appeal, and they are defending that the appeal suspends the suspension granted by the order of the first order. It is not possible. It is possible to lodge an appeal. It is normal. It has been taking what we call in Spain *medida de cautela,* precautionary measures; certainly it is a unilateral measure that later on the respondent has the right to appeal or to challenge but the second order reconfirmed the previous one, and it is not myself but the legal expert provided by Guinea-Bissau in 2004 that textually stated that the suspension, the appeal against the first order, does not suspend the order number one. It is very clear and it has been confirmed by our lawyers locally corresponding in Guinea-Bissau.

The only problem that happened was that the Government, via the Minister of Finance, did not take this into consideration and continued to keep the military on board, maintained restrictions on the mobility of the crew, and continued to impose measures such as the one that happened in the vicinity of 20 August, unloading the cargo. That decision was also challenged by the shipowner. I have provided the data of the number of the decision, and also an order was obtained imposing similar sanctions to the ones that would not respect the order, but then they explain, they start to play with the mechanics of the legal judicial system in Guinea-Bissau. I will be happy to elaborate further on this if I have time.

On the merits, certainly following the interpretation of article 295 of UNCLOS, the possibility at the time for the shipowner was to lodge an appeal at local level.

It was in good faith. It was a case of: “What are my rights? What can I do? I need to lodge an appeal”. In Portugal, as in Spain, and probably in your countries of origin, soon after lodging an interim measure, or at the same time, you need to lodge an appeal on the merits. This was submitted. First an appeal was submitted against the two confiscation orders. In Guinea-Bissau legal pleadings, legal observations, were submitted – yesterday I attached them to my written submissions – arguing exceptions on admissibility. I do not know how the judge in this country can issue a new order, can issue deadlines to submit a reply rejecting the reasons on admissibility; and at the moment the dossier is found at the level of the rejoinder. The system in Guinea-Bissau has been absolutely inoperative.

Three years and six months have elapsed from the moment of the reply to the exception on admissibility. A subsequent order rejecting the exception for admissibility has been decided, granting the right of a rejoinder to the Government of Guinea-Bissau, represented by the *Advogado do estado*, the legal counsel of the Government, and today, after three years, no decision has been taken. That is why we will have provided sufficient evidence to show that we have been trying to exhaust all the possible local remedies in this country. Certainly we have provided evidence to show that this is not the case. Therefore, there is enough jurisprudence, enough reference in the law and in the articles to confirm that the system does not work. For instance, Professor Ian Brownlie, referring to page 53 of our Reply, concludes that a fair number of writers on arbitral awards have been willing to presume ineffectiveness of remedies from the circumstances, for example on the basis of evidence that the courts were subservient to the executive.

Therefore, the precautionary remedies available in Guinea-Bissau were rendered ineffective by virtue of the forceful and unjust manner in which Guinea-Bissau acted

above the law, such as against the owner of the *Virginia G.* The only viable option, therefore, was for Panama to submit the matter to international arbitration, and that is why we are here today.

I think I have talked too much. We have provided enough argument in the written material, and on the other pending points I prefer to give the floor to my colleague to continue explaining some parts of our claim.

THE PRESIDENT: Thank you, Mr García-Gallardo. I now give the floor to the Co-Agent of Panama, Mr Mizzi, to make his statement.

MR MIZZI: Good morning. Mr President, Members of the Tribunal, this case raises a number of interesting questions. It has a number of approaches, we think. One of them would seem to be the question as to whether a tanker that provides refuelling services to fishing vessels in the exclusive economic zone enjoys freedom of navigation as an internationally lawful use of the sea relates to that freedom as being associated with the operation of ships. That is quite a mouthful but there is a reason behind it, and if you would allow me to analyze in brief the drafting of the main provisions of the EEZ, it could perhaps offer some clarity at least for the record.

Bunkering services to fishing vessels in the exclusive economic zone of a coastal State is not dealt with specifically in the Convention, and is not settled by international law. The *M/V "SAIGA" (No. 2) Case* was an opportunity for the International Tribunal to consider the question. However, the customs jurisdiction context of that case ultimately led the International Tribunal not to make any general findings about the legal aspects of bunkering in the EEZ. It seems that it is now pertinent to approach this angle.

At the time UNCLOS III commenced there was a strong lobby in place in support of the creation of the exclusive economic zone. It was believed that the establishment of the exclusive economic zone would enable coastal States to control and manage their marine resources; and this is perhaps true in particular of fishing resources in the EEZs of developing States. Developing States were concerned about long-distance fishing fleets exploiting fishing resources in the seas adjacent to their coasts. A historical overview of the negotiations leading to the creation of the exclusive economic zone reveals a tension between States.

