JOINT DISSENTING OPINION OF VICE-PRESIDENT HOFFMANN AND JUDGES MAROTTA RANGEL, CHANDRASEKHARA RAO, KATEKA, GAO AND BOUGUETAIA

We voted against paragraphs 5, 8, 16 and 17 in the operative part of the Judgment. These paragraphs deal with exhaustion of local remedies, violation of article 73, paragraph 1, of the Convention and the award of compensation to Panama, respectively. We would like to explain the reasons for our dissent. The facts of the case and the arguments of both Panama and Guinea-Bissau are as stated in the Judgment.

1. Guinea-Bissau contests the admissibility of certain claims espoused by Panama in the interests of the owner of the *M/V Virginia G* on the ground that the ship-owner has not exhausted the local remedies available to it in Guinea-Bissau, as required by article 295 of the Convention. It is not disputed that this article embodies an important principle of customary international law, namely, the local remedies must be exhausted by the injured alien in the host State before international proceedings may be instituted.

2. Two issues arise: whether on the facts of this case, the local remedies rule applies, and, if so, whether the requirements of the rule have been met.

3. On the first issue, Panama argues that the rule of exhaustion of local remedies does not apply in this case since, as the flag State, it is directly injured by the wrongful acts of Guinea-Bissau. Panama states that when the claim contains, as in the present case, elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is *preponderant*.

4. The legal position thus stated is unexceptionable. Our differences with the majority Judges arise in the matter of application of this test to the facts of this case.

5. The Tribunal notes that most provisions of the Convention as referred to in the final submissions of Panama confer rights mainly on States. In response, it may be stated, the question of direct injury to a State cannot be determined merely on the number of provisions of the Convention cited in the final submissions of the Claimant State. It is relevant to find out how many submissions centered around such provisions are upheld by the Tribunal. In the present case, we have no doubt that, to borrow the words of the International Court of Justice, "the matter which colours and pervades" the Panamanian claim "as a whole", is the alleged damage to the owner of the *M/V Virginia G*.[1]

6. The Tribunal has negated almost all Panamanian claims except the ones seeking relief on account of confiscated gasoil and costs of repairs of the vessel. This relief is at the core of the Panamanian complaint before this Tribunal. Accordingly, we are not persuaded by the argument that the principal submission of Panama lies in direct injury to Panama so as to render the local remedies rule inapplicable in the present case. The elements of diplomatic protection are preponderant as the facts of the case reveal.

7. Even if one were to adopt the "but for" test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national, on the facts of this case, the question has to be answered negatively. As pointed out by the International Law Commission, there is, however, little to distinguish the preponderance test from the "but for" test.[2]

8. The Tribunal claims that it followed the approach of the *M/V "SAIGA" (No. 2) Case*[3] in arriving at the conclusion that the claim of Panama as a whole is brought preponderantly on the basis of an injury to Panama. With due respect, the *Saiga* holding is distinguishable from the present case. There, Guinea´s application of its

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[1] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989,* p. 15, at p. 43 (see para. 452 (17) read with para. 446 of the Judgment of the Tribunal).
[2] See the Report of the International Law Commission on the work of its fifty-eighth session, p. 46.
[3] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999,* p. 10.

customs laws in its customs radius was found to be contrary to the Convention and, consequently, no jurisdictional connection was found between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims. The Tribunal also states that, in arresting the *Saiga*, Guinea acted in contravention of the Convention on the exercise of the right of hot pursuit, that Guinea used excessive force contrary to international law, that Guinea violated its rights under international law by citing Saint Vincent and the Grenadines as "civilly liable" in the schedule of summons issued in connection with the criminal proceedings against the Master of the *Saiga* before the Tribunal of First Instance of Conakry.

9. Though *M/V "SAIGA" (No. 2)* was a case involving mixed claims, the Tribunal observed, on account of the factors mentioned above, that the claim of Saint Vincent and the Grenadines involved direct violations of the rights of that country. Accordingly, the Tribunal held that the local remedies rule did not apply (see para. 155 of the Judgment). We do not agree that in the present case the Tribunal followed the approach of the *M/V "SAIGA" (No. 2)*. On the facts of this case, as noted earlier, the claims of Panama were preponderantly indirect.

10. In any view of the matter, the ship-owner, having made use of some of the local remedies in Guinea-Bissau, cannot turn back now and take the untenable position that the local remedies rule is inapplicable in this case.

