Separate Opinion of Judge Paik

1. I agree with most of the conclusions in the operative part of the present Judgment and the bulk of the reasoning upon which they are based. In particular, I fully endorse the central finding of the Judgment that the sovereign rights of the coastal State in the exclusive economic zone (hereinafter the "EEZ") under article 56, paragraph 1, of the United Nations Convention on the Law of the Sea (hereinafter the "Convention") encompass the competence to regulate the bunkering of foreign vessels fishing in that zone. However, with respect to subparagraph (8) of the operative part, on the legality of the confiscation measure taken by Guinea-Bissau under article 73, paragraph 1, of the Convention, I would have wished the Tribunal to elaborate its view further, especially on the question of how the term "necessary" in the provision should be interpreted and applied. I believe that this question, together with that of the scope of the sovereign rights of the coastal State in the EEZ mentioned above, is central to the present dispute. As such, it merits a more in-depth analysis. On the other hand, to my regret I had to vote against subparagraph (18) of the operative part, on the award of compensation for the loss of profit, as I disagree with both its reasoning and conclusion. I offer this opinion in respect of these two issues.

I Legality of confiscation under article 73, paragraph 1

2. The Parties disagree as to the legality of the confiscation measure taken by the authorities of Guinea-Bissau against the *M/V Virginia G* and the gas oil on board under article 73, paragraph 1, of the Convention. Panama contends that Guinea-Bissau violated its obligation as its domestic legislation and practice resulted in an abuse of what is permitted within the framework of article 73, paragraph 1, of the Convention (paragraph 261 of the Judgment). On the other hand, Guinea-Bissau argues that its actions were in full conformity with article 73, paragraph 1, of the Convention as confiscation is considered to be a legitimate reaction to bunkering without authorization (paragraph 262 of the Judgment).

3. At the outset, I would like to point out that both Parties, in particular the Applicant, which has the initial burden of proof to show that the Respondent

violated article 73, paragraph 1, of the Convention, fell far short of developing arguments relating to this provision in their pleadings. I regret that I did not have the pleasure of being enlightened, let alone persuaded, by the arguments made by the Parties. They could and should have presented to the Tribunal more pointed arguments to support their respective submissions in this regard. Nevertheless I find it necessary to offer my views at some length on the interpretation and application of article 73, paragraph 1, of the Convention for two reasons. First, as the voting on subparagraph (8) of the operative part shows, whether Guinea-Bissau violated article 73, paragraph 1, of the Convention was the key issue which deeply divided the Tribunal. Thus I feel particularly obliged to explain why I voted in favour of that subparagraph. Second, the interpretation of article 73, paragraph 1, of the Convention and its application to the present case touch upon the core of the legal regime of the EEZ as a delicate balance between the interests of the coastal State and those of other States. Thus I believe that this question deserves close scrutiny.

(a) *Requirements under article 73, paragraph 1*

4. Article 73, paragraph 1, of the Convention reads as follows:

> Article 73
> *Enforcement of laws and regulations of the coastal State*
>
> 1. 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.

Article 73, paragraph 1, of the Convention appears to confer on the coastal State broad enforcement powers in its EEZ. However, the enforcement powers of the coastal State are not unlimited. Their exercise is qualified by the phrase "as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention". According to O'Connell, this provision, while allowing the coastal State enforcement powers of "a generalized character", nonetheless introduces "two relativities – 'as may be necessary' and 'in conformity with'. The former refers to general international standards of

the resort to force, and the latter to the unstable content of practice respecting the law of the EEZ" (D.P. O'Connell, *The International Law of the Sea, Vol. II*, edited by I.A. Shearer, Clarendon Press Oxford, 1984, p. 1071).

5. In order to determine whether the coastal State complies with article 73, paragraph 1, of the Convention, three questions should be asked: first, whether the laws and regulations of the coastal State are "in conformity with the Convention"; second, whether an enforcement measure taken by the coastal State is to "ensure compliance" with them; and third, whether the enforcement measure is "necessary" for that purpose. If the answer to any of these three questions is in the negative, the coastal State should be found to be in violation of article 73, paragraph 1, of the Convention.