Whilst the vast majority of States supported the idea, there were different views as to what legal status the exclusive economic zone should take. Some States saw the exclusive economic zone as an extension of the territorial sea – an extension of sovereignty (and considered that this would be the only way of truly protecting their resources). Other States considered that this would be an encroachment on the freedoms of navigation and communication at the time, and that the exclusive economic zone should have high sea status, with certain limited rights of exploitation and exploration. The exclusive economic zone was ultimately created as a *sui generis* zone, which is neither part of the territorial sea nor part of the high seas. It is set up specifically to cover exploitation and exploration activity. This can be seen in article 55 of the Convention.

For the next part I hope to be a little clear, because in the hall-of-mirrors fashion of the Convention I shall need to cross-refer to a number of articles. An analysis of the exclusive economic zone must begin with the high seas, and in this case the freedoms afforded in the high seas. Article 87 of UNCLOS lists those freedoms as: the freedom of navigation; the freedom to communicate; the freedom to construct artificial islands and installations; the freedom of fishing; the freedom of scientific research.

The freedoms are not absolute but are limited by certain rules designed to ensure a balance between States in the exercise of such freedoms. Article 86 “extracts”, quite specifically, the exclusive economic zone from the application of the high seas regime, but then makes a specific reference to article 58 (to be found the exclusive economic zone chapter), stating that the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58 are not abridged; in other words, will not be reduced in scope or limited or curtailed.

We then look at article 56, paragraph 1, which uses the term “sovereign rights” and establishes the “jurisdiction” of the coastal State in relation to specific activities. It also refers to other rights and duties in the Convention.

The provisions of article 56, paragraph 1(a), are relevant to this present case; that is, exploring, exploiting, conserving and managing the living natural resources. Whilst article 56 establishes “sovereign rights” over the resources in the zone, article 58, paragraph 1, provides that all States enjoy in the exclusive economic zone the high seas freedom of navigation, overflight and communication – only three of the five freedoms, thus excluding fishing and scientific research. In other words, it seems that article 58 re-incorporates the application of only these three freedoms from the high seas into the EEZ. How does it do that? Article 58, paragraph 1, refers to these three freedoms as the freedoms set out in article 87. Article 87 therefore links back to article 58, and the reference to article 87 seems, therefore, to associate the value or quality of the high seas freedoms to those that can be exercised in the exclusive economic zone.

If Members of the Tribunal agree with this approach – that it is the same freedoms enjoyed on the high seas as those that are enjoyed in the exclusive economic zone – then, at least in respect of those three freedoms, the interpretation in case of a dispute of this kind would, or perhaps should, be in favour of these three freedoms.

The interconnection to article 87 in article 58, therefore, seems to assert, or re-assert, the legal value of those three freedoms. Indeed, the exclusive economic zone is excluded from the high seas (article 86) but article 58 then reincorporates three high seas freedoms into the EEZ.

The history of the establishment of the exclusive economic zone regime would show that an exclusive economic zone without these three freedoms – in other words, subject only to the right of innocent passage – could not have been negotiated. It is critical, therefore, to preserve the three freedoms as they were intended.

Two further points need to be made on the drafting of article 58. First, the words “other internationally lawful uses of the sea related to these freedoms, such as those

associated with the operation of ships …", which I think is particularly relevant to this case. This is a second confirmation that the freedoms are there in their totality. The freedoms are not abridged or subject to a restrictive interpretation; they are meant to be equivalent to those on the high seas.

A third confirmation is article 58, paragraph 2, through which articles 88–115 of the Convention and other pertinent rules of international law are made applicable to the exclusive economic zone. Article 58, paragraph 2, therefore incorporates almost the entire section 1 of the High Seas Chapter VII. Yet we need to keep in mind that article 58, paragraph 2, also provides that in the exclusive economic zone all States enjoy the freedoms of navigation and communication provided they are not incompatible with the parts of the Convention dealing with the exclusive economic zone.

Therefore, a fishing vessel intending to exploit the living resources of a coastal State might well be subject to measures that a coastal State may wish to take, and which would limit that freedom. Therefore, we have gone full circle: the coastal States would be reasonably allowed to impose limitations in respect of its resources, but the Convention maintains the freedoms in relation to activities that fall within the two excluded freedoms – fishing and scientific research – and the other rights mentioned in article 56.