11. On the basis that the local remedies rule does apply in this case, we may now turn to the second issue, i.e., whether the local remedies were or were not exhausted by the ship-owner. Panama argues that in the present case there is no effective remedy to exhaust in Guinea-Bissau. It maintains that the ineffectiveness of the local remedies has to be presumed "on the basis of evidence that the courts were subservient to the executive."

12. This total condemnation of the legal remedies in Guinea-Bissau cannot be sustained. These remedies are not invented for the sake of any particular natural or juridical person. They are of general application and are known to all concerned,

either nationals or foreigners, who are willing to do bunkering business in areas of the sea subject to the sovereign rights of Guinea-Bissau.

13. Guinea-Bissau argues that the owner of the *M/V Virginia G* did not exhaust all internal mechanisms of dispute resolution available in that country. It points out that the legal action is still pending in the courts of Bissau awaiting payment by the ship-owner of the costs that are necessary for this action to continue. It states that, since there was no previous exhaustion of local remedies, the claims of Panama cannot be presented before the Tribunal according to article 295 of the Convention.

14. The expression "local remedies" in the local remedies rule refers to legal remedies which are open to the injured person before the "judicial or administrative courts or bodies" of the State alleged to be responsible for causing the injury.[4]

15. As the International Law Commission has pointed out in its commentary on article 14:

> [T]he foreign national must exhaust *all* the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has discretion to grant leave to appeal, the foreign national must still apply for leave to appeal to that court (emphasis supplied).

16. In the *ELSI* case, the Chamber of the International Court of Justice (ICJ) stated:

> [F]or an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and *pursued as far as permitted by local law and procedures*, and without success[5] (emphasis supplied).

17. Guinea-Bissau argues that the *M/V Virginia* G violated its General Fisheries Law because it did not have written authorization for performing the operation of bunkering of oil in the exclusive economic zone of Guinea-Bissau.

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[4] See art. 14 of the draft articles on Diplomatic Protection adopted by the International Law Commission in 2006.
[5] *I.C.J. Reports 1989*, p. 46, para. 59.

18. In the *Ambatielos Case*[6], an international tribunal held that "it is the whole system of legal protection, as provided by municipal law, which must have been put to the test."

19. The question is: Have all the available judicial remedies provided for in the municipal law of Guinea-Bissau been exhausted by the ship-owner?

20. The dispute in this case had arisen by reason of the arrest, on 21 August 2009, and prolonged detention, by Guinea-Bissau, of the Panama-flagged oil tanker *M/V Virginia G* and the confiscation of the cargo of gas oil on board. An evaluation of municipal law and procedures, as they obtain in Guinea-Bissau, discloses that there are adequate remedies for the defence of the rights of the ship-owner and that the ship-owner failed to test *all* available judicial mechanisms.

21. Reference may be made first to the Fisheries Law contained in Decree-Law 6-A/2000, as amended by Decree-Law 1-A/2005. Article 65 of this law provides that the competent court may issue an order for the immediate release of a ship and its crew, even before the hearing, at the request of the ship-owner, etc., if "enough bond is posted". Such an order is required to be issued within a maximum of 48 hours after the filing of the petition to have ship and crew release. Article 66 of this law also makes provision for the release of the bond within a very short period if the court finds that the accused person is not guilty or, if found guilty, after all fines, penalties, etc., have been fully paid.

22. Article 65 thus introduces a provision for prompt release of vessels and their crew. There was never any satisfactory explanation as to why recourse was not taken by the ship-owner to this procedure to secure the release of the ship, including the gas oil on board. It is a generally recognized principle of law that the injured party is required reasonably to mitigate the damage it has incurred[7]. As pointed out by the ICJ:

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[6] (1956) 12 RIAA 83 at 120.
[7] Stephan Wittich, "Compensation", *Max Planck Encyclopedia of Public International Law*, p. 5.

> It would follow from such a principle [of mitigation] that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided.[8]

23. More recently, in a letter dated 16 September 2013, well after the commencement of the present case, Panama observed:

> [The ship-owner] could not reasonably have made recourse to the "prompt release" action under Article 65 of Decree-Law 6-A/2000 since the conditions for providing security/guarantees were (i) unknown, (ii) partial towards Guinea-Bissau, (iii) unreasonable and (iv) prohibitive, thus preventing effective access to this remedy (see also paragraph 147 of the Judgment).