6. With respect to the first question, the relevant laws and regulations of Guinea-Bissau include, *inter alia*, Decree-Law 6-A/2000 of 22 August 2000, Decree-Law 1-A/2005 of 27 June 2005, Decree 4/96 and Joint Ordinance 1/2013 of 31 January 2013. I agree with the Judgment that they are in conformity with Convention to the extent that fishing includes fishing-related activities and the activity of providing logistical support to fishing vessels at sea (including bunkering operations) is one of such fishing-related activities (article 3 of Decree-Law 6-A/2000); fishing-related activities are subject to the authorization of the relevant government authorities (article 23 of Decree-Law 6-A/2000); and fishing vessels carrying out fishing activities without authorization will be confiscated (article 52 of Decree-Law 6-A/2000). I also find that the requirement and procedure for authorization for logistical support operations (including bunkering operations) provided in article 39 of Decree 4/96, despite some ambiguities, are not inconsistent with the Convention.

7. Regarding the second question, "ensur[ing] compliance" with the laws and regulations of the coastal State can involve the acts of remedying past wrongs and deterring future wrongs. In this case, the facts indicate that the confiscation measure was taken in response to the bunkering activities of the *M/V Virginia G* carried out without obtaining the written authorization required by the legislation and administrative practice of Guinea-Bissau. The decision made by the Inter-Ministerial Commission for Maritime Surveillance (CIFM) of Guinea-Bissau clearly states that the confiscation was for the repeated practice of fishing-related activities in the form of "unauthorized sale of fuel to

ships fishing in our EEZ" in violation of article 52, paragraph 1, and article 23 of Decree-Law 6-A/2000. While the authorities of Guinea-Bissau, in my view, did not act consistently in imposing sanctions against the vessels involved in the unauthorized bunkering (see paragraph 36 of this Opinion), there is not sufficient evidence to indicate that in confiscating the *M/V Virginia G* Guinea-Bissau had other purposes in mind than to ensure compliance with its laws and regulations. I thus conclude that the purpose of the confiscation was to "ensure compliance".

8. Now I come to the third question, that is, whether the confiscation measure was "necessary" to ensure compliance. Before examining this question, however, I find it useful to provide some general observations regarding the term "necessary" or notion of necessity in international law and the standard of review by international courts or tribunals for the determination of necessity.

(b) *Notion of necessity in international law*

9. The term "necessary" or notion of necessity is employed in a great number of areas of international law to address the relationship between an objective a State intends to seek and the means the State chooses to achieve that objective. The term "necessary" in such a context requires that measures taken must not merely be such as tend to achieve the objective but must be "necessary" for that purpose (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Judgment, I.C.J. Reports 1986*, p. 14, at p. 141, para. 282). Thus if there is a choice between several appropriate measures, the least onerous (to other protected interests) and equally effective (in achieving the intended objective) needs to be chosen. In so doing, the notion of necessity attempts to balance two conflicting interests at play: namely, preserving the freedom of a State to achieve the objective it seeks through means of its choosing, and restraining the State from choosing means that would unduly infringe the protected rights or interests of another entity, be it an individual or a State. The notion of necessity understood this way can be characterized essentially as a "balancing test".

10. Examples can be found across international agreements on diverse subjects. For example, World Trade Organization (hereinafter "WTO") Agreements contain a number of provisions commonly referred to as "necessity tests". (See *Necessity Tests in the WTO, S/WPDR/W27*, 2 December 2003) I may quote just one of those provisions, namely, Article XX of the General Agreement on Tariffs and Trade, which reads as follows:

> **Article XX**
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) *necessary* to protect public morals;
> (b) *necessary* to protect human, animal or plant life or health;
> . . .
> (d) *necessary* to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement, . . . (emphasis added).

It is interesting to note that the wording of subparagraph (d) is strikingly similar to that of article 73, paragraph 1, of the Convention.

11. A number of international human rights agreements also contain so-called "exception clauses" or "limitation clauses", whereby some freedoms enunciated in those agreements are subject to limitations under certain conditions including that of necessity. For example, Article 18, paragraph 3, of the International Covenant on Civil and Political Rights provides: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are *necessary* to protect public safety, order, health, or morals or the fundamental rights and freedoms of others" (emphasis added). Likewise, Article 10, paragraph 2, of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "The exercise of these freedoms [freedom of expression] . . . may be subject to such

formalities, conditions, restrictions or penalties as are prescribed by law and are *necessary* in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, . . ." (emphasis added). In these cases, measures taken by States must be those necessary to achieve one or more of the policy objectives enumerated in the provisions.