The question is whether States can legislate in a manner that goes further than the allowances of the Convention. Indeed, during the UNCLOS negotiations a number of States had sought to include provisions in what was to become article 56 to extend their rights in respect of enforcement of customs laws within what was then termed "the economic zone".

Those efforts were expressly rejected by many States representing different perspectives. In this context it was specifically put that the application and enforcement of customs laws within the exclusive economic zone would limit freedom of navigation.

Today, the statement is being put again in another way: that the enforcement of national laws which seek to regulate, via ever creeping definitions, an activity which is not fishing in the sense of the Convention or indeed perhaps of international understanding, as my colleague explained, is not and cannot be seen to be in line with the Convention, and would, likewise, limit the freedom – the other internationally lawful uses of the sea related to these freedoms, indeed such as those associated with the operation of ships.

Members of the Tribunal, the law of Guinea-Bissau is the law of Guinea-Bissau and Guinea-Bissau cannot defend the law of Guinea-Bissau simply because it is the law. It should be assessed for compatibility with the Convention.

Indeed, a coastal State is to have due regard to the rights and duties of other States (article 56), and the laws and regulations which that coastal State expects other States to comply with must be in line with the Convention. There is no residual authority in a coastal State to make laws which themselves violate or result in a violation of the Convention.

Here we have a resonance, do we not? The suggestion that a degree of residual authority in respect of the emerging economic zone should be with the coastal State was already made by a small number of States during the negotiations for the 1982 Convention, but was rejected overwhelmingly. They supported the concept that such freedoms of the seas were only to be limited in accordance with any rights recognized expressly to the coastal States in the new Convention.

Italy commented: “Any residual regime applied in the area should be that of the freedom of the seas, not that of the authority of the coastal State.”

Ukraine commented: “Some delegations had even proposed that the coastal State would establish customs, fiscal, immigration and health controls in the exclusive economic zone. The delegation wondered what would eventually be left of the freedom of navigation, and commented that under the pretext of exercising such controls a coastal State might at any time detain a foreign vessel ...That was the purpose of the attempts to replace the concept of the economic zone with concepts such as ‘national sea’. A clear distinction must be made between the regime of the territorial waters and that of the economic zone.”

Yet, decades down the line, we see article 2 of Guinea-Bissau’s Fisheries Law, which includes the exclusive economic zone in the definition of “maritime waters <u>of</u> Guinea-Bissau”; and yet we have seen how Guinea-Bissau has extended its national laws to somehow include the recent phenomenon of bunkering within the scope of such legislation, by defining it as an activity which is related to the primary activity or operation of a fishing vessel.

Yet we hear conjecture from published experts such as Mr Djabulá, who was here yesterday or the day before, who, in answer to a question put by the Honourable Judge Marotta Rangel, stated that article 59 of the Convention provides that a conflict between the rights of the coastal State and a third State is settled on the basis of the advantage that can be created for the coastal State and the other State; but he excluded the words “as well as the international community as a whole.”

I refer here to Judge Vukas’s Separate Opinion in the *M/V “SAIGA” (No. 2) Case*, where he said:

> The following paragraph relative to article 59, written by the most authoritative commentators of the Convention, confirms that in conceiving economic sovereign rights and jurisdiction of the coastal State, UNCLOS III never reasoned beyond their resource contents:
>
> “On issues not involving the exploration for and exploitation of resources, where conflicts arise, the interests of other States or of the international community as a whole are to be taken into consideration”.
>
> It appears from all the above mentioned that the drafting history and the content of Part V of the Convention do not provide valid reasons for considering bunkering of any type of ships as an illegal use of the exclusive economic zone. In this respect, a note circulated at the beginning of the fifth session of UNCLOS III by the President of the Conference should be

recalled. Pleading for a consensus on the regime of the exclusive economic zone, the President wrote:

> "A satisfactory solution must ensure that the sovereign rights and jurisdiction accorded to the coastal State are compatible with well-established and long recognized rights of communication and navigation which are indispensable to the maintenance of international relations, commercial and otherwise".

The bunkering activity carried out by the *Virginia G* is a commercial activity for which vessels, including fishing vessels, in the exclusive economic zone of West Africa offer a particular market, namely the sale of gas oil.

The argument has been propounded that the connection between the rendering of bunkering services to fishing vessels in the exclusive economic zone results in overexploitation by fishing vessels; that the activity of bunkering could have an effect on the environment, and that, hence, it is justified to strip the bunkering vessel of its freedom of navigation or other internationally lawful use of the sea and consider her activities akin to fishing activities for the purposes of regulation. In other words, a fictitious distinction is sometimes made between navigation pure and simple of a bunkering vessel through the EEZ, and the rendering of bunkering services in the EEZ.

