

## Separate Opinion of Judge Akl

(Translation by the Registry)

1. I have voted in favour of the findings and decisions of the Tribunal save for the eighteenth decision in the operative part, pursuant to which Panama is awarded no compensation for the loss of profit. My position follows from my disagreement with the grounds in fact and law relied on in the Judgment, specifically in paragraphs 435 to 438, to deny Panama any compensation for the loss of profit consequent upon the confiscation of the *M/V Virginia G* by the authorities of Guinea-Bissau.

2. Paragraph 434 of the Judgment states: “The Tribunal takes the view that... Panama in the present case is entitled to reparation for damage suffered... [and] to reparation for damage or other loss suffered by the *M/V Virginia G*, including all persons and entities involved... in its operation, as a result of the confiscation of the vessel and its cargo.”

3. However, while observing that “the confiscation of the *M/V Virginia G* and its cargo has been found to be a violation of article 73, paragraph 1, of the Convention”, the Tribunal considers that “only damages and losses related to the value of the gas oil confiscated and the cost of repairing the vessel are direct consequences of the illegal confiscation” (para. 435). In respect of the compensation sought for loss of profit, the Tribunal “is of the view that Panama failed to establish the direct nexus between the confiscation of the *M/V Virginia G* and the damage claimed by Panama as loss of profit” (para. 436).

4. The Tribunal grounds its decision on its understanding, mistaken in my view, of the circumstances surrounding the termination of the time charter between Lotus Federation, an Irish company, and Gebaspe, acting for Penn Lilac. The Tribunal considers that the contract “was terminated on 5 September 2009 by a statement of termination between Lotus Federation and Gebaspe which acted as intermediary between Penn Lilac (the owner of the vessel) and the former company which states that ‘the parties consider the contract as terminated and declare not to have anything to claim to each other with regards to the said contract’”. On the basis of this statement the Tribunal concludes “that no loss of income may be claimed for any period between the arrest of the vessel on 21 August 2009 and the date of termination of the contract on 5 September

2009, and that this contract may not be used as the basis for any calculation of lost profit after the termination date of the contract" (para. 437).

5. To be noted is that, on the subject of the termination of the charter contract, the Judgment makes no reference to the relevant termination provisions in that agreement, cites only part of the statement of 5 September 2009, gives the statement a meaning it does not have and infers unjustified factual and legal consequences from it.

6. Clause XVII of the time charter between Lotus Federation and the owner of the *M/V Virginia G*, to be found in Annex 13 to Panama's Memorial, states: "In case of loss, disappearance or immobilization of the Vessel, freight will be ceased from the date on which the Vessel was lost". The full text of the 5 September 2009 statement by Gebaspe and Lotus Federation, found in Annex 57 to Panama's Memorial, is as follows:

After the arrest of the Ship Virginia G in Guinea Bissau on 20 August 2009, and as a consequence of the impossibility to keep on providing services to the company Lotus Federation under the conditions of the referred contract, the parties consider the contract as terminated and declare not to have anything to claim to each other with regards to the said contract.

7. The Tribunal considers that by this joint statement the two parties terminated the contract they had entered into on 1 January 2009 for four years. It concludes that a direct connection between the detention of the *M/V Virginia G* and the damage suffered from loss of profit has not been established.

8. I cannot subscribe to this conclusion of the Tribunal. In my opinion, the termination of the contract follows from a specific provision of the charter agreement providing: "In case of loss, disappearance or immobilization of the Vessel, freight will be ceased from the date on which the Vessel was lost". It is a well-established fact that the vessel was detained on 21 August 2009 and that, as a result of its confiscation on 27 August 2009, the owner lost its title to the vessel. Indeed, the *M/V Virginia G* was confiscated pursuant to decision No. 07/CIFM/09 of the Inter-Ministerial Commission for Maritime Surveillance ("CIFM") and remained so until 20 September 2010, when, by decision No. 05/CIFM/2010, the CIFM decided: "To order the release of the vessel VIRGINIA G and to consider repealed the previous Decision which orders its confiscation."