12. The notion of necessity as a balancing test is well known in the law on the use of force (*ius ad bellum*) and the law of armed conflict or international humanitarian law (*ius in bello*). This notion, together with that of proportionality, restricts not only the circumstances in which States can resort to force but also the manner in which ensuing hostilities are to be conducted when the restraint on resort to force fails.

13. This notion is widely employed in the law of the sea as well. In fact, there are numerous provisions in the Convention which limit the freedom of action of a State by the requirement of necessity. Just to name a few, they include article 25 (Rights of protection of the coastal State), article 115 (Indemnity for loss incurred in avoiding injury to a submarine cable or pipeline), article 118 (Cooperation of States in the conservation and management of living resources), article 139 (Responsibility to ensure compliance and liability for damage), article 194 (Measures to prevent, reduce and control pollution of the marine environment), article 207 (Pollution from land-based sources), article 208 (Pollution from seabed activities subject to national jurisdiction), article 213 (Enforcement with respect to pollution from land-based sources), and several other articles in Part XII (Protection and preservation of the marine environment), Section 6 (Enforcement), of the Convention.

14. I must stress, however, that despite the similarities in wording, the meaning and connotation of the term "necessary" in those various provisions are not always the same. The term "necessary" in each provision has to be interpreted in its specific context and in the light of its object and purpose. An interpretation developed in the context of one provision, though it can be helpful, cannot be automatically applied to other provisions.

15. I also would like to point out that the term "necessary" can be employed either as a positive obligation to be imposed on a State taking permissible measures (*e.g.*, article 73, paragraph 1, of the Convention) or as an exceptional condition to justify measures otherwise inconsistent with treaty obligations (*e.g.*, Article XX (d) of the GATT). While the term "necessary" in both cases addresses the relation between means and ends, necessity as a positive obligation may be different from that as an exceptional condition in such respects as how the term "necessary" should be interpreted or who has the initial burden of proof to establish the necessity of measures taken (see *Necessity Tests in the WTO, ibid.*, p. 2).

(c) *Standard of review*

16. While the term "necessary" is employed in many different areas of international law, it is by no means clear what "necessary" means and how it is to be applied. While it is possible to formulate the notion of necessity in general terms, such general formulation may be of limited value in a specific situation. Assessment of necessity in a specific situation is fact-intensive and circumstance-dependent. As such it is bound to be subjective or even speculative. This aspect must be taken into consideration when international courts or tribunals review whether the decisions or measures taken by States are consistent with the requirement of necessity laid down in international agreements.

17. The standard of review in international law refers to the standard applicable to judicial review of national decisions or measures by international courts or tribunals. While the term "standard of review" is widely used in the context of WTO dispute settlement, it is not unique to the WTO or even to the field of international economic law. The question of the standard of review arises whenever an international judicial institution undertakes to examine the actions or decisions of States which raise the issue of consistency with international agreements to which they are parties. The latest decision of the International Court of Justice also addressed this question in the context of the consistency of special permits granted by Japan with Article VIII of the International Convention for the Regulation of Whaling (see *Whaling in the Antarctic* (*Australia v. Japan: New Zealand Intervening*), *Judgment of 31 March 2014*, paragraphs 62–69). The standard of review raises such issues as the intensity of review, the level of scrutiny, and the degree of discretion to be granted

to national decision-makers. While this question does not frequently arise in law of the sea disputes, it needs to be addressed in the present case because the key issue relates to the interpretation and application of the term "necessary", which is by nature fact-intensive and circumstance-dependent, as mentioned above.

18. The standard of review for the determination of necessity (*i.e.*, whether the term "necessary" was properly interpreted and applied by national decision-makers in a given case) has been a difficult issue. I do not find it necessary to examine the jurisprudence of international courts or tribunals on this question in this Opinion. I wish just to point out that the key dilemma lies in the fact that, while international judicial bodies can be relied upon to be neutral and impartial, they are not well positioned to assess the complexities of local conditions, an understanding of which is critical to proper determination of necessity. On the other hand, States taking necessary measures certainly know more about their own circumstances and have greater resources for making rational assessments, yet they may not always be relied upon to assess facts or laws in a neutral way. Thus an important consideration for the standard of review for the determination of necessity should be the recognition of the relative strengths and weaknesses of international judicial bodies and national authorities.