24. Panama never substantiated these allegations, which are palpably wrong. If the conditions for providing security were "unknown", how could the ship-owner claim in the same breath that they were "unreasonable" and "prohibitive".

25. In any event, if the conditions of the bond were "unreasonable", it was open to the ship-owner to approach this Tribunal under article 292 of the Convention to have a reasonable bond fixed, which would have required the authorities of the detaining State to comply with the decision of the Tribunal. The ship-owner thus failed to take advantage of the prompt release proceeding either at national or at international level.

26. In the *M/V "SAIGA" Case*, the Tribunal made it clear that an application may be made to the Tribunal even "when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal State's laws or when it is alleged that the required bond is unreasonable."[9]

27. Guinea-Bissau repeatedly stated that the ship-owner was unable to post a bond to secure the release of the ship because of his financial problems. This averment was never seriously contested by the ship-owner.

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[8] See *Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997*, p. 7, at p. 55.
[9] *ITLOS Reports 1997*, p. 16, at p. 35, para. 77.

28. Whatever the reason, the failure of the ship-owner to invoke the prompt release proceeding either at the level of the municipal court or at the level of the Tribunal has two consequences: first, it signifies that the ship-owner has failed to exhaust all the local remedies, and, second, the ship-owner has failed to take the necessary measures to limit the damage said to have been caused on account of the repairs of the vessel and confiscation of the gasoil on board. As a consequence of the aforesaid, the ship-owner is not entitled to compensation for the damage which could have been avoided had he taken recourse to prompt release proceedings.

29. The Tribunal finds that the dispute-settlement procedure laid down in article 65 of Decree-Law 6-A/2000 meets the requirements of article 73, paragraph 2, of the Convention and declares:

> [A]s the available procedures under the laws and regulations of Guinea-Bissau have not been used by the owner of the vessel to secure its release, Panama cannot claim on behalf of the owner of the vessel any loss of profit.[10]

30. This declaration is not tenable for two reasons: first, having stated in paragraphs 157-158 that the ship-owner was not required to exhaust local remedies, the Tribunal cannot now find fault with the ship-owner for not taking recourse to the procedure laid down in article 65 of Decree-Law 6-A/2000; second, there is no reason why only loss of profit was denied to the ship-owner. The ship-owner should have been denied even the costs of repairs of the vessel.

31. To proceed further on the subject of the local remedies, attention may be drawn to article 46, paragraph 1, of Decree-Law 6-A/2000. It states that, once the inspectors have drafted a report on an infringement by a ship, they are required to immediately notify the member of the government in charge of fisheries who will at once forward said report to the Attorney General or the District Authority at the territorially competent court. By virtue of article 62, paragraph 2, during the court procedure, a Government officer authorized for the purpose may settle the matter with the ship-owner on behalf of the State. The ship-owner failed to utilize the

[10] See para. 438 of the Judgment.

opportunity to reach an out-of-court settlement under article 62 of Decree-Law 6-A/2000.

32. On 28 October 2009, the ship-owner lodged a request for a preliminary injunction before the Regional Court of Bissau against the confiscation of the vessel. On 5 November 2009, the Regional Court ordered the suspension of any and all acts concerning the confiscation of the vessel and any product on board. On 19 November 2009, the Public Prosecutor of Guinea-Bissau submitted an appeal to the Regional Court of Bissau seeking annulment of the preliminary injunction, since it was issued without giving an opportunity for the Public Prosecutor to intervene. On 18 December 2009, the Regional Court considered the appeal to be "outside of the time limit" and confirmed the earlier order, but nevertheless submitted the files to the Superior Court of Guinea-Bissau. Guinea-Bissau argues that this appeal had the effect of suspending the interim order by virtue of article 740, paragraph 1, of the Civil Procedure Law of Guinea-Bissau. Guinea-Bissau states that there was no decision taken by the Superior Court of Guinea-Bissau, since the ship was released in the meanwhile, on 20 September 2010. According to Guinea-Bissau, the ship was released because its presence in the Port of Bissau was considered to be a danger to the security of maritime navigation. It appears that no further action was taken in this case.