It is true that whilst that distinction might hold for an activity that is specifically subject to sovereign rights in the EEZ, for example fishing, the extension of this logic to a bunkering vessel (which is subject to its own special body of rules) would be misconceived.

Indeed, why is the fishing vessel the discriminating factor? Why not consider the *Virginia G* a bulk carrier today, a container ship tomorrow, depending on the ship being refuelled?

Panama contends that, logically, the contrary conclusion should be reached: that it is precisely the inherent connection between bunkering and navigation, and hence the necessity of the former for the performance of the latter, that would lead to the conclusion that bunkering activities should be considered to be more akin with the freedom of navigation and other internationally lawful uses of the sea, such as those associated, in fact, with the operation of ships.

Moreover, the activities conducted with a view to providing a commercial service to fishing vessels (operating legally in the EEZ of Guinea-Bissau) by no means amount to an economic exploitation of the EEZ of Guinea-Bissau. In this regard, Guinea-Bissau cannot reasonably contend that the activity of bunkering of vessels, even in relation to fishing vessels, would be, or should be, captured by its sovereign rights or jurisdiction in its EEZ, in terms of article 55 of the Convention.

Indeed, the vessel is neither a fishing vessel nor (by definition) engaged in exploring, exploiting or utilising the natural resources in the EEZ of Guinea-Bissau in the context of the rights and jurisdiction accorded to Guinea-Bissau.

The material scope of Guinea-Bissau's rights and jurisdiction over living resources in its EEZ relate to their conservation and management and to the exploration and exploitation or utilisation of such living resources, and it is perhaps reasonable that these terms can even be described as "sufficiently wide to embrace all normal enterprise and governmental functions that pertain to living resources." I refer here to the work of Burke in *The New International Law of Fisheries.*

However, it would also be reasonable to state that even a wide interpretation would necessarily have to preserve the fundamental link to the living resources themselves. Indeed, Burke says:

> Exploring and exploiting' would normally be considered to cover all the activities involved in commercial or recreational fishing. These activities include the initial searching and finding of the valuable fish populations; the use of fishing gear to capture them; their placement on board vessels for processing, or transport to other vessels or ports where processing may occur prior to their disposal by sale, barter or other transaction.
>
> Similarly, 'conserving and managing' are broad concepts that incorporate all the activities that bear on deciding about the wise use and disposition of living resources. These activities include the gathering, analysis, and dissemination of information; the public and private processes of deciding about permissible levels of fish utilization; the myriad choices about time, place, equipment, machinery, gear and instruments that may be used in exploring and exploiting stocks; and all other phases of the business process that relate to fishing, such as investment, subsidization, taxation, credit arrangements, and so forth.

It is contended, therefore, that in respect of the three freedoms (navigation, overflight and communication), in case of a dispute, the shift should be in favour of those freedoms and "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships […]" understood in terms of the high seas regime, in good faith and based on the ordinary meaning to be given to the terms of the Convention, in their context and in the light of the object of the Convention – on which note, that would be the Vienna Convention on Treaties.

THE PRESIDENT: Thank you, Mr Mizzi. We have almost reached eleven-thirty so the Tribunal will withdraw for a break. The hearing will continue at noon.

(Break)

THE PRESIDENT: We will continue the hearing but before I call upon Mr García-Gallardo I would like to inform you that Judge Nelson will join us a bit later.

I give the floor again to the Co-Agent of Panama, who will continue his statement. Would you please speak a bit slower so that the interpreters can follow you? Thank you.

MR MIZZI: Since this is my final remark, I take the opportunity to thank the excellent work of the interpreters.

Your Honours, I would like to spend a few minutes in order to underline at least two of the provisions that we think have particularly been breached during these events.

The basis of the events surrounding the *Virginia G*'s case Panama sees as being a series of continual, persistent and deliberate actions in bad faith by an administration of Guinea-Bissau that abused its powers and caused harm to the vessel and her crew, and to an owner who would not acquiesce to their illegal requests.

The result – the punishment – was a completely disproportionate and a manifestly deliberate 14-month detention that caused damages and losses, psychological, physical and financial hardship, and represented a blatant irreverence towards the rights of Panama as a flag State.

Guinea-Bissau demonstrated a high level of disregard to its obligations under the Convention.