19. Before proceeding further, I would like to underscore at this juncture that it is undoubted that international courts or tribunals have competence to review whether national decisions or measures are necessary under the circumstance. This view has been repeatedly affirmed by different international courts or tribunals. For example, in dealing with the necessity of the restrictions imposed by the United Kingdom authorities upon freedom of expression under Article 10, paragraph 2, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights stated that Article 10, paragraph 2, leaves to the Contracting States a margin of appreciation, but it does not give them "an unlimited power of appreciation" (see *Handyside v UK, 1 EHRR 737* (1976), pp. 753–754). In dealing with the question what are the "necessary" and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, the Seabed Disputes Chamber of the Tribunal pointed out that "[t]he sponsoring State does not have an absolute discretion" in this regard (*Responsibility*

and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS *Reports 2011*, p. 10, at p. 71, para. 230). It is interesting to note that the International Court of Justice allowed no discretion at all for national authorities in determining necessity in the context of the use of force. It stated in the Oil Platforms Case that "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion'" (*Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), *Judgment, I.C.J. Reports 2003*, p. 161, at p. 196, para. 73). Thus I fully endorse the finding of the present Judgment in paragraph 256 that "[i]t is within the competence of the Tribunal to establish . . . whether the measures taken in implementing this legislation are necessary."

20. The question is not whether an international judicial body has competence to review national decisions, but rather what should be the appropriate standard of review, how intensively should a national measure be reviewed by international courts or tribunals, or how much deference should be granted to national authorities taking the measure. In light of the nature of the notion of necessity mentioned above, I am of the view that a certain degree of discretion should be allowed to national authorities for determination of necessity. However, the allowable degree of discretion or the appropriate level of scrutiny may vary from case to case, and from issue to issue.

(d) *Meaning of "necessary" in article 73, paragraph 1*

21. Now I come back to the question whether the confiscation by Guinea-Bissau was "necessary" to ensure compliance with the laws and regulations adopted by it. The answer to this question requires interpretation of the term "necessary" in article 73, paragraph 1, of the Convention.

22. In accordance with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, which provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, the starting point should be the ordinary meaning to be given to the term "necessary".

"Necessary" as an adjective ordinarily means "indispensable, vital, essential; requisite" (*Oxford English Dictionary on line*, Oxford University Press, March 2014). Similarly, it denotes something "that cannot be dispensed with or done without" (*The New Shorter Oxford English Dictionary, Vol. 2*, Clarendon Press Oxford, 1993). In legal parlance, however, this term has multiple meanings. It is thus cautioned that

> "necessary" is a somewhat protean word whose meaning depends on the context in which it is used. In some contexts, it means "indispensable" or "essential". . . . In some contexts, the word "necessary" has a weaker meaning. But it will usually bear the connotation of some degree of compulsion or exigency. The context will determine where on the spectrum of compulsion or exigency the word "necessary" is placed (*Stroud's Judicial Dictionary of Words and Phrases, Seventh Edition, Vol. 2*, London Sweet & Maxwell, 2006, p. 1753).

23. As to the context in which the term "necessary" is used in article 73, paragraph 1, of the Convention, two points can be made. First, the term "necessary" in the provision is used together with a modal auxiliary verb "may". The phrase used in the provision is "as may be necessary", rather than "as is necessary", "only to the extent necessary" or just "necessary", the wording often found in other provisions. Second, "necessary" in article 73, paragraph 1, of the Convention is employed to place a limitation on the exercise of broad enforcement powers conferred upon the coastal State. As stated above, this should be distinguished from the context in which the term "necessary" is employed to allow States to take measures otherwise inconsistent with treaty obligations when such measures are necessary to achieve the objectives prescribed in the treaty (*e.g.*, public morality, public health, or public safety). In my view, these two factors together make the meaning of "necessary" in article 73, paragraph 1, of the Convention more flexible and less compulsory. The term "necessary" used in the context of article 73, paragraph 1, of the Convention thus may be placed, on the spectrum of compulsion or exigency, between "indispensable", at the one end, and "reasonable", "desirable", "useful" or "conducive", at the other.