33. On 4 December 2009, the ship-owner lodged an appeal on the merits before the Regional Court of Bissau against the confiscation of the vessel (Case 96/2009). Panama states that there have been no developments in the case since February 2010. Guinea-Bissau alleges that this was "due to the negligence of the applicant to promote its terms". While Guinea-Bissau states that the action is still pending in the Regional Court, Panama states that the case is pending on account of Guinea-Bissau not having filed a rejoinder. Panama contends that there was no progress in this case, since "[t]he vessel was released in October 201[0], and the ship-owner's judicial recourse has been futile".

34. On 30 November 2009, the Secretary of State of the Treasury, Ministry of Finance of Guinea-Bissau ordered that the *M/V Virginia G* be authorized to discharge the gasoil in the premises of CLC. On 7 December 2009, the ship-owner

lodged a request for interim measures before the Regional Court of Bissau against the 30 November 2009 order referred to above concerning the unloading of the gasoil (case 98/2009). By order dated 16 December 2009 (notified on 18 December 2009), the Regional Court ordered “the immediate return of the unloaded oil to the claimant’s vessel”. Guinea-Bissau adds that the interim measure was again granted without hearing the State which makes the interim measure without effect. In this case too, the ship-owner, on 18 January 2010, lodged an action on the merits before the Regional Court of Bissau against the unloading of the gasoil (case 14/2010). Guinea-Bissau argues that this action was presented outside the deadline of 30 days which makes the interim measure ineffective.

35. The Parties agree that the case did not proceed. While Guinea-Bissau argues that this was on account of the fact that the ship-owner did not pay the court fee, Panama argues that the ship-owner was never officially notified to pay the initial court fees.

36. To sum up, the ship-owner failed to exhaust all judicial remedies available in Guinea-Bissau. The local law permits appeals in all the proceedings to which he is a Party. The legal position is that such appeals must be brought in order to secure a final decision in the matter. In the present case, the ship-owner ought to have pursued his remedies as far as permitted by local law and procedures. Since he failed to do so, he cannot invoke this Tribunal’s jurisdiction with any success.

37. The next question is whether the confiscation of the ship and the gasoil on board was necessary in the circumstances of this case.

38. The Tribunal observes that neither the boarding and inspection nor the arrest of the ship violated article 73, paragraph 1, of the Convention. It states that breach of the obligation to request permission for bunkering in writing is a serious one. It adds that a coastal State enjoys jurisdiction under article 56 of the Convention concerning the conservation and management of marine living resources and that such jurisdiction also encompasses the right to regulate bunkering of fishing vessels in the exclusive economic zone and to provide for the necessary enforcement measures.

39. The Tribunal further states that providing, in the laws and regulations of Guinea-Bissau, for the confiscation of a vessel offering bunkering services to fishing vessels in the exclusive economic zone of Guinea-Bissau is not *per se* in violation of article 73, paragraph 1, of the Convention. It adds that, whether or not confiscation is justified in a given case, however, depends on the facts and circumstances of the case.

40. The Tribunal finds that in the present case the confiscation of the ship and the gas oil was not “necessary”. It adds that the enforcement measures taken on the facts of this case were “not reasonable” in light of the particularities of the case.

41. The Tribunal states that, while taking enforcement measures, Guinea-Bissau failed to take into consideration what the Tribunal called “mitigating factors”. Explaining them, the Tribunal observes that Guinea-Bissau should have taken into account that on previous occasions the ship’s agent had applied for and obtained the necessary authorization for the fishing vessels which were meant to be served by the *M/V Virginia G*. It adds that Guinea-Bissau authorities knew that the agent of Balmar for whose fishing vessels bunkering services were to be supplied by the *M/V Virginia G* had informed FISCAP on 20 August 2009 of the coordinates, date and time of the refueling operations to take place on 21 August 2009; the agent, however, neglected to follow the required procedure for applying for an authorization in writing.

42. The Tribunal further states that the failure to request and receive a written authorization was rather the consequence of a “misinterpretation of the correspondence between the representatives of the fishing vessels and FISCAP than an intentional violation of the laws and regulations of Guinea-Bissau”.

43. We would like first to examine whether the Tribunal’s holding regarding the “mitigating factors” is legally tenable. How could there be a “misinterpretation of the correspondence” when, as the Tribunal itself acknowledges in the same breath, that authorization was obtained on previous occasions? If the ship-owner had previous experience of obtaining the requisite authorization, how could failure to obtain

authorization serve as a mitigating factor? If at all, failure or negligence to secure the authorization should be taken as an aggravating factor to justify a higher penalty.

