

## Declaration of Judge Heidar

1. I have voted in favour of the present Judgment and support its reasoning. However, in my view, further arguments should have been provided for the finding of the Tribunal in paragraph 270 of the Judgment, in the context of the rule of exhaustion of local remedies, that the right of Panama to enjoy freedom of navigation on the high seas is a right that belongs to Panama under article 87 of the Convention, and that a violation of that right would amount to direct injury to Panama. Secondly, as regards the operative provisions (*dispositif*) of the Judgment, in my opinion, they should have contained a formal disposition of each of the eight preliminary objections of Italy so that each objection would have been voted on separately. I shall address these two issues in turn.

### Exhaustion of local remedies – direct injury

2. In paragraph 266 of the Judgment, reference is made to the following statement of the Tribunal in the *M/V “Virginia G” Case*: “It is also established in international law that the exhaustion of local remedies rule does not apply where the claimant State is directly injured by the wrongful act of another State.”

3. In the subsequent paragraphs of the Judgment, the Tribunal explains that it will follow the same approach as in the *M/V “SAIGA” (No. 2) Case* and the *M/V “Virginia G” Case* in examining the nature of the rights which Panama claims have been violated by Italy.

4. The Tribunal then expresses its view in paragraph 270, referring to the *M/V “Virginia G” Case*, that “the right of Panama to enjoy freedom of navigation on the high seas is a right that belongs to Panama under article 87 of the Convention, and that a violation of that right would amount to direct injury to Panama”. On that basis, and considering that the claim for damage to the persons and entities with an interest in the *M/V “Norstar”* or its cargo arises from the alleged injury to Panama, the Tribunal concludes that the rule of exhaustion of local remedies does not apply in the present case.

5. In my view, the Tribunal's finding regarding the nature of Panama's right under article 87 of the Convention merits further reasoning. This is all the more relevant because this point was subject to considerable controversy in the *M/V "SAIGA" (No. 2) Case* and, in particular, in the *M/V "Virginia G" Case*, as evidenced by the number of separate and dissenting opinions addressing this point.

6. The relevant parts of article 87 of the Convention, entitled "Freedom of the high seas", read as follows:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

(a) freedom of navigation;

...

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas ... [emphasis added].

7. The question to be decided is whether the freedom of navigation invoked by Panama in the present case is a right of States only or also a right of ships. The clear and unequivocal wording of article 87 confirms that the former is true. This is unaffected by the fact that the freedom of navigation is exercised, in practice, mostly by natural or juridical persons, because they do so through the State, the flag under which they are flying.

8. That the freedom of navigation on the high seas under article 87 is a right that belongs to States is further supported by the wording of the related article 90 of the Convention, which is entitled "Right of navigation" and reads: "Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas."

9. Consequently, the right of Panama to enjoy freedom of navigation on the high seas is a right that belongs to Panama under article 87 of the Convention, and a violation of that right would amount to direct injury to Panama.

### Operative provisions (*dispositif*)

10. The *M/V "Norstar" Case* is the first preliminary objections case in the twenty-year history of the Tribunal. The Tribunal decided to confine the operative provisions of the Judgment to: (1) rejecting, *in toto*, the objections raised by Italy to the jurisdiction of the Tribunal and finding that it has jurisdiction to adjudicate upon the dispute; and (2) rejecting, *in toto*, the objections raised by Italy to the admissibility of Panama's Application and finding that the Application is admissible. In my view, the Tribunal was misguided in its approach. The operative provisions should have contained a formal disposition of each of the eight preliminary objections of Italy, three to the jurisdiction of the Tribunal and five to the admissibility of Panama's Application, so that each objection would have been voted on separately.

11. Article 97, paragraph 6, of the Rules of the Tribunal reads:

The Tribunal shall give its decision in the form of a judgment, by which it shall uphold the objection or reject it or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Tribunal rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

In my view, the most natural interpretation of this provision is that, in case of two or more objections, the Tribunal should, as a rule, decide and vote on each of them separately. This is supported by a contextual reading of article 97. In particular, the initial phrase of article 97, paragraph 1, refers to: "[a]ny objection to the jurisdiction of the Tribunal or to the admissibility of the application". [**Emphasis added**]

12. Article 97, paragraph 6, of the Rules of the Tribunal was modelled on Rule 79, paragraph 9, of the Rules of the International Court of Justice (ICJ) and they are almost identical. The latter reads as follows:

After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

13. The practice of the ICJ regarding the disposition of preliminary objections in operative provisions of its judgments has been described as follows:

In judgments on a single preliminary objection the Court usually confines itself to a statement whether it does or does not have jurisdiction, in the first case also resuming the proceedings on the merits. Similarly, this is the customary form of operative provision where there are multiple objections, but the Court finds it possible to dispose of the case – one way or the other – simply on the basis of its decision on one objection. Where the Court finds it necessary to deal with each objection separately, the operative clause usually contains a formal disposition of each objection, in appropriate cases also indicating whether it is an objection to the jurisdiction or to the admissibility, as in the *Interhandel* case.<sup>1</sup> [Emphasis added]

14. The ICJ has been consistent in this regard in its jurisprudence and in almost all cases where it has dealt with each objection separately, the operative clause has contained a formal disposition of each objection and each has been voted on separately.<sup>2</sup>

1 Shabtai Rosenne, *The Law and Practice of the International Court 1920–2005*, Martinus Nijhoff Publishers, 2006, vol. III Procedure, pp. 1534–1535.

2 See: 1. *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 28, at p. 46; 2. *Right of passage over Indian territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 125, at pp. 152–153; 3. *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 6, at pp. 29–30; 4. *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, at p. 47; 5. *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 268–269; 6. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, at pp. 623–624; 7. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9, at pp. 30–31; 8. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 115, at pp. 135–136; 9. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at pp. 325–326; 10. *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6, at p. 27; 11. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412, at pp. 466–467; 12. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports*

15. In the present case, the Tribunal has dealt with each of the eight preliminary objections by Italy separately and rejected them in turn (see paragraphs 133, 175, 219, 232, 273, 305, 308 and 314 of the Judgment). Consequently – and taking into account the practice of the ICJ – the Tribunal should have included in the operative provisions of the Judgment a formal disposition of each of the eight objections of Italy so that each would have been voted on separately.

16. The aforementioned approach would ensure transparency with respect to the positions of Judges on the different preliminary objections and thus regarding the jurisprudence of the Tribunal.

17. It is to be hoped that the Tribunal will review this issue when it has the opportunity to do so in the future and that it will be guided by the foregoing considerations.

(signed) T. Heidar

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2011, p. 70, at pp. 140–141; 13. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2007*, p. 582, at pp. 617–618; 14. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2007*, p. 832, at pp. 875–876; 15. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment of 17 March 2016*, at pp. 39–40; and 16. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment of 17 March 2016*, at pp. 40–41.