24. The object and purpose of the Convention, in particular those of article 73, paragraph 1, should also be considered. Article 73, paragraph 1, employs the term "necessary" to balance two conflicting sets of interests; that is, the interests of the coastal State taking enforcement measures it chooses to ensure compliance with its laws and regulations in respect of exploring, exploiting, conserving and managing living resources in its EEZ, and those of other States whose legitimate rights and freedoms in the EEZ of the coastal State need to be protected. In the balancing test, the relative importance of those interests to the respective State or States is an important factor to be considered in assessing whether a measure in question is necessary.

25. Thus understood, an indispensable measure is undoubtedly a necessary measure. However, even if a measure taken is not indispensable in the sense that the objective of ensuring compliance can be achieved without resort to that measure, it nevertheless can be necessary. In assessing whether a measure is necessary, the Tribunal should consider both the extent to which the measure contributes to the achievement of the objective sought and the degree to which the measure encroaches upon the protected rights of other States. The greater the contribution and the less the encroachment, the more likely the measure will be considered to be necessary.

(e) *Application of the term "necessary" to the present case*

26. Let me now turn to the question of how the term "necessary" in article 73, paragraph 1, of the Convention should be applied in the present case. The preliminary question to be considered is the appropriate standard of review for assessment of necessity under article 73, paragraph 1, of the Convention. I would like to point out in this regard that there is no provision in the Convention for the standard the Tribunal should apply in reviewing the conformity of national actions with the Convention. Therefore it is up to the Tribunal to determine such standard in each case. This competence may be inherent in the general power of the Tribunal to frame rules for carrying out its functions, provided for in article 16 of the Statute of the Tribunal.

27. In my view, the appropriate standard the Tribunal should apply in the present case in reviewing whether the confiscation measure taken by Guinea-Bissau was necessary under article 73, paragraph 1, of the Convention may not be as stringent as that of *de novo* review, the most stringent standard, under

which the Tribunal would review all matters, both legal and factual, *de novo*. However, the standard applicable to the Tribunal should certainly be much higher than that of deferential review, under which the Tribunal would give deference to the action of national authorities insofar as it is not arbitrary or manifestly unreasonable.

28. There are several reasons for a relatively high standard. Apart from the general consideration of the relative strengths and weaknesses of international judicial institutions and national authorities, there is a consideration particularly pertinent to the interpretation and application of the Convention. The Convention was adopted to establish an international legal order for the oceans applicable to all States. Indeed the Preamble of the Convention recognizes

> the desirability of establishing through this Convention . . . a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.

The uniform interpretation and application of the provisions of the Convention is indispensable to establishing a stable legal order for the seas and oceans. If each State is allowed to interpret and apply the provisions of the Convention as it sees appropriate, uniformity would be impossible and obligations under the Convention would mean different things to different States. This would upset the delicate balance achieved in the Convention through painstaking negotiation and render the multilateral ocean regime created by the Convention ineffective. Such danger is particularly serious with respect to the EEZ, which is often characterized as a "zone of tension" due to conflicting interests between coastal States and other States. Thus I am of the view that the Tribunal should apply a fairly high standard in reviewing the consistency of the confiscation measure taken by Guinea-Bissau with article 73, paragraph 1, of the Convention.

29. The application of the above standard to the present case requires an "objective" assessment of whether the confiscation by Guinea-Bissau was necessary. To this end, the Tribunal should consider, among others: the availability

of other measures (equally effective and less onerous); the importance to Guinea-Bissau of the objective sought in taking the confiscation measure (*i.e.*, protection of living resources in the EEZ); the impact of that measure on protected rights of Panama (the *M/V Virginia G*) and other States; and the circumstances and manner in which the confiscation measure was taken.

30. Regarding the availability of other measures, I do not believe that the confiscation measure taken by Guinea-Bissau against the *M/V Virginia G* was indispensable. While there are some ambiguities in the relevant laws of Guinea-Bissau, it appears that under the Decree-Law 6-A/2000 of Guinea-Bissau, other penalties such as a fine can be imposed for unauthorized bunkering. The fact that the fishing vessels involved in the unauthorized bunkering by the *M/V Virginia G* were not confiscated but fined shows that other sanctions were available and could have been taken. Confiscation, as the heaviest penalty, undoubtedly would have strong deterrent effect against possible future violations but at the same time could be the most intrusive on the rights of other States.