Testimony to the events in relation to 21 August 2009 and thereafter, as heard by the Tribunal over the past days, demonstrates not only the particular breaches of a number of articles of the Convention, as mentioned earlier by my colleague Mr García-Gallardo, but an overall shroud of bad faith and abuse of rights, and a disrespect of another State's rights, in clear breach of articles 300 and 56, paragraph 2. The violations, we suggest, also include breaches of basic humanitarian provisions and principles of due process of law.

Guinea-Bissau did not fulfil in good faith the obligations assumed under this Convention and did not exercise the rights, jurisdiction and freedoms recognised in the Convention in a manner which would not constitute an abuse of right.

Reference to "good faith" reflects the fundamental rule of *pacta sunt servanda*.

The concept of "abuse of rights" is founded on the obligation of States under international law to act in good faith in fulfilling their treaty commitments.

Oppenheim explains that the doctrine arises when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by legitimate considerations of its own advantage. Thus, even if technically acting within the law, a State may incur liability by abusing its rights.

The *Dictionnaire de la terminologie du droit international* defines "*abus de droit"* as:

> The exercise by a State of a right in such a manner or in such circumstances as indicated that it was for that State an indirect means of avoiding an international obligation imposed upon that State, or was carried out with a purpose not corresponding to the purpose for which that right was recognized in favour of that State.

UNCLOS, unusually, contains a provision that expressly relates to abuse of rights. The framers of the Convention deliberately made article 300 an overarching part of

the Convention, as all factual and legal circumstances could not be predicted and covered by explicit rules.

Article 300 fills a gap by authorising ITLOS to find justice in cases of abuse. The States Parties in article 300 empowered ITLOS with residual authority to hear about instances of injustice and to provide remedies where merited.

The principle also appears in the case law of the ICJ: in *The Case concerning certain German interests in Polish Upper Silesia* and *The Case of the Free Zones of Upper Savoy and the District of Gex*.

I would also like to make a few comments in relation to article 73 of UNCLOS, if indeed the Tribunal were to find that this article applies.

The Separate Opinion of Judge Treves in the *"Juno Trader" Case* is particularly relevant in relation to this article, which states:

> While paragraph 1 includes a broad and non-exhaustive list of measures the coastal State may take to ensure compliance with its laws and regulations, the three paragraphs that follow have the purpose to ensure that these measures will not have the effect of limiting the freedom of the persons involved (prompt release of the crew, prohibition of imprisonment as a penalty) and of unduly jeopardizing the rights of ship owners and of the flag State (prompt release of the vessel), while ensuring timely protective action by the flag State (obligation to notify in case of arrest and of the imposing of penalties).

With particular reference to article 73, paragraph 4, I should remark that, insofar as Guinea-Bissau deemed it was enforcing its EEZ rights against the *Virginia G*, the violation of article 73, paragraph 4, had particular repercussions. Article 73, paragraph 4, states: "In the cases of arrest or detention of foreign vessels, the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed."

It is quite simple: Guinea-Bissau did not notify Panama of the measures it took against her vessel. Guinea-Bissau does not deny this, but, rather, seeks to justify it in its Counter-Memorial, as being owing to the alleged lack of a genuine link, and the lack of a Panamanian diplomatic representation nearby.

Guinea-Bissau was not entitled to do this. Panama is the flag State, and Guinea-Bissau was bound to notify it. By failing to do so, Panama was denied the opportunity to take timely protective action in respect of her vessel and its crew.

In fact, Panama was never officially, and through appropriate channels, informed by Guinea-Bissau of any occurrence in relation to the *Virginia G* during the entire 14 months of detention. Even the release of the *Virginia G* was never officially notified to the Panamanian authorities.

There is a connection between paragraphs 2 and 4 of article 73, since absence of prompt notification may have a bearing on the ability of the flag State to invoke article 73, paragraph 2, and other measures under the Convention (for instance

article 292) in a timely and efficient manner, with humanitarian considerations at the forefront. This was recognized in the *"Camouco" Case.*

THE PRESIDENT: I thank Mr Mizzi for his statement.

I now give the floor again to the Agent for Panama, Mr García-Gallardo. I would like to ask you again to slow down. Thank you for your cooperation.

MR GARCÍA-GALLARDO: Thank you. Even speaking slowly I will try to finish earlier than expected.

THE PRESIDENT: Thank you very much.

MR GARCÍA-GALLARDO: Mr President, thank you.

Your Honours, I will not repeat each and every paragraph of our Memorial and Reply in relation to the annexes. We have provided sufficient legal basis and jurisprudence from the ICJ and the *M/V "SAIGA" Case* because that was the first case in which this Tribunal considered the principle and ordered compensation.

I will repeat some of the main principles set out by the jurisprudence.

