# Joint Separate Opinion of Judges Wolfrum and Attard

1. Although we regret being unable to agree with all the findings and certain major reasonings in the Judgment of 4 November 2016 in the *M/V "Norstar" Case* (*Panama* v. *Italy*), *Preliminary Objections* (Judgment), we deemed it nevertheless possible to vote in favour of the Judgment. The reason for this will be explained in due course.

2. Before dealing with the problematic issues contained in the Judgment, some general considerations are called for.

*Preliminary objections: some general considerations*

3. Preliminary objections are governed by article 294 of the Convention in connection with article 97 of the Rules of the Tribunal. They are a procedural device through which the jurisdiction of the Tribunal and the admissibility of a case may be challenged without entering into the merits. In the words of the Permanent Court of International Justice, in the *Panevezys-Saldutiskis Railway case* (*Estonia* v. *Lithuania*), *Judgment, P.C.I.J. Series A/B, No. 76*, at p. 16, such procedure covers "any objection of which the effect will be, if the objection is upheld, to interrupt further proceedings in the case, and which it will therefore be appropriate for the Court to deal with before enquiring into the merits." As the International Court of Justice (ICJ) observed in the *Case concerning the Barcelona Traction, Light and Power Co. Ltd* (*Belgium* v. *Spain*), *Preliminary Objections, I.C.J. Reports 1964*, p. 6 at p. 44: "the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits." This may occasionally be problematic since jurisdictional issues may be interwoven with issues of the merits or, in other words, may only be decided together with issues which are of relevance for the decision on the merits. To overcome this problem, the ICJ in several cases has decided not to rule on the one or other objection but has held that the objection in question did not possess an exclusively preliminary character. This *de facto* meant that this objection was joined to the merits. The Tribunal did not make use of such an option although this may have been appropriate for some of the objections raised by Italy. We shall come back to this later.

4. The decision on preliminary objections is rendered in the form of a judgment which decides on the objections raised with binding effect on the parties concerned (*res judicata*). This means, in principle, that there is no possibility to reintroduce an objection against jurisdiction and admissibility decided upon by a judgment on preliminary objections or to reopen an issue which was dealt with in this context in the merits phase. In this respect, the procedure of preliminary objections differs significantly from a decision on jurisdiction in the course of proceedings on provisional measures. In the latter case, the decision on jurisdiction and admissibility is taken *prima facie* without prejudice to the merits; in a procedure on preliminary objections such a decision is, as already indicated, final. This necessarily has consequences concerning the assessment of facts, the interpretation and application of the provisions on jurisdictional limitations, and on limitations concerning admissibility. The standards to be applied by the Tribunal have to reflect that the decision is a final one; consequently we feel the *prima facie* standard establishing jurisdiction concerning provisional measures is not sufficient in proceedings on preliminary objections.

5. Unfortunately the Judgment is – in our view – unclear as to which standard of appreciation applies to the reasoning of Panama. For example, it is stated in paragraph 122 that "The Decree of Seizure by the Public Prosecutor of the Court of Savona against the *M/V "Norstar"* with regard to activities conducted by that vessel on the high seas and the request for its execution by the Prosecutor of the Court of Savona may be viewed as an infringement of the rights of Panama under article 87 as the flag State of the vessel." What do the words "may be viewed as an infringement" actually mean? What is the factual basis therefor and what is the legal one? The critical words, in our view, are "may be viewed". What led the Tribunal to such a conclusion? In substance, this statement is nothing more than the repetition of the statement made by Panama but lacking any legal reasoning. It is neither evident that the mere issuing of a Decree of Seizure together with a request for execution by the Prosecutor *ipso facto* constitutes a violation of the rights of Panama as a flag State nor that the wording as well as the object and purpose of article 87 of the Convention cover the situation of the M/V *"Norstar"*. We note that even the Tribunal has some hesitation concerning the sustainability of its reasoning. Rather than holding that the reasoning advanced by Panama is sufficient to convince the Tribunal that Panama has, on the basis of article 87 of the Convention, a sustainable case, the Tribunal instead concludes "that article 87 is relevant to the present case." In our view, the standard of appreciation

applied by the Judgment does not even meet the *prima facie* standard of appreciation in provisional measures proceedings.

