Declaration of Judge Gao

1. I voted against paragraphs 5, 8, 16 and 17 in the Operative Provisions of the Judgment on exhaustion of local remedies, violation by Guinea-Bissau of article 73, paragraph 1, of the Convention and the award of compensation to Panama. Although the reasons for my disagreement on these paragraphs have been given in our collective Dissenting Opinion, I still consider it necessary to provide some additional comments on some of the major issues of the case. The purpose of this Declaration is two-fold: to supplement my critical comments on parts of the Judgment; and more importantly, to emphasize the significance of the important rulings pronounced in the Judgment.

2. I will begin my discussion by focusing on the relevance and importance of the Judgment in contributing to the existing international case law on the general topic of bunkering fishing vessels in the exclusive economic zone (EEZ).

3. The subject matter of the present case, or, in other words, the dispute between Panama as the Applicant and Guinea-Bissau as the Respondent, centres on the arrest by Guinea-Bissau of the Panama-flagged oil tanker *M/V Virginia G* and the subsequent confiscation of the gas oil on board. Two of the major issues on which the Parties fundamentally disagreed are: first, whether bunkering activities can be considered to fall within the freedom of navigation; and second, whether a coastal State has competence to regulate such bunkering activities in its EEZ.

4. While Panama contended that the bunkering activities carried out by the *M/V Virginia G* in the EEZ of Guinea Bissau fell within the category of freedom of navigation and other internationally lawful uses of the sea related to that freedom and were therefore outside the jurisdiction of coastal States, Guinea-Bissau insisted that the freedom of navigation through the exclusive economic zone of coastal States should not include the right to conduct economic activities such as bunkering of fishing vessels, and that the maritime freedoms

benefitting other States in the EEZ may be restricted as far as necessary to ensure the rights of the coastal State.

5. It may be pointed out that bunkering of fishing vessels in the EEZ of coastal States is perhaps an activity of recent origin, having developed after adoption of the United Nations Convention on the Law of the Sea in 1982. Thus, the issue arising from the provision of bunkering services to foreign fishing vessels in the EEZ is dealt with neither in the Convention nor in general international law.

6. Apparently, the issue of bunkering fishing vessels in the EEZ has not been dwelt upon in depth in any international case law. This Tribunal did have an opportunity in the *M/V "SAIGA"* (*No. 2*) *Case* to approach the question, but it declined to do so because it considered it unnecessary in light of the particular circumstances of that case.

7. We may therefore conclude that the issue of bunkering service to foreign fishing vessels in the EEZ of coastal States lies in a grey area of international law. This uncertainty in international law contributes to the dispute between the two Parties in the present case.

8. Against this backdrop, the Judgment sets off to deal with the dispute over bunkering activities in the EEZ by addressing two basic questions. The first is whether bunkering activities in support of foreign vessels fishing in the EEZ of a coastal State fall within the concept of freedom of navigation; and the second is whether a coastal State has jurisdiction in the exercise of its sovereign rights in respect of exploration, exploitation, conservation and management of natural resources to regulate bunkering of foreign vessels in its EEZ.

9. After examining the facts of the case, relevant provisions of the Convention and recent State practice in this regard, the Tribunal arrives at the following finding and conclusion. On the issue of freedom of navigation, the Judgment states that article 58 of the Convention on freedom of navigation is to be read together with article 56 on the rights and duties of coastal States in the EEZ. The provision on freedom of navigation in the Convention "does not prevent coastal States from regulating, under article 56 of the Convention, bunkering of foreign vessels fishing in their exclusive economic zones" (paragraph 222) and, therefore, "the bunkering of foreign vessels engaged in fishing in the exclusive economic zone is an activity which may be regulated by the coastal State concerned" (paragraph 223).

10. With respect to the second question, on jurisdiction over bunkering activities in the EEZ, the Judgment finds that the term "sovereign rights" referred to in article 56 of the Convention "encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures" (paragraph 211) and, in exercising such sovereign rights, "the coastal State is entitled under the Convention, to adopt laws and regulations establishing the terms and conditions for access by foreign fishing vessels to its exclusive economic zone" (paragraph 213). The Judgment finally concludes

> that the regulation of bunkering of foreign vessels fishing in the exclusive economic zone of coastal States is among those measures which a coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 read together with article 62, paragraph 4, of the Convention.
> (paragraph 217)

11. To sum up, the Tribunal has found that "coastal States have jurisdiction to regulate the bunkering of foreign vessels fishing in their exclusive economic zones and to provide for the necessary enforcement measures" (paragraph 264). By so ruling, the Tribunal has determined for the first time, albeit implicitly, that bunkering activities, as far as their service to fishing vessels in the EEZ is concerned, do not fall within the category of freedom of navigation and that coastal States are entitled under the Convention to introduce national legislation on, and take enforcement measures against, such activities.