As I learned in university, every damage must relate to an illegality, in this case an international illegality, to real damage, and there should be a causal link between the damage and the illegality. We have tried to prove that over the five days of the hearing and previously in writing, tried to show that Guinea-Bissau violated not only one but different provisions of UNCLOS but also other international conventions and well-established principles and rules of international law.

My colleague has referred to the classic principles of violation and explained the scope of the main provisions on freedom of navigation. That is the first principle set out by this article and we always forget to continue reading the full paragraph which deals not only with freedom of navigation but to the lawful rights in this area, including the possibility to operate ships.

Coming back to the basis of compensation, I will just highlight that the claim for reparation brought by Panama is principally in the form of compensation, and illustrating Guinea-Bissau's responsibility in international law, specifically but without limitation under the provisions of the Convention and under the existing rules on responsibility of States for the consequences of their unlawful actions in terms of the general article 304. Certainly in this case we cannot apply the principle of hot pursuit – article 110, I think, where it is also possible specifically to claim damages for that particular violation. We rely more on the general provision of article 304 and link this to the different provisions that we have claimed have been violated by Guinea-Bissau.

Panama submits that Guinea-Bissau is liable to compensate Panama, as well as all persons, for all the consequences of its unlawful actions and its abuse of right, as stated in article 300. There is quite a lot of jurisprudence on article 300 but we hope that for the time being this provision will be more and more applied by this Tribunal,

as described in our Memorial and in our Reply. It is submitted that in accordance with the general rules of international law Guinea-Bissau is internationally responsible to Panama for the violations of international law occasioned by its actions in respect to the vessel *Virginia G*, its owner, crew and cargo owners as well as the rights of Panama and other interested parties.

The scope covered by the responsibility, in addition to the State of Panama, the flag State, certainly will be a key issue for the internal discussions of the Tribunal to consider the amount of our claims.

We have for the moment some references, particularly on ships. Certainly in the *M/V "SAIGA" Case* the reality of business life in the maritime sector was taken into consideration. It is absolutely unacceptable to continue hearing in this room that the vessels of Panama need to go to Panama to pass inspections. When someone hears this, they realize that the activities are not related to the international activity that characterizes the activity of the shipping, maritime and fishing industry all over the world. Certainly the scope will be a key question.

We do not abandon the possibility that we justify linking sister ships. We have very well established, I think, and provided supporting evidence about the consequences of the arrest of the *Virginia G* for the family group of the shipowner, Mr Gamez, which included a second vessel, the *Iballa G*. Just out of interest, the *Iballa G* and the *Virginia G* are the names of the daughters of the shipowner, so it certainly did considerably affect the family group. It happened at the moment that the economic crisis started not only in Spain but also in Panama and all over the world, and certainly the credit lines were suddenly cut and it was impossible to stop the consequences of one arrest on the second vessel of the company.

So there will be a discussion, I hope, as to whether in the scope of the claim you can consider the possibility to claim for damages to related individuals and related companies, such as charterers – charterers were recognized in the *M/V "SAIGA" Case* – but also to consider the possibility of going beyond this scope and to consider the rest of the group.

We have not quoted any amount in relation to the *Iballa G*. If my information is correct, the experts, particularly the expert Mr Moya Espinosa, confirmed in his report that there is not any particular claim relating to the *Iballa G*, although it did suffer arrest in Las Palmas, as was pointed out by my colleague, but we consider to keep this particular point to assess the scope of this parameter.

The second point we have modified following instructions from our flag State, which is not to consider any more the claim of moral damages reflected in a quantum, as we reflected in the Reply, but rather to come back to basic principles and to consider a letter of apology, a letter of consideration, following the case law set down by this Tribunal in the *M/V "SAIGA" Case*.

I think it is fair that I invite the Tribunal to consider the reasons that Panama has to claim this point because, first of all, it is totally inadmissible that an authority of the Guinea-Bissau Government, in particular the Coordinator of FISCAP, as stated in our annex to the Memorial, issued a press release to the media in different countries

setting out that a pirate ship had been arrested flying the flag of Panama, and repeating these words on two or three occasions. This is totally unacceptable for the quality and seriousness of the Panamanian Shipping Registry. In accordance also with references taken from other cases that are still to be judged by an arbitral tribunal – I am referring to the *ARA Libertad* case – I think that it is fair to consider declaring that Guinea-Bissau has violated different principles of UNCLOS and related provisions and that that will be, in principle, enough compensation in terms of moral damages for Panama.