9. According to the Judgment, Lotus Federation and Gebaspe terminated the charter contract by means of their statement of 5 September 2009. A careful reading of the statement does not confirm this. In the words of the statement, the parties consider the contract terminated “[a]fter the arrest of the Ship Virginia G in Guinea Bissau on 20 August 2009, and as a consequence of the impossibility to keep on providing services to the company Lotus Federation under the conditions of the referred contract”. In fact, the parties are recording the fact of termination of the contract by operation of a clause, quoted above, within the contract itself, that clause specifying the situation in which the charter would come to an end. The purpose of the statement is not to terminate the contract but to indicate the consequences of termination for the parties, who thus affirm “not to have anything to claim to each other with regards to the said contract”.

10. I consider the termination of the charter of the *M/V Virginia G* and the loss of profit to be direct consequences of the arrest of the vessel and its confiscation, which is characterized by the Tribunal as a violation of article 73, paragraph 1, of the Convention. For nearly 15 months the *M/V Virginia G* was prevented by its unlawful confiscation from engaging in its business activity and its owner incurred significant losses. In opposition to the assertion in the Judgment, I consider that the causal nexus between, on the one hand, the detention and confiscation of the *M/V Virginia G* and, on the other, the prejudice suffered in terms of lost profit has been firmly established and that Panama is entitled to seek compensation for loss of profit.

11. The decision of the Tribunal to reject Panama’s compensation claim for lost profit runs counter to well-established rules of international law reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (“the ILC Draft Articles”). It also departs from the case law of international courts and tribunals, including that of this Tribunal.

Article 31 of the ILC Draft Articles provides: “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”; and “Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State”.

In addition, article 36 of the ILC Draft Articles reads:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

One of Panama's two compensation claims for loss of profits fulfils the conditions laid down by international law: the Tribunal concludes that the confiscation of the *M/V Virginia G* was an internationally wrongful act; and, as stated above, the damage was caused directly by the confiscation, which brought about a lengthy hiatus in the business activity of the vessel and cut off the source of profits for its owner. Panama produced experts' reports, documents and invoices proving the loss of profits.

12. In their decisions international courts and tribunals have upheld claims for compensation for the profits lost as a result of internationally wrongful acts.

In its judgment in the *Factory at Chorzów* case, the Permanent Court of International Justice defined the substance of the obligation to make reparation in the following terms:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.

In paragraphs 428 and 432 of the Judgment in the present case, paragraphs 170 and 172 of the Tribunal's decision in the *M/V "Saiga" (No. 2) Case* are cited, wherein the Tribunal expressed a view on the rules on reparation under international law in keeping with that set out in the Permanent Court judgment. In paragraph 172 of the *M/V "Saiga" (No. 2) Judgment*, the Tribunal stated:

Saint Vincent and the Grenadines is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation. Damage or other loss suffered by the *Saiga* and all persons involved or

interested in its operation comprises injury to persons, unlawful arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic losses, including loss of profit.

In paragraph 175(b) the Tribunal decided to award Saint Vincent and the Grenadines compensation in the amount of US\$ 650,250, plus interest, for losses with respect to charter hire of the *Saiga*.

13. To justify its decision not to award Panama compensation for the loss of profit, the Tribunal points out in paragraph 438 of the Judgment that the *M/V Virginia G* was confiscated for the violation of laws and regulations of Guinea-Bissau and that the owner of the vessel did not pursue the procedures available to it under the laws and regulations of Guinea-Bissau to secure the vessel's release. The Tribunal concludes that Panama may not claim any loss of profit on behalf of the owner. It bears noting in this connection that the *M/V Virginia G* was detained on 21 August 2009 and confiscated six days later, on 27 August 2009.

In respect of the violation committed by the vessel, the Tribunal finds "mitigating factors . . . in respect of the *M/V Virginia G*". As for them, the Judgment notes in paragraphs 268 and 269 that the Guinea-Bissau authorities should have taken into account that the agent of Balmar, a Spanish fishing enterprise whose fishing vessels were to be bunkered by the *M/V Virginia G*, had on 20 August 2009 given FISCAP the required information concerning the date, time and co-ordinates for the refuelling operation. It is further noted in the Judgment that the same Balmar agent, Bijagos Lda, failed to follow the required procedure for applying for written authorization for the vessel. The view taken in the Judgment is that "the failure to obtain 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".