12. The Tribunal in the present case has certainly taken one small step beyond its original position in the *M/V "SAIGA"* (*No. 2*) *Case* (*M/V "SAIGA"* (*No. 2*) (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment,* ITLOS *Reports 1999*, p. 10), but this step is an important one in the right direction. Such progress might be regarded as breaking new ground in international case law.

13. After having considered the positive contribution made in the Judgment, I will now turn to my doubts about and reservations on the decisions in the Judgment on the issues of violations and the award of compensation.

14. Let us deal first with the decision in the Judgment on the violation by Guinea-Bissau of article 73, paragraph 1, of the Convention.

15. After examining the relevant facts of the case, evidence presented by the Parties, and the law applicable to the dispute in the case, the Tribunal finds that the relevant national legislation of Guinea-Bissau in general and article 52 of Decree-Law 6-A/200 as amended by Decree-Law 1-A/2005, providing for "ex-officio" confiscation, in particular conform to the provisions of the Convention (paragraph 236). 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" (paragraph 257). The Tribunal further holds that neither the boarding and inspection nor the arrest of the *M/V Virginia G* violated article 73, paragraph 1, of the Convention. The Judgment comes to the conclusion that "breach of the obligation to obtain written authorization for bunkering and to pay the prescribed fee is a serious violation" (paragraph 267).

16. That being stated, the Judgment nonetheless arrives at a contrary decision: that "the confiscation by Guinea-Bissau of the *M/V Virginia G* and the gas oil on board was in violation of article 73, paragraph 1, of the Convention" (paragraph 271). According to the Judgment, that decision is based on two grounds: first, confiscation "was not necessary either to sanction the violation committed or to deter the vessels or their operators from repeating this violation" (paragraph 269); and second, the enforcement measures against the *M/V Virginia G* were "not reasonable in light of the particular circumstances of this case" (paragraph 270).

17. I disagree with the above reasoning and the ruling in the Judgment on this particular point. In my view, confiscation of only the cargo of gas oil on board by Guinea-Bissau in response to "a serious violation" of its national laws and regulations is, by any standard, not only necessary but also reasonable.

18. I cannot accept the notion of "a serious violation" not entailing any responsibility, since this does not conform to the well-established principle of the international law on State responsibility (see paragraph 32 of this Declaration).

19. The question of whether the confiscation of the gas oil on board was necessary and reasonable has been exhaustively dealt with in our collective Dissenting Opinion (see generally paragraphs 37–61 of the Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia), so there is no need for me to return to it in this Declaration.

20. Nonetheless, I continue to have difficulties in appreciating the reasoning and logic deployed in the Judgment to establish the violation by Guinea-Bissau. Since the national laws and regulations of Guinea-Bissau are in conformity with the Convention in general and its article 73, paragraph 1, in particular, and the enforcement measures were taken, in turn, in strict accordance with such national laws and regulations, how then can the corollary "ex-officio" confiscation of the gas oil on board be found to be in violation of article 73, paragraph 1, of the Convention?

21. It is my view that the underlying reasoning and the decision itself on the violation by Guinea-Bissau of article 73, paragraph 1, of the Convention in the Judgment are not only illogical but also confusing. As a result, I am not convinced by them.

22. My next fundamental reservation concerns the manner in which the violations are treated in the Judgment.

23. On the basis of the facts of the case and the evidence presented by the Parties, two distinct violations, one by each Party, are found and confirmed in the Judgment.

24. The first violation is a clear one and was committed by the *M/V Virginia G*: at the time it was arrested, it did not have the written authorization required by the legislation of Guinea-Bissau for bunkering. The Judgment correctly states that "[I]n the view of the Tribunal, *breach of the obligation to obtain written authorization for bunkering and to pay the fee is a serious violation*" (paragraph 267, emphasis added).

25. The second violation was an alleged one committed by Guinea-Bissau: the Judgment holds "that the confiscation by Guinea-Bissau of the *M/V Virginia G* and the gas oil was in violation of article 73, paragraph 1, of the Convention" (paragraph 271). The grounds on which the alleged violation is established are given in the Judgment as follows: first, while the Tribunal recognizes that a coastal State may take such measures "as may be necessary to ensure compliance with the laws and regulations adopted by it [the coastal State] in conformity with this Convention", "it is within the competence of the Tribunal to establish whether . . . the measures taken . . . are necessary"(paragraph 256); second, "the enforcement measure against the *M/V Virginia G* was, in the view of the Tribunal, not reasonable in light of the particular circumstances of this case" (paragraph 270).