*The Parties' submission to the jurisdiction of the Tribunal*

6. Italy submitted to the jurisdiction of the Tribunal by declaring on 26 February 1997:

> In implementation of article 287 of the United Nations Convention for the Law of the Sea, the Government of Italy has the honour to declare that, for the settlement of disputes concerning the application or interpretation of the Convention and of the Agreement adopted on 28 July 1994 relating to the Implementation of Part XI, it chooses the International Tribunal for the Law of the Sea and the International Court of Justice, without specifying that one has precedence over the other.
> In making this declaration under article 287 of the Convention on the Law of the Sea, Italy is reaffirming its confidence in the existing judicial organs. In accordance with article 287, paragraph 4, of the Convention Italy considers that it has chosen "the same procedure" as any other State Party that has chosen the International Tribunal for the Law of the sea or the International Court of Justice.

7. As far as Panama is concerned, its Declaration under article 287 was submitted only in 2015. The Declaration of Panama reads:

> In accordance with paragraph 1 of Article 287 of the United Nations Convention on the Law of the Sea of December 10th, 1982, the Government of the Republic of Panama declares that it accepts the competence and jurisdiction of the International Tribunal for the Law of the Sea for the settlement of the dispute between the Government of the Republic of Panama and the Government of the Italian Republic concerning the interpretation and application of UNCLOS that arose from the detention of the Motor Tanker NORSTAR, flying the Panamanian flag.

8. Panama's declaration under article 287 of the Convention was made long after the dispute materialized and only briefly before Panama filed its Application. On the basis of the material before the Tribunal, it is – at least for us – uncertain when the dispute or the facts which gave rise to the dispute as reflected in paragraph 122 of the Judgment materialized. The answer to this

question is decisive for the responsibility of the act in question – Italy alone or Italy together with Spain? The answer to this question is also relevant for determining the scope of the dispute (on this see below). The Judgment takes the position that the Decree of Seizure by the Public Prosecutor and the request for execution "may be viewed as an infringement of the rights of Panama under article 87 as the flag State" (paragraph 122). It is evident that without such Decree, the M/V *"Norstar"* would not have been detained. But it is equally true that, without the detention by the Spanish authorities, the M/V *"Norstar"* could have continued to enjoy the freedom of navigation on the high seas. Further, we consider it a major deficiency of paragraph 122 of the Judgment that there is no mention of the role of the Spanish authorities. We will return to this issue under the subheading "Indispensable third party" below.

9. Italy's declaration and that of Panama differ in scope. Panama's declaration is limited to the *M/V "Norstar" Case*, whereas Italy's covers all disputes concerning the interpretation and application of the Convention. This difference between the two declarations makes it necessary to deal with two issues: namely, whether it is possible to limit the declaration on the Tribunal's jurisdiction to one particular case only; and what the scope of the Tribunal's jurisdiction is in a case such as this, where the two declarations differ significantly. It is to be noted that this issue of two differing declarations under article 287 of the Convention was not addressed by Italy's preliminary objections. This does not exclude the Tribunal's considering this issue, since it has to satisfy itself that it has jurisdiction to entertain the case.

10. The Judgment touches upon the scope of the Tribunal's jurisdiction in paragraph 58 but not as to whether such practice of limited declarations is legitimate under the Convention. As to this latter point, the Tribunal stated in the *M/V "Louisa" Case* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Judgment of 28 May 2013* (*ITLOS Reports 2013*, p. 4, at p. 30, paragraph 79) that the Convention does not preclude a declaration limited to a particular category of disputes or the possibility of making a declaration immediately before filing a case. The justification for this statement is restricted to stating that the Convention does not exclude such an option and that some States have limited their declarations on the submission to the jurisdiction of the ICJ and that this practice has been endorsed by the ICJ. We hoped that the Judgment would offer more convincing reasoning, since such practice is hardly reconcilable with the

principle of equality of arms. The decision in the *M/V "Louisa" Case* (quoted above) cannot be invoked in this respect, since, in its declaration under article 287 of the Convention, St Vincent and the Grenadines had accepted a category of cases (see paragraph 75), whereas Panama only accepts the Tribunal's jurisdiction for a single case.

