

## Declaration of Judge Cot

1. I agree with most of the Tribunal's reasoning, in particular with its conclusion on the issue of jurisdiction. But I still have a problem with admissibility of the Application and, more specifically, the applicability of the rule of exhaustion of local remedies.

2. The rule of exhaustion of local remedies is a general one well established in international law.<sup>1</sup> Primarily, it ensures the possibility for the State whose responsibility is involved to correct if necessary the alleged violation within its own legal framework. It is in particular relevant in cases of diplomatic protection. The rule is enshrined in article 295 of the Convention:

*Article 295*  
*Exhaustion of Local Remedies*

Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

3. International jurisprudence, as summarized in the draft articles of the International Law Commission (ILC), does not require exhaustion of local remedies if the dispute amounts to a direct injury to the claimant State. In case of a dispute of a mixed character, the ILC considers the exhaustion of local remedies if the claim is principally based on the injury caused to one of its nationals, a juridical or natural person. On the other hand, if the claim arises from a direct injury, the claimant State is not obliged to exhaust local remedies before presenting its claim.

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<sup>1</sup> Crawford and Grant: Local Remedies, Exhaustion of, *Max Planck Encyclopedia of Public International Law*, vol. 6, pp. 895–905.

4. The essential criterion is that of preponderance. Is the dispute mainly concerned with a direct injury to the State in question – here to Panama as the flag State – or is the dispute based on the rights of the person concerned – here Mr Carreyó, the ship-owner's representative?

5. The case law of this Tribunal in the past has clearly given preference to the direct injury to the State, in particular in the *M/V "SAIGA" (No. 2)* and *M/V "Virginia G"* cases. In my opinion, this past case law is not in conformity with practice and the general state of international law. Our case law should be changed in that respect. By excessive reliance on the concept of direct injury to the flag State, the Tribunal is ignoring the clear wording of article 295 of the Convention, rendering it devoid of any meaning. It is difficult to imagine a situation in which the Tribunal, in a given case, would not invoke direct injury to the claimant State.

6. Preponderance of direct injury to Panama in the present case is all the more noticeable when considering the very discreet presence of the Panamanian authorities throughout the proceedings.

7. The written and oral proceedings were led by Mr Carreyó, member of the bar of Panama and representative of the Norwegian owner of the *Norstar*, Mr Mörch. Nothing prevents a State from appointing a private person as agent in a litigation brought before an international tribunal. However, I cannot help but notice that Panama did not find it necessary to ask one of its officials to plead during the hearing. The only official of Panama was the very silent Ship Registration Officer of the Consulate General of Panama in Hamburg. To say the least, it was quite an unusual situation for litigation before a public international law court or tribunal.

8. Given all these facts, I consider that the *M/V "Norstar" Case* has without a doubt a mixed nature and cannot be considered solely as an instance of direct injury to Panama. As to the issue of the obligation to exhaust local remedies, the criterion of preponderance recommended by the ILC must be applied.

9. In the present instance, application of the criterion of preponderance is not evident. Preponderance here calls for an evaluation of the facts of the dispute, i.e. the merits, and is not, therefore, an exclusively preliminary matter. Therefore, in my opinion, the Tribunal should not reject the preliminary

objection based on the non-exhaustion of local remedies, as proposed in paragraph 273 of the Judgment. The objection should be joined to the merits.

*(signed)* J.-P. Cot