

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



YEAR 2012

2 November 2012

THE M/V “VIRGINIA G” CASE

(PANAMA/GUINEA-BISSAU)

ORDER

Present: President YANAI; Vice-President HOFFMANN; Judges MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, KULYK; *Judges ad hoc* SERVULO CORREIA, TREVES; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 27 of the Statute of the Tribunal,

Having regard to article 98 of the Rules of the Tribunal,

Makes the following Order:

1. *Whereas*, by a letter dated 4 July 2011, the Agent of Panama notified the Tribunal of a special agreement concluded by an exchange of letters, dated 29 June and 4 July 2011, between the Republic of Panama and the Republic of Guinea-Bissau, to submit to the Tribunal a dispute concerning the vessel *Virginia G*;

2. *Whereas* a “Notification of submission of the VIRGINIA G dispute to arbitration dated 3 June 2011”, together with a Statement of Claim, was attached to the letter dated 4 July 2011;
3. *Whereas* a certified copy of the notification dated 4 July 2011 submitted by Panama was communicated to Guinea-Bissau on the same day;
4. *Whereas* in the light of the agreement of the Parties, as expressed through their exchange of letters dated 29 June and 4 July 2011, to submit their dispute concerning the vessel *Virginia G* to the Tribunal for adjudication, and of the notification by the Agent of Panama dated 4 July 2011, the case was entered in the List of cases as Case No.19 on 4 July 2011;
5. *Whereas* the agreement of the Parties refers to “the dispute between them concerning the VIRGINIA G” and states that the submission of the dispute to the Tribunal is subject to the following conditions, namely: that “[...] the written and oral proceedings before ITLOS shall comprise a single phase dealing with all aspects of the merits (including damages and costs) [...]” and that the Tribunal “shall address all claims for damages and costs and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before it”;
6. *Whereas* the Statement of Claim states that the dispute between the Parties “relates to the Panamanian flagged oil tanker “Virginia G”, which was arrested by the authorities of the Republic of Guinea-Bissau (Guinea-Bissau) on 21 August 2009 in the Exclusive Economic Zone (EEZ) of Guinea-Bissau, whilst carrying out refuelling operations”;
7. *Whereas* the Statement of Claim further states that “[t]he *Virginia G* remained detained in the port of Bissau until 22 October 2010 (for 14 months) and started operating again in December 2010 (16 months after its detention commenced)”;
8. *Whereas* the Statement of Claim further states that “Panama claims that in this case Guinea-Bissau breached its international obligations set out in the 1982

United Nations Convention on the Law of the Sea (UNCLOS), which breach lead to a prejudice being caused to the Panamanian flag and to severe damages and losses being incurred by the vessel and other interested persons and entities because of the detention and the length of the period of detention”;

9. *Whereas* the President, by Order dated 18 August 2011, fixed 4 January 2012 and 21 May 2012 as the time-limits for the filing, respectively, of the Memorial of Panama and the Counter-Memorial of Guinea-Bissau;

10. *Whereas*, by Order dated 30 September 2011, the Tribunal authorized the submission of a Reply by Panama and a Rejoinder by Guinea-Bissau and fixed 21 August 2012 and 21 November 2012, respectively, as the time-limits for their filing;

11. *Whereas*, by Order dated 23 December 2011, the President extended the time-limits for the filing of the Memorial and the Counter-Memorial to 23 January 2012 and 11 June 2012, respectively;

12. *Whereas*, by Order dated 8 August 2012, the President extended the time-limits for the filing of the Reply and the Rejoinder to 28 August 2012 and 28 November 2012, respectively;

13. *Whereas* the Parties duly submitted the Memorial, the Counter-Memorial and the Reply within the time-limits so fixed;

14. *Whereas*, in the Memorial, Panama states that “[t]he Parties, having reached the Special Agreement, have accepted to submit to the jurisdiction of the International Tribunal the dispute between them relating to the *VIRGINIA G*” and that “therefore [...] there is no question as to whether the International Tribunal has jurisdiction over this dispute”;