It is further noted in the Judgment that the *Amabal I* and *Amabal II*, fishing vessels arrested together with the *M/V Virginia G*, had committed a violation under the laws and regulations of Guinea-Bissau similar in gravity to that committed by the *M/V Virginia G*'s but were not confiscated. On 27 August 2009 FISCAP imposed a fine of US\$ 150,000 on each of them; they were released on

28 August 2009 without having paid the fines. Moreover, the other two fishing vessels, *Rimbal I* and *Rimbal II*, which had been refuelled by the *M/V Virginia G* on 20 August 2009 were neither arrested nor fined.

14. For a clearer idea of how FISCAP exercised its authority, it is useful to quote several passages from the statement dated 20 March 2012 by Mr Augusto Artur António da Silva, found in Annex 5 to Guinea-Bissau's Counter-Memorial.

At the time of the *M/V Virginia G*'s confiscation Mr da Silva was Minister of National Defence and a member *ex officio* of FISCAP:

- On 11.08.2009, the fishing boats Amabal I and Amabal II were arrested for the provision of fuel between themselves, in our Exclusive Economic Zone, without authorization.
- I met with the former consul of Spain, Hamadi Busarai Emhamed, owner / representative of the Amabal I and Amabal II. In this meeting the Consul lamented the difficulty of paying the fines applied to the two ships, requesting their release on the condition they be allowed to resume fishing activity and pay the fines out of the income that would result from their activities.
- We thus released the Amabal I and Amabal II on 20.08.2009 without any formality, based on the trust and good relationship between Guinea-Bissau and the Kingdom of Spain in the area of fisheries.
- On 28.08.2009, after much thought and aware of the fact that the Amabal I and Amabal II belonged to the former Consul of Spain and taking into account our good cooperation relations with the Kingdom of Spain, we eventually made a political decision to release them.
- But on the day before the decision to pardon the payment of the fines, our intention was still that the fines be paid.

15. It should be pointed out that Mr Hamadi Busarai Emhamed is himself a director of Bijagos and agent of Balmar, which failed to obtain written authorization from FISCAP for the *M/V Virginia G*.

The circumstances of the present case point to the conclusion that FISCAP, in determining the sanctions to be imposed on different vessels accused of violations of the same nature and gravity of laws and regulations of Guinea-Bissau, holds a discretionary power that enables it either to impose *ex officio* confiscation or to exonerate from any fine whatsoever.

16. Moreover, in rejecting Panama's claim for compensation for loss of profit, the Judgment asserts that the owner of the *M/V Virginia G* failed to pursue the procedures available to it under the law of Guinea-Bissau to secure the release of the vessel, specifically the procedure under article 65 of Decree-Law No. 6-A/2000 for release upon provision of security.

In this regard, Panama points out:

under the law of Guinea-Bissau, the shipowner was entitled to make use of several co-existing procedures to challenge the decisions and actions of the Guinea Bissau authorities and to seek to release the VIRGINIA G and her crew.

The ship-owner contested the decision to confiscate the *M/V Virginia G* and its cargo at the administrative level by sending FISCAP a number of letters between 28 August and 14 September 2009 seeking resolution of the situation through the fixing of the amount of a bond or other security to be put up to secure release of the vessel and its crew.

The vessel-owner thus pursued the judicial procedures provided for in paragraph 3 of article 52 of Decree-Law No. 1-A/2005, which states: "The decision taken in terms of paragraph 1 can be appealed".

On 28 October 2009, the ship-owner lodged a request for interim measures with the Regional Court of Bissau seeking a stay of implementation of the decisions taken by FISCAP. On 5 November 2009, that Court ordered the defendants (FISCAP and the Inter-Ministerial Commission for Fisheries)

to refrain from the practice of any and all acts concerning the confiscation of the vessel Virginia G and any product onboard until final decision in the declaratory process that will be brought.