31. The objective Guinea-Bissau intended to achieve by confiscating the *M/V Virginia G* was ensuring compliance with its fishery law in the EEZ, thus protecting fishery resources in that zone. The assessment of the importance to Guinea-Bissau of this objective requires an understanding of the economic and other situations in Guinea-Bissau and of the nature of law enforcement in the EEZ.

32. According to the information provided by Guinea-Bissau to the Tribunal, it is one of the poorest countries in the world with an economy based primarily on farming and fishing activities, which represent about 46 percent of GDP (Counter-Memorial of Guinea-Bissau, para. 87). Because of this, revenue resulting from fishing activities, the preservation of its fishing resources, and the protection of the marine environment are "absolutely essential" for the country. Guinea-Bissau also points out that it has poor infrastructure and weak social indicators. I can see, without much difficulty, the vital importance to Guinea-Bissau of protecting living resources in its EEZ.

33. However, the protection of living resources in the EEZ is not an easy task, not least owing to the difficulty of enforcing relevant laws of the coastal State in that zone. The EEZ is a vast area for many coastal States, and enforcement

at sea is much costlier than on land. Even developed States with advanced enforcement capabilities often find it challenging to enforce their laws and regulations in every corner of such a vast area. Needless to say, it is all the more so for States lacking adequate resources and capabilities. Thus coastal States often tend to take a draconian approach to law enforcement in the EEZ. The need for taking strong action increases when coastal States are plagued by the problems of illegal, unreported and unregulated fishing in their EEZs. This factor, together with the vital importance to Guinea-Bissau of protecting fishery resources in its EEZ, should be taken into account in assessing the necessity of the confiscation.

34. Now I will consider the impact of the confiscation on the rights of Panama and other States in the EEZ. Article 58 of the Convention provides for the freedoms and rights other States enjoy in the EEZ of the coastal State. In this regard, it should be recalled that the EEZ is a zone of balance between the interests of the coastal State and those of other States. As is provided for in article 55 of the Convention, the EEZ is subject to "the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention". The elaborate balance between the rights and obligations of the coastal State and those of other States is at the core of the legal regime of the EEZ. Thus provisions in Part V of the Convention need to be construed and applied with utmost care. Article 73, paragraph 1, of the Convention is no exception. No word in the provision can be taken lightly. The fact that enforcement powers are specifically spelled out in Part V, while they are merely assumed in Part VI on Continental Shelf, where the coastal State also has sovereign rights, indicates that enforcement in the EEZ is a highly delicate matter and the balance struck between the interests of the coastal State and those of other States in the provision should be preserved to the full extent. Confiscation, as a measure depriving a ship-owner of title to the vessel, forfeits the freedoms and rights the flag State or the vessel would otherwise be entitled to enjoy in the EEZ of the coastal State. In so doing, it could burden the exercise of the freedom of navigation in the EEZ and thus undermine the balance between the coastal State and the flag State in that zone. This factor should also be taken into account in assessing whether confiscation was necessary in the present case.

35. Lastly, let me consider relevant circumstances and the manner in which the confiscation measure was imposed by the authorities of Guinea-Bissau. In the present case, while the *M/V Virginia G* failed to obtain the formal authorization required by the laws and administrative practice of Guinea-Bissau, it is clear that it did not operate "clandestinely". On the contrary, the authorities of Guinea-Bissau were informed in advance of the operation, including its date, time and location with the exact coordinates as well as the name of the supply vessel. The fishing vessels to which the *M/V Virginia G* supplied the gas oil were lawfully licensed in accordance with the laws of Guinea-Bissau. It should also be pointed out that the relevant regulation of Guinea-Bissau, in particular article 39 of Decree 4/96, is not free of ambiguities. While this provision stipulates the requirement and procedures for obtaining authorization for logistical support operations (including bunkering operation), it is unclear who should make the request for such authorization. According to Guinea-Bissau,

> the law of Guinea-Bissau requires a formal document to perform the operation of fuelling vessels, *which is usually requested by the recipient vessels on behalf of the supply vessel*, and the authorization must state which vessels are to be fuelled
> (emphasis added; Counter-Memorial of Guinea-Bissau, para. 115).

Indeed, it was the agent of *Balmar*, a fishing company for whose fishing vessels bunkering services were provided by the *M/V Virginia G*, that made a request for authorization. If there were a failure to comply with the required procedure and that failure constituted such a serious violation, responsibility would lie more with the recipient fishing vessels than with the *M/V Virginia G*.