15. *Whereas*, in the Counter-Memorial, Guinea-Bissau states that the Tribunal has “jurisdiction about the case related to the arrest and detention of *VIRGINIA G*. and all claims arising from the detention and the length of the detention”;

16. *Whereas*, in the Counter-Memorial, Guinea-Bissau presented a counter-claim stating that “Panama violated art. 91 of the Convention by granting its nationality to a ship without any genuine link to Panama, which facilitated the practice of illegal actions of bunkering without permission in the EEZ of Guinea-Bissau” and that “Guinea-Bissau is entitled to claim from Panama all damages and costs caused by the VIRGINIA G to Guinea-Bissau, which are a result of the granting of the flag of convenience to the ship by Panama”;

17. *Whereas*, in the Reply, Panama requests the Tribunal “to 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”;

18. *Whereas*, in the Reply, Panama states that, “should the International Tribunal reject Guinea-Bissau’s objection to the admissibility of Panama’s claims on the ground of alleged lack of genuine link between Panama and the VIRGINIA G [...], then the alleged legal basis for this counter-claim would no longer exist, thus rendering the counter-claim unfounded and inadmissible”;

19. *Whereas*, in the Reply, Panama requests the Tribunal “to fix an additional date, following the 28 November 2012 deadline for the submission of Guinea Bissau’s Rejoinder, by which date Panama may submit final submission in reply only to the sections of Guinea-Bissau’s Rejoinder concerning the counter-claim”;

20. *Whereas* the Registrar, by a letter dated 6 October 2012, informed the Parties at the request of the President that “[b]efore taking a decision on the possibility for Panama to file an additional pleading restricted to the issue of the counter-claim, the Tribunal has to examine whether the counter-claim raised by Guinea-Bissau is admissible under article 98 of the Rules”;

21. *Whereas*, in the same letter, both Parties were given the opportunity to submit their observations on this particular question by 19 October 2012;

22. *Whereas* such observations were received from Guinea-Bissau on 18 October 2012 and from Panama on 19 October 2012;

23. *Whereas* Guinea-Bissau, in its observations, states that

[i]t is clear that the facts of the claim and the counter-claim are precisely the same: they refer to the fact that the ship VIRGINIA G. was illegally performing the activity of bunkering in the EEZ. Panama claims that Guinea-Bissau could not arrest the ship. Guinea-Bissau defended itself affirming the missing of a genuine link between the ship and Panama and counter-claimed based precisely on the same reason, due to the fact that granting its flag to VIRGINIA G., Panama contributed to its illegal actions in the EEZ of Guinea-Bissau. It is therefore clear that there is a direct connection between the claim and the counter-claim. That connection is in fact obvious when the counter-claim is based on the same facts that justify the defense to the claim.

24. *Whereas* Guinea-Bissau further states that “not even Panama in its Reply contested the existence of that direct connection”;

25. *Whereas* Guinea-Bissau further states that the “counter-claim comes within the jurisdiction of ITLOS as both governments agreed by Special Agreement to ‘submit the dispute between them concerning the VIRGINIA G to ITLOS’ and ‘that ITLOS shall address all claims for damages and costs and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before it’”;

26. *Whereas* Guinea-Bissau further states that the “request of Panama to have an additional written pleading in these proceedings [...] is totally inadmissible according to the rules of the Tribunal”;

27. *Whereas* Panama, in its observations, states that Guinea-Bissau’s counter-claim is inadmissible “as it is not directly connected with the subject-matter of the claim brought by Panama”;

28. *Whereas* Panama, in support of this statement, argues that “Guinea-Bissau makes no link to the facts of the 21 August 2009 which form the basis of the claims brought by Panama against Guinea-Bissau” and “ no link to the legal bases propounded by Panama in furtherance of its claims against Guinea-Bissau”;