44. Turning now to the question whether the confiscation of the ship was necessary, it is relevant here to set out article 73, paragraph 1, of the Convention, which provides:

> The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, *as may be necessary* to ensure compliance with the laws and regulations adopted by it in conformity with this Convention (emphasis supplied).

45. What does this expression "as may be necessary" in this paragraph mean? Does it leave the latitude to decide what is necessary entirely to the coastal State and keep it immune from judicial review? If it is not free from judicial review, what could be the extent of such review?

46. There is no provision of the Convention which is immune from interpretation by the competent judicial body. Therefore, when the occasion arises, the Tribunal is competent to interpret every word and expression in the Convention. Any other view will be contrary to the rule of law.

47. In the *"Monte Confurco"* Judgment, the Tribunal declared that, when determining whether the assessment made by the detaining State in fixing the bond or other security is reasonable, "it is not an appellate forum against a decision of a national court".[11] Here, in the present case, there is no decision by a national court, since the ship-owner failed to pursue judicial settlement within the framework of the law of Guinea-Bissau. The decision to confiscate was either a quasi-judicial act (since it was taken after due notice to the ship-owner, following principles of natural justice), or an administrative act. In either case, it may be stated that the Tribunal is not an appellate forum in respect of a decision taken by a national body called upon to interpret and apply the laws in force. In short, within the framework of article 73, paragraph 1, of the Convention, the Tribunal does not sit as a court of appeal in

[11] *ITLOS Reports 2000*, p. 86, at p. 108.

assessing whether or not the enforcement measures are necessary in the circumstances of the case.

48. The question then is: What is the extent of judicial review in deciding whether or not a particular enforcement measure is necessary? One thing is absolutely clear, namely, that, while exercising its rights under article 73, paragraph 1, of the Convention, the coastal State does not enjoy unlimited freedom.

49. In the context of article 73, paragraph 1, of the Convention, the inquiry should start with a clear understanding that what is being discussed is the coastal State's "sovereign rights" to *manage* the living resources in its exclusive economic zone. The term "sovereign rights" ought to carry with it a degree of deference to the coastal State in its exercise of those rights, unless such deference is denied by the Convention itself.

50. It cannot be denied that the national courts or authorities are better placed to appreciate all the relevant considerations of law and fact in the State concerned.[12] Hence, they should be given a broad "margin of appreciation", i.e., a wide discretion in the operation of law. This concept is widely recognized in municipal jurisdictions as also in transnational contexts. It should not be forgotten that for the limitation on discretionary powers of the coastal State concerning enforcement measures under article 73, paragraph 1, the matter would have rested with the coastal State to take whatever measures it deems necessary. In view of this also, international tribunals should exercise judicial restraint in dealing with the coastal State's discretionary powers under article 73, paragraph 1, of the Convention.

52. It may be worthwhile to quote in this connection the opinions of Judges Cot, Wolfrum and Anderson. Referring to the margin of appreciation in relation to the exclusive economic zone, Judge Cot observed:

> The concept of sovereign rights is central to our discussion. Stopping short of full sovereignty, it implies an unfettered power of the coastal

[12] See Jean-Pierre Cot, "The Law of the Sea and the Margin of Appreciation" in T.M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007), p. 392. Anderson, *"Camouco", Judgment, ITLOS Reports 2000*, p. 50. See also European Court of Human Rights: *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24.

> State to manage resources and establish rules and regulations accordingly. Member States do accept important obligations in that respect, but they have a free hand in deciding how to discharge these obligations…. Sovereign rights carry a degree of deference to the State in its exercise of those rights… Coastal States may in particular specify monetary penalties they consider appropriate. The Convention does not put a limit upon the amount of fines against violations a coastal State may consider appropriate.[13]

Commenting on article 73 of the Convention, Judge Wolfrum declared:

> In particular, the Convention does not put a limit on the amount of fines against violators a coastal State may consider appropriate…. Coastal States enjoy considerable discretion in laying down the content of laws concerning the conservation and management of marine living resources in their exclusive economic zone and of the corresponding laws on enforcement… These discretionary powers or margin of appreciation on the side of the coastal State limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not. It is not for the Tribunal to establish a system of its own which does not take into account the enforcement policy by the coastal State in question. [14]