36. Furthermore, as pointed out in paragraph 268 of the Judgment, the fishing vessels (*Amabal I* and *Amabal II*) arrested together with the *M/V Virginia G* were only fined and released shortly, although they had committed a violation of similar gravity under the laws of Guinea-Bissau. Guinea-Bissau acknowledged that "the vessels eventually left without paying the fine, due to the Ambassador's [Ambassador of Spain] insistence" (Counter-Memorial of Guinea-Bissau, para. 125). The other two fishing vessels (*Rimbal I* and *Rimbal II*) which had received bunkering services from the *M/V Virginia G* on the same day were not even arrested, let alone fined or confiscated. In my view, such inconsistency in imposing penalties on the vessels involved in the

same violation raises a serious doubt about the necessity of the confiscation measure.

37. The final episode of the present dispute is the decision taken by the CIFM to "repeal" the confiscation and release the vessel thirteen months after its arrest. According to Guinea-Bissau, the decision was taken following references made by the Prime Minister of Guinea-Bissau to the danger to the security of maritime navigation caused by the long presence of the vessel and "taking into consideration our relationship of friendship and cooperation with the Kingdom of Spain in the field of fisheries". The decision to "repeal" the confiscation and the reason for which it was taken seem to confirm the view that the confiscation was not necessary at the outset.

38. In weighing and balancing the above considerations, I came to the conclusion that, while I see the need for the authorities of Guinea-Bissau to take strong action against the violation of its Decree-Law 6-A/2000, the confiscation measure against the *M/V Virginia G* in the present case was not "necessary". Thus I voted in favour of subparagraph (8) of the operative part to the effect that, by confiscating the *M/V Virginia G* and the gas oil on board, Guinea-Bissau violated article 73, paragraph 1, of the Convention.

II Loss of profit

39. I will now turn to the Tribunal's findings on the claim made by Panama for compensation for the loss of profits. The Tribunal found in paragraph 435 of the Judgment 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. Particularly for the loss of profit, the Tribunal found in the next paragraph that Panama failed to establish the direct nexus between the confiscation of the *M/V Virginia G* and the loss of profit. As an explanation for this finding, the Tribunal pointed out in paragraph 438 that expeditious prompt release procedures for arrested or detained vessels were available under the laws and regulations of Guinea-Bissau but the owner of the *M/V Virginia G* did not use them.

40. A causal relationship between an internationally wrongful act and the injury is a key requirement for the reparation for such injury. In the present case, Panama is thus required to establish the causation between the confiscation and the loss of profits the owner of the *M/V Virginia G* claims to have suffered. The Judgment seems to suggest in the paragraphs referred to above that there is no direct causation in this regard because the owner of the vessel failed to use the prompt release procedure available under article 65 of Decree-Law 6-A/2000 of Guinea-Bissau.

41. However, I am not convinced by this reasoning. It is generally recognized in international law that the injured party has a duty to mitigate the damage it has incurred. It follows that an injured party who fails to mitigate the damage may not claim compensation *pro tanto*. This principle was affirmed by the International Court of Justice when it stated 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 (*Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), *Judgment, I.C.J. Reports* 1997, p. 7, at p. 55, para. 80). However, it should be cautioned that a duty to mitigate, by definition, arises after damage has occurred as a result of a wrongful act. It is plain that a State cannot mitigate the damage before it occurs. On the other hand, the prompt release procedure available under the law of Guinea-Bissau could not be used after the confiscation was effected, as the confiscation of the vessel would necessarily entail the transfer of its ownership. Therefore it makes little sense to say that there is no direct nexus between the confiscation and the loss of profits due to the failure of the owner of the *M/V Virginia G* to use the prompt release procedure, an option which was no longer available to the owner when the vessel was confiscated. Furthermore, as explained in paragraphs 73–81 of the Judgment, the owner of the *M/V Virginia G* tried, without success, other remedial procedures available under the laws of Guinea-Bissau to challenge the confiscation. Thus I do not find that the owner failed to take necessary measures to mitigate the damage.

42. As indicated in paragraphs 429–430 of the Judgment, the principle of "full reparation" is well established in international law. It is also recognized that the compensation includes both *damnum emergens* and *lucrum cessans*. This has been affirmed by several decisions of international courts and tribunals. It is also reflected in article 36, paragraph 2, of the Draft Articles on State Responsibility, which provides that "the compensation shall cover any

financially assessable damage including loss of profits insofar as it is established". Thus the loss of profits must be compensated insofar as it is established by the injured State.