The governmental authorities of Guinea-Bissau completely ignored this decision by the Regional Court of Bissau. On 13 November 2009, the Attorney General transmitted a letter to the Prime Minister concerning the Regional Court of Bissau decision, in which he wrote:

we deem the decision to confiscate the offending ship with its tackle, equipment and products found on board to have been correct. We therefore have no reservation in regard to the use of the fuel that this ship was transacting in our EEZ.

By letter dated 30 November 2009, the Secretary of State of the Treasury, Ministry of Finance, ordered the unloading of the gas oil on board

[n]otwithstanding the judicial order of suspension of the seizure and not having the opposition of the Public Prosecutor, the Government Attorney and Supervisor of Legality ... [in respect of] "... the use of the oil".

The gas oil cargo of the *M/V Virginia G* was unloaded on 20 November 2009.

In response to a request for interim measures filed by the ship-owner with the Regional Court of Bissau on 7 December 2009, contesting the decision to unload the gas oil, that Court on 16 December 2009 ordered "the immediate return of the unloaded oil to the claimant's vessel" (see paragraphs 73 to 79 of the Judgment). The executive authorities of Guinea-Bissau ignored this decision by the Regional Court of Bissau as well. On 4 December 2009, the ship-owner, relying on paragraph 3 of article 52 of Decree-Law 6-A/2000, brought an appeal in the Criminal Division of the Regional Court of Bissau to annul the CIFM decisions. This action on the merits is still pending.

The owner's efforts to find a solution, at the administrative level and through the courts, to the problem of the confiscation of the vessel and its cargo were unsuccessful. In this regard, the following excerpts bear quoting from the Regional Court of Bissau's order in respect of staying the CIFM decision to confiscate:

We are facing a fundamental property right and on the other hand, an infraction of the fishing rules subject to fines.



The process of confiscation of a good, because it is a fundamental property par excellence, and competence of courts established under the Constitution of the Republic and nobody is allowed to take justice into their own hands. In this case, it is FISCAP itself attempting to confiscate the ship and every product on board.

(Memorial of Panama, Annex 54)

17. Panama sought compensation in the aggregate amount of € 3,837,475.04, plus an additional 10 per cent, for damage, costs and losses incurred as a result of the wrongful confiscation of the *M/V Virginia G* and its cargo of gas oil, that amount including € 1,311,489.43 for the loss of profit on the Lotus Federation contract caused by the detention of the vessel and € 1,245,626.40 for losses incurred as a result of the termination of the contract with Lotus Federation and relating to the new operating contract.

The Tribunal has rightly rejected Panama's claim to an additional 10 percent of the total amount of compensation to make good the reputational injury suffered by the vessel and its owner, as well as the claim for € 1,245,626.40 resulting from the termination of the contract with Lotus Federation, which had been entered into for a four-year term. The injuries alleged by Panama are too indirect, remote and uncertain to be financially assessable and do not satisfy the requirement of a causal link.

On the other hand, I believe that the Tribunal to some extent could have upheld the claim for compensation for profit lost while the *M/V Virginia G* was detained as a result of its confiscation.

It is indisputable that, for valuing an injury caused by an internationally wrongful act and determining the appropriate amount of compensation, a well-settled rule of international law calls for account to be taken of the contribution to the injury made by the State and persons injured by the act. This rule is reflected in article 39 of the ILC Draft Articles, reading as follows:

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

18. In light of the facts and circumstances of the present case and of the elements considered in the Judgment to constitute a contribution by the owner of the *M/V Virginia G* to the injury, I believe that it would have been fair to award Panama a lesser amount of compensation, equal to one half the amount sought by Panama for loss of profit during the time the *M/V Virginia G* was detained in Guinea-Bissau.

Ultimately, the loss incurred by the owner of the *M/V Virginia G* from the long hiatus in the owner's commercial activity owing to the confiscation of the ship exceeds the maximum fine of US\$ 1,000,000 which FISCAP would have imposed on it for the violation by the *M/V Virginia G* of the laws and regulations of Guinea-Bissau.

(signed) Joseph Akl