Dealing with the question of fixing a reasonable bond under article 292 of the Convention, Judge Anderson observed:

> It should be recognized that the local courts are best placed to appreciate all the relevant considerations of fact and law in the State concerned. In a matter such as this… the local court should be accorded a wide discretion in fixing the amount of the security for release pending trial. In other words, national courts should be accorded a broad "margin of appreciation".[15]

53. Though, as noted earlier, national authorities enjoy wide discretion in the matter of enforcement measures, article 73, paragraph 1, of the Convention does not give them unlimited power of appreciation. Whenever the Convention seeks to place the exercise of discretionary powers beyond judicial review, it makes this clear in unambiguous terms, e.g., under article 189 of the Convention, the Seabed Disputes Chamber "shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers" and "in no case shall it substitute its discretion for that of the Authority". However, there is no similar provision in article 73, paragraph 1, of the Convention. It is in no way the task of the Tribunal to take the place of the competent

[13] See Jean-Pierre Cot, *op. cit*., pp. 396, 400 – 401.
[14] See *"Camouco", ITLOS Reports 2000*, pp. 68, 69.
[15] See *"Camouco", ITLOS Reports 2000*, p. 50.

national authorities but rather to review the decisions they delivered in the exercise of their power of appreciation.

54. It must be borne in mind that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an appellate authority. A court may exercise the power of judicial review if there is manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which no not exist and which are patently erroneous.

55. In the present case, the Tribunal, instead of exercising its powers of judicial review, appears to have functioned as an appellate authority substituting its judgment for that of the local authority. On the facts of this case, we found no occasion for the Tribunal to interfere.

56. Guinea-Bissau is not against bunkering activities in its exclusive economic zone. This is clearly reflected in the small fee – € 112.00 per week – that it has prescribed for securing its written authorization for bunkering. It is in cases involving failure to obtain authorization that Guinea-Bissau has prescribed the stiff penalty of confiscation of the vessel and the fuel therein, which operates *ex-officio*. *Prima facie*, this may appear to be arbitrary, but on closer examination, Guinea-Bissau's action may be found reasonable.

57. The Tribunal admits that the legislation of Guinea-Bissau conforms to articles 56 and 62, paragraph 4, of the Convention, that the laws and regulations of Guinea-Bissau also provide for automatic confiscation of vessels, that breach of the obligation to request permission for bunkering in writing and to pay the fee is a serious one, and that bunkering activities have a bearing upon the status and productivity of the fish stocks in the exclusive economic zone. If this be so, is there any justification for the Tribunal to hold that the confiscation of the vessel and the gas oil by Guinea-Bissau is unreasonable "on the facts and circumstances" of this case, as the Tribunal puts it?

58. The Tribunal notes that the laws and regulations of Guinea-Bissau offer several possibilities for the applicant to mount a legal challenge to confiscation. The

Tribunal observes that this provides flexibility for the sanctioning of violations of fishing laws and regulations. The Tribunal adds:

> Therefore, the Tribunal holds that providing for the confiscation of a vessel offering bunkering services to foreign vessels fishing in the exclusive economic zone of Guinea-Bissau is not *per se* in violation of article 73, paragraph 1, of the Convention.

59. Drastic action in protection of the State's interests in each instance may be regarded as warranted, indeed, if not to be expected. The decision to confiscate was also justified in light of the "repeated practice" of fishing-related activities in the form of unauthorized sale of fuel to fishing vessels in the exclusive economic zone of Guinea-Bissau. A State is entitled to eliminate the prospect of unauthorized bunkering activities contrary to its laws by a vessel it has arrested.

60. Offences relating to bunkering are difficult to detect, especially for the developing countries which do not have the capacity to police vast areas of exclusive economic zones. Hence, general deterrence features dominantly upon the assessment of penalty for breaches of fisheries and fishing-related legislation.

61. For the above reasons, we do not agree that by confiscating the *M/V Virginia G* and the gas oil, Guinea-Bissau violated article 73, paragraph 1, of the Convention and are consequently against the award of compensation in favour of Panama.

(signed) Albert J. Hoffmann

(signed) Vicente Marotta Rangel

(signed) P. Chandrasekhara Rao

(signed) James L. Kateka

(signed) Zhiguo Gao

(signed) Boualem Bouguetaia