26. As for the first violation, or in other words the "triggering violation", committed by the *M/V Virginia G* in providing illegal bunkering service to foreign fishing vessels in the EEZ without the written authorization required under the national laws and regulations of Guinea-Bissau, it is surprising that no sanction whatsoever is prescribed in the Judgment for such "a serious violation".

27. As for the second violation, which may be termed the "responsive violation", committed by Guinea-Bissau in arresting the *M/V Virginia G* and confiscating the gas oil on board in accordance with its laws and regulations, the Judgment announces that "Panama in the present case is entitled to reparation for damage suffered by it" (paragraph 434); and awards the Applicant compensation in the total amount of US$ 534,586.80 (US$ 388,506.00 for the confiscation of the gas oil; and US$ 146,080.80 for the costs of repairs to the vessel), with interest as determined in the Judgment (operative paragraph 452, (16) and (17)).

28. According to the Judgment, the justification for the Tribunal's decision not to impose sanctions for "the triggering violation" is that it was "rather the consequence of a misinterpretation of the correspondence between the representatives of the fishing vessels and the FISCAP than an intentional violation of the laws and regulations of Guinea-Bissau" (paragraph 269). So two rationales are given in the Judgment for not penalizing "a serious violation": misinterpretation and lack of intention.

29. I am afraid that the reasoning and justifications provided in the Judgment are neither legally sound nor convincing. First, the argument for non-sanction perhaps represents a self-contradiction in the Judgment since, on the one hand, the Judgment confirms that the breach of the obligation under Guinea-Bissau's national law and regulation is "a serious violation", while on the other it claims that such a violation was not intentional. One might wonder how an unintentional act could result in "a serious violation".

30. Second, as to the question of whether the violation was intentional or not, the answer emerges perhaps automatically and sufficiently clearly from the facts of the case. On a previous occasion the *M/V Virginia G* had obtained a formal document to carry out the fishing-related operation, but it did not obtain the analogous authorization for bunkering at the time of its arrest in

August 2009. So the *M/V Virginia G* was perfectly aware of the legal requirement of formal written authorization (paragraph 244). The two Parties did not disagree on these facts. Based on this evidence, we may safely conclude that the violation by the *M/V Virginia G* of fishing laws and regulations of Guinea-Bissau was intentional, if not on purpose.

31. Third, with respect to the second rationale, that of misinterpretation, it is sufficient to say that neither misunderstanding of the legal procedures nor misinterpretation of the correspondence with the competent agency can constitute a legal justification for the violation by the *M/V Virginia G* or for the Tribunal not imposing sanctions for a "serious violation". Such arguments and alleged justifications would not be accepted by any court or tribunal, be it international or domestic.

32. In the final analysis, it is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47, also quoted in *M/V "SAIGA" (No. 2)*, (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment, ITLOS Reports 1999*, p. 10, at p. 65, para. 170). This general rule of international law is also reaffirmed in the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts: "Every internationally wrongful act of a State entails the international responsibility of that State" (art. 1).

33. Since the Judgment fails to penalize "a serious violation" of the fishing laws and regulations of a coastal State, and the justifications for such a failure are not legally sound and valid, one may well ask what is the international responsibility of the Applicant for "a serious violation" of the laws and regulations of the Respondent.

34. For these and other reasons, I believe that: first, the Judgment is flawed in its decision on the violation by Guinea-Bissau and it does not treat the two violations on an equal basis; second, the decisions in the Judgment do not properly reflect the general rule of international law on State responsibility; third, the decisions in the Judgment on violations, sanctions and compensation are not fair to Guinea-Bissau, which is a victim rather than a violator; and

fourth, Guinea-Bissau, which has suffered damage as a result of an internationally wrongful act by another State, is also entitled to obtain reparation for the damage suffered from the State which committed "a serious violation".

35. That notwithstanding, I wish to acknowledge that the weak aspects of the Judgment do not subtract from its importance. On the contrary, the Judgment closes a gap in the field of bunkering of foreign fishing vessels in the EEZ of coastal States, an issue that has thus far been left in the grey area of international case law. The rules pronounced in the Judgment with respect to the interpretation of freedom of navigation and the coastal States' competence in legislation and regulation of bunkering activities in their EEZ provide clear guidance for the bunkering industry and coastal States to follow in the years to come. Thus, this part of the Judgment positively contributes to the progressive development of international law.

(*signed*) Zhiguo Gao