43. In general, a ship is an income-producing property. It generates income through its operation. Therefore when a ship is forced to stop operation by a wrongful act, it is bound to lose income which it would otherwise have generated and such loss can be regarded as a direct consequence of the wrongful act.

44. As stated in paragraph 56 of the Judgment, Penn Lilac, the owner of the *M/V Virginia G*, entered into a charter agreement with Lotus Federation on 1 January 2009. Under the agreement, the owner receives €40 per ton of gas oil transported for the two ships, with a maximum of 90,000 tons per year, for a period of 4 years (Annex 13 of the Memorial of Panama). The report submitted by Alfonso Moya Espinoza estimates that in accordance with the agreement, during the charter period from 1 January 2009 until its arrest on 21 August 2009, the *M/V Virginia G* generated a monthly profit of € 83,005.66 (Annex 4.1 of the Reply of Panama). In my view, this establishes the ability of the *M/V Virginia G* to generate profits, as well as the approximate amount of profits that could be expected to be generated if the vessel continued operation. Setting aside for the time being consideration of the relevant period for, and the exact amount of, the loss, it can reasonably be established that those profits were lost when the vessel stopped operation due to the confiscation and thus a direct nexus exists between the confiscation and the loss of profits Penn Lilac claims to have suffered.

45. However, there is another relevant factor to be considered in the present case, namely contribution by the injured party to the injury. The *M/V Virginia G* was confiscated for unauthorized bunkering, which constitutes a violation of article 23 of Decree-Law 6-A/2000 of Guinea-Bissau. The vessel would not have been confiscated had it not engaged in the unauthorized bunkering. Thus the origin of the injury was the illegal bunkering operation by the *M/V Virginia G*. When an injured party intentionally or negligently contributed to the loss it suffered, that factor may need to be considered in the determination of compensation. This idea is reflected in article 39 of the Draft Articles on State Responsibility, which provides that "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured Sate or any person or entity in relation to

whom reparation is sought." There are several judicial decisions that can be understood to this effect (See, for example, *LaGrand* (*Germany* v. *United States of America*), *Judgment, I.C.J. Reports* 2001, p. 466, at p. 487, para. 57, and at p. 508, para. 116). In my view, the unauthorized bunkering carried out by the *M/V Virginia G* was an act that contributed at least negligently, if not wilfully, to the injury it incurred and should be considered an attenuating factor in the determination of compensation. In addition, this contributory factor ought to be applied to all the damages and losses directly caused by the confiscation.

46. For the loss of profits, Panama claims € 1,311,489.43 by applying the average profit margin the *M/V Virginia G* generated before its arrest to the detention period of 474 days from the time of arrest until it could restart operation in December 2010. In addition, Panama also claims €1,245,626.40 for the profit not realized due to the termination of the charter agreement following the arrest of the *M/V Virginia G*.

47. In my view, the relevant period for the loss of profits should be the one from the time the decision to confiscate the *M/V Virginia G* was confirmed by the CIFM (09/CIFM/09) until the vessel again became operational. I also find unacceptable the claim of Panama for the profits not realized or future profits, as compensation for such profits in the present case would clearly amount to double recovery. The exact amount of the compensation for the loss of profits exceeds the scope of this Opinion. However, it should be recalled that the arrest of the *M/V Virginia G* was a lawful enforcement act against unauthorized bunkering operation. While its confiscation in the present case was found to be illegal, the vessel could otherwise have been subject to a fine of a minimum of US $ 150,000 and a maximum of US $ 1,000,000 under article 54, paragraph 2, of the Decree-Law 6-A/2000. I point out in this regard that the two fishing vessels (*Amabal I* and *Amabal II*) arrested together with the *M/V Virginia G* for the unauthorized bunkering were fined US $ 150,000 per vessel and released one week after the arrest (Annex 15 of the Counter-Memorial of Guinea-Bissau). This factor should be taken into account in assessing the amount of compensation.

48. Considering the above factors, I believe that at least the modest amount of compensation for the loss of profits should have been awarded to Panama. For these reasons, I voted against subparagraph (18) of the operative part.

(*signed*) Jin-Hyun Paik