29. *Whereas* Panama further states that Guinea-Bissau's counter-claim is inadmissible "as it does not come within the jurisdiction of the Tribunal as conferred to it by the parties in the Special Agreement";

30. *Whereas* Panama, in support of this statement, argues that

[t]he Special Agreement between Panama and Guinea-Bissau makes no mention of Guinea-Bissau submitting a counter-claim to the Tribunal; the jurisdiction conferred on the Tribunal related only to the claims and proceedings brought by Panama, and there was no express reservation of right by Guinea-Bissau, or, indeed, an implied agreement between the parties, for that jurisdiction to extend to a counter-claim;

31. *Whereas* Panama further states that Guinea-Bissau's counter-claim is inadmissible "as it was presented in an invalid and insufficient format, to the prejudice of Panama's rights of defence";

32. *Considering* that article 98, paragraph 1, of the Rules of the Tribunal requires that the counter-claim "comes within the jurisdiction of the Tribunal";

33. *Considering* that the Parties disagree on whether the requirement of jurisdiction set out in article 98, paragraph 1, of the Rules, is met in respect of the counter-claim presented by Guinea-Bissau;

34. *Considering* that the counter-claim was presented in the Counter-Memorial of Guinea-Bissau in accordance with article 98, paragraph 2, of the Rules;

35. *Considering* that the agreement concluded between the Parties refers to "the dispute between them concerning the VIRGINIA G" and states that the proceedings before the Tribunal shall deal "with all aspects of the merits (including damages and costs)" and that the Tribunal "shall address all claims for damages and costs";

36. *Considering* therefore that the counter-claim presented by Guinea-Bissau meets the requirement of jurisdiction set out in article 98, paragraph 1, of the Rules of the Tribunal;

37. *Considering* that, pursuant to article 98, paragraph 1, of the Rules, the counter-claim shall be “directly connected with the subject-matter of the claim of the other party” and *considering* further that it is for the Tribunal “to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and whereas, as a general rule, the degree of connection between the claims must be assessed both in fact and in law” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997, paragraph 33*);

38. *Considering* that the counter-claim relates to an alleged breach of the Convention by Panama in the granting of its nationality to the vessel *Virginia G*;

39. *Considering* that the counter-claim presented by Guinea-Bissau is directly connected with the subject-matter of the claims of Panama;

40. *Considering* that a decision given on the admissibility of a counter-claim taking account of the requirements set out in article 98 of the Rules in no way prejudices any question which the Tribunal will be called upon to hear during the subsequent proceedings;

41. *Considering* that, in order to ensure equality between the Parties, Panama should be given an opportunity to file an additional pleading confined to the counter-claim as presented by Guinea-Bissau;

42. *For these reasons,*

THE TRIBUNAL

(A) By 18 votes to 4

Finds that the counter-claim presented by Guinea-Bissau satisfies the conditions set forth in article 98, paragraph 1, of the Rules of the Tribunal;

IN FAVOUR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, PAIK, KELLY; *Judge ad hoc* SERVULO CORREIA.

AGAINST: *Judges* COT, GOLITSYN, KULYK; *Judge ad hoc* TREVES.

(B) By 18 votes to 4

Finds that, in the light of the foregoing, the counter-claim presented by Guinea-Bissau is admissible under article 98, paragraph 1, of the Rules of the Tribunal;

IN FAVOUR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, PAIK, KELLY; *Judge ad hoc* SERVULO CORREIA.

AGAINST: *Judges* COT, GOLITSYN, KULYK; *Judge ad hoc* TREVES.

(C) Unanimously

Authorizes the submission by Panama of an additional pleading relating solely to the counter-claim submitted by Guinea-Bissau and *fixes* 21 December 2012 as the time-limit for the filing of this pleading;

(D) Unanimously

Reserves the subsequent procedure for further decision.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this second day of November, two thousand and twelve, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Panama and the Government of Guinea-Bissau, respectively.