For the rest, I would not like to comment further on damages, on the right to have damages. They are well reflected in our submissions. In relation to quantum, I simply rely on the reports of the economic experts. Certainly it took a lot of time to consider and double-check the different amounts. Certainly we have supporting evidence in our room, and we will provide in due course a full set of originals or certified copies of each and every invoice, bank statement, contract, and any other evidence relating to the different claims coming all together to pay, starting with salaries that remain unpaid. We heard Mr Fausto Ocaña starting the payments to suppliers of the vessel to pay reparations, and that certainly all of them have been providing support to the shipowner that certainly went into bankruptcy. Mr Gamez simply closed – not formally and legally – the company but was forced to stop the activities with the vessels for a while.

So I would just rely on the two reports. The second report, to avoid duplicity, is a confirmatory report made by an appropriate expert in international shipping. You can see the *curriculum vitae* as an appendix to his report, and I think it is quite a solid and deep report, very consistent with the practice in terms of claims for damages – perhaps not before an international public tribunal, much more relating to national level and private arbitration, if I can use these words, or before the high courts in the United Kingdom and similar courts, but certainly I think it is a very good quality and informed report and certainly justifies the direct link for each and every cost that he considers admissible and to justify the amount of the compensation.

I will read later the conclusions on our claim but I now need to dedicate ten minutes to the counter-claim that the Republic of Guinea-Bissau decided to lodge in response to the legal action launched by Panama. What can I say about the counter-claim? I do not know whether this is a kind of reprisal strategy but, in my opinion, it really shows a lack of respect to this Tribunal to submit such a counter-claim if someone really considers they have suffered damage, not even about the quantum, because I have tried to put an overall figure, US $4 million, but the minimum thing that we need when submitting a document or a plea to this Tribunal is a minimum of respect in considering and grounding minimally one and another argument of such a counter-claim. I do not think it is the case to elaborate too much, again, adjudge this against my esteemed colleagues, but certainly I am very sure that you will consider that, in the absence of any substantive report, any substantive split of the amounts claimed overall of such an amount, it is in principle purely a lack of respect to this Tribunal to submit a counter-claim in this way.

Based on that, and following some Separate Opinions that have already been adopted by the Tribunal in previous cases, I think the time has arrived to consider also the possibility of imposing the legal costs. Certainly, if my information is not

wrong, there are no rules on costs to date in this Tribunal. It has been subject to some comment by some honourable Members of the Tribunal but I think that independently of the assistance of rules on costs, a minimum rule would need to exist, but particularly in cases where a claim for damages has to be taken into consideration, and in this respect I would really take into consideration only and exclusively in particular the extra costs that not only the Republic of Panama but also the human resources you in this Tribunal have invested in the extra preparation of this counter-claim.

As I said before, I would not like to elaborate more on the counter-claim with arguments. I just said, for instance, this morning in relation to the environmental cost, it is really problematic because there is not any founded argument to consider a claim for such a big amount in a case where there is not one single reference – maybe one reference, which is the surprising letter of release of the vessel with allegations that the vessel was in very bad condition or was at risk of a problem with navigation and would probably sink in the port of Bissau and that it is better to release the vessel after 14 months to the shipowner, but apart from that element, I have never seen – and I may be wrong – one single document justifying the payment of such a claim for environmental problems created even potentially by the *Virginia G*.

I invite the honourable Members of the Tribunal to consider this argument, because, for the rest, they have not even considered any costs in relation to the costs of the administration dealing with this case or whatever other costs to date. Not one single piece of evidence, not one single contradictory report on the costs has been submitted by Guinea-Bissau, and probably I am wrong, but maybe this afternoon they will surprise us with supporting evidence to justify the $4 million claimed, but in my opinion it will be too late and the Tribunal should not admit any more evidence at this stage of the proceedings.

Thank you very much.

THE PRESIDENT: Thank you very much, Mr García-Gallardo. I understand that this was the last statement made by Panama during this hearing. Article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of the last statement made by a party at the hearing, its Agent, without recapitulation of the arguments, shall read that party's final submissions. A copy of the written text of these submissions, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other party.

I now invite the Agent of Panama to take the floor to present the final submissions of Panama.

MR GARCÍA-GALLARDO: I have split the submissions in relation to the claim and the counter-claim.

Case No. 19 “Virginia G”

6 September 2013

1. Submissions in relation to the claim.

Panama respectfully requests the International Tribunal for the Law of the Sea of the United Nations to declare, adjudge and order that:

1 The International Tribunal has full jurisdiction under the Special Agreement and under the Convention to entertain the full claims made on behalf of Panama;

2 The claims submitted by Panama are admissible;

3 The claims submitted by Panama are well founded;

4 The actions taken by Guinea-Bissau, especially those taken on the 21 August 2009, against the *Virginia G* violated Panama’s right and that of its vessel to enjoy freedom of navigation and other internationally lawful uses of the sea in terms of article 58(1) of the Convention.