(signed)
SHUNJI YANAI
President

(signed)
PHILIPPE GAUTIER
Registrar

Judges COT and KULYK append a joint declaration to the Order of the Tribunal.

Judge TÜRK appends a declaration to the Order of the Tribunal.

Judge *ad hoc* TREVES appends a dissenting opinion to the Order of the Tribunal.

JOINT DECLARATION BY JUDGES COT AND KULYK

We regret that the Tribunal has not taken advantage of the flexibility offered by the wording of article 98, paragraph 3, of the Rules, providing that

in the event of a doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Tribunal shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings.

We are not convinced, on the basis of the written proceedings, that a direct connection exists. In our opinion, this still is an open question. We feel the Tribunal would have been well advised to join the counter-claim to the original proceedings without prejudging, at the present stage of the proceedings, the admissibility of the counter-claim.

(signed) J.-P. Cot

(signed) M. Z. Kulyk

DECLARATION BY JUDGE TÜRK

I regret that the Tribunal has not taken advantage of the flexibility offered by the wording of article 98, paragraph 3, of the Rules, providing that

in the event of a doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Tribunal shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings.

I have voted in favour of the admissibility of the counter-claim. In view of doubts raised as to the existence of a direct connection, it would in my opinion, however, have been a more prudent course of action to join the counter-claim to the original proceedings without prejudging the question of its admissibility at the present stage.

(signed) H. Türk

DISSENTING OPINION OF JUDGE *AD HOC* TREVES

1. To my regret I could not concur with the Tribunal in considering admissible Guinea-Bissau's counter-claim.

2. According to article 98, paragraph 2, of the Rules of the Tribunal, "a counter-claim shall be made in the counter-memorial of the party presenting it and shall appear as part of the submissions of that party". In conformity with this provision Guinea Bissau's counter-claim was included in the counter-memorial and appears in the submissions set out therein. It is in my view correct to take the submissions set out in paragraph 268 of Guinea Bissau's counter-memorial as the basis for assessing whether the requirements set out in paragraph 1 of article 98 of the Rules are satisfied. I will limit myself to the requirement of the direct connection of the counter-claim with the subject-matter of the claim of the other party.

3. The relevant part of Guinea Bissau's submissions in the counter-memorial is as follows:
 1. Panama has violated Article 91 of the Convention;
 2. Panama is to pay in favour of Guinea-Bissau compensation for damages and losses caused as a result of the aforementioned violation ...

Submission Nr. 1 is clearly the principal one, as Submission Nr. 2 is logically subordinated to the well-foundedness of Submission Nr. 1.

4. In my view the claim set out in Submission Nr. 1 lacks the "direct connection with the subject-matter of the claim of the other party" required by article 98, paragraph 1, of the Rules. The alleged violation of the Convention's article 91 regards, as explained in paragraph 257 of the counter-memorial, Panama's "granting of the nationality to a ship without any genuine link to Panama".

5. To challenge the exercise of the sovereign right of Panama to grant its flag to a vessel because such a vessel has allegedly caused damage and losses to the challenging State is in my view disproportionate and devoid of direct connection with Panama's claims. These claims (as set out in the submissions in Panama's

Memorial, paragraph 442) are all linked to alleged violations on the part of Guinea-Bissau of its obligations as a coastal State under various rules of the Convention concerning the exclusive economic zone. These rules are completely disconnected from article 91.

6. It is true that both the claim and counter-claim are based on alleged violations of the Convention, and that reference to the same convention might be seen as sufficient to establish connection for the purposes of admissibility of counter-claims. The Law of the Sea Convention is not, however, an ordinary convention. Its text has three hundred and twenty articles and about four hundred including the annexes that form an integral part of it. It has rightly been called “the constitution of the oceans” because it deals with all aspects of the law of the sea. To consider directly connected two claims just because they are based on provisions of the Convention does not take into consideration the broad coverage of the Convention.

(signed) T. Treves