5 Guinea-Bissau violated article 56(2) of the Convention;

6 Guinea-Bissau violated article 73(1) of the Convention;

7 Guinea-Bissau violated article 73(2) of the Convention;

8 Guinea-Bissau violated article 73(3) of the Convention;

9 Guinea-Bissau violated article 73(4) of the Convention;

10 Guinea-Bissau used excessive force in boarding and arresting the *Virginia G,* in violation of the Convention and of international law;

11 Guinea-Bissau violated the principles of articles 224 and 110 of the Convention;

12 Guinea-Bissau violated article 225 of the Convention as well as the SUA Convention, as well as the fundamental principles of safety of life at sea and collision prevention;

13 Guinea-Bissau violated article 300 of the Convention;

14 Guinea-Bissau is to immediately return the gas oil confiscated on 20 November 2009, of equivalent or better quality, or otherwise to pay adequate compensation;

15 Guinea-Bissau is to pay in favour of Panama, the *Virginia G*, her owners, crew and all persons and entities with an interest in the vessel’s operations, compensation for damages and losses

caused as a result of the aforementioned violations, in the amount quantified and claimed by Panama in paragraph 450 of its Reply (p. 84) or in an amount deemed appropriate by the International Tribunal;

16 As an exception to Point 15, the amount of moral damages requested in paragraph 470 of the Reply as due to Panama for moral damages is withdrawn and replaced by a request for a declaration of satisfaction/apology to the attention of the Republic of Panama, for the derogatory and unfounded accusations against the *Virginia G* and her flag State and as regards all aspects of the merits of the *Virginia G* dispute as from 21 August 2009;

17 Guinea-Bissau is to pay interest on all amounts held by the International Tribunal to be due by Guinea-Bissau;

18 Guinea-Bissau is to reimburse all costs and expenses incurred by Panama in the preparation of this case, including, without limitation, the costs incurred in this case before the International Tribunal, with interest thereon;

19 In the alternative to the previous paragraph 15, Guinea-Bissau is to compensate Panama, the *Virginia G*, her owners, crew (or spouse or dependant in the case of Master Guerrero)" – who has passed away, as you know – "charterers and all persons and entities with an interest in the vessel's operations in the form of any other compensation or relief that the international Tribunal deems fit.

2. Submissions in relation to the counter-claim

Panama respectfully requests the International Tribunal to:

A Declare, adjudge and order that Guinea-Bissau's objections to the admissibility of Panama's claim are outside the time-limit and/or are brought in bad faith such that they should be dismissed, rejected or otherwise refused;

B Dismiss, reject or otherwise refuse Guinea-Bissau's counter-claim on the basis that Guinea-Bissau has no legal basis under international law and under the Convention to bring the counter-claim, given the existence of the required links between Panama and the *Virginia G,* or, in the alternative, on the basis that Guinea-Bissau's counter-claim is unfounded in fact and at law, and that the counter-claim is frivolous and vexatious;

C Dismiss, reject or otherwise refuse each and all of the submissions of Guinea-Bissau, as set out in Chapter IX of Guinea-Bissau's Counter-Memorial, and declare, adjudge and order that:

20. Panama did not violate article 91 of the Convention;

21. In connection with Submission B above, Panama is not to pay in favour of Guinea-Bissau compensation for damages and losses as claimed by Guinea-Bissau in its counter-claim as set out in Chapter VII of its Counter-Memorial; and

22. Panama is not to pay all legal costs and other costs that Guinea-Bissau has incurred in relation to this counter-claim;

D Declare, adjudge and order that Guinea-Bissau's Decree Law 6-A/2000, as was applied to the *Virginia G* (and as applied in general) in the EEZ of Guinea-Bissau, is a unilateral extension of the scope of the Convention, restricting the freedoms under the Convention, and, in effect, an extension by Guinea-Bissau of a type of tax and/or customs-duty radius, in violation of the Convention.

Hamburg, 6 September 2013.

THE PRESIDENT: Thank you, Mr García-Gallardo.

That completes the second round of oral arguments of Panama. The hearing will be resumed today at 3 p.m. to hear the second round of oral arguments of Guinea-Bissau.

The sitting is now closed.

(*The sitting was closed at 12.38 p.m.*)