11. In the Judgment in the *M/V "Louisa" Case* (quoted above, at paragraph 81), it is further stated that, in a situation where declarations under article 287 of the Convention have a different scope, the Tribunal's jurisdiction covers the substance of the dispute only to the extent to which the two declarations of the two parties to the dispute coincide. This is a matter of consequence. The Judgment should have stated that the declarations under article 287 of the Convention express the consent of States parties as to whether and to what extent they accept the jurisdiction of the Tribunal and that the exercise of the Tribunal's juridical powers is based upon the mutual consent of both parties to the conflict.

*Existence of a dispute between Panama and Italy*

12. It is common ground that the existence of a dispute is the primary condition for a court to exercise its judicial functions. In its Order of 27 August 1999 in the *Southern Bluefin Tuna Cases* (*New Zealand* v. *Japan; Australia* v. *Japan*), *ITLOS Reports 1999*, p. 280 at p. 293 (paragraph 44), the Tribunal stated that a dispute is "a 'disagreement on a point of law or fact, a conflict of legal views or of interests' (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p.11) and '[i]t must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 238)." This jurisprudence of the ICJ has been consolidated further with its Judgment on *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands* v. *United Kingdom* (Preliminary Objections) of 5 October 2016 (paras 27 *et seq*.) (see in particular the Declaration by President Abraham).

13. It is pertinent to clearly distinguish between the existence of a dispute and its scope; the Judgment does so only implicitly (paragraph 104). The former has to be established during the preliminary objections phase; whereas, in respect of the latter, it is sufficient, but also necessary, that the Applicant establishes that the scope of the dispute is covered by the jurisdiction of the

Tribunal in general and as set out in the declaration under article 287 of the Convention as described above. We shall return to this issue later.

14. Crucial elements for establishing that a legal dispute exists between the Parties are the Application of Panama as well as the letters sent to the Italian Government, in particular the notes verbales. Of relevance is also certain limited action that was undertaken by the Italian Government.

The Application of Panama of 16 December 2015 reads:

> Accordingly, Applicant requests the Tribunal to adjudge and declare that:
>
> 1. Respondent has violated articles 33, 73(3) and (4), 87, 111, 226 and 300 of the Convention.
> 2. Applicant is entitled to damages as proven in the case on the merits which are provisionally estimated in Ten Million and 00/100 US Dollars ($10,000,000); and
> 3. Applicant is entitled to all attorney's fees, costs and incidental expenses.

15. In the hearing, much was said about the various letters sent by Mr Carreyó to the Italian Government which are accurately reflected in the Judgment (paragraphs 66–83 and again in paragraphs 87–89). That the various letters sent by Mr Carreyó are dealt with in great detail is beside the point. Having said that, it may be appropriate to point out that Italy's treatment of the two notes verbales sent by Panama was unfortunate.

16. That a legal dispute existed was evident at the latest on 31 August 2004 when Mr Carreyó forwarded to the Italian Embassy in Panama a document of full powers sent by the Panamanian Government to the Tribunal on 2 December 2000. This document authorized Mr Carreyó to represent Panama exclusively for the purpose of obtaining a prompt release procedure before the Tribunal, pursuant to article 292 of the Convention. On the same date, the Ministry of Foreign Affairs of Panama sent a note verbale to Italy in which it reiterated the mandate of Mr Carreyó. On 7 January 2005, the Panamanian Minister of Foreign Affairs sent a communication to Italy urging it to lift the

seizure of the M/V *"Norstar"* and reaffirming Mr Carreyó's mandate as representative of the State and the owners.

17. The Judgment mentions that the letters referred to were all submitted under Mr Carreyó's letterhead as an advocate. But what is not mentioned is that all these letters, as well as notes verbales nos. 227 and 97, were sent before Panama had accepted the Tribunal's jurisdiction by its declaration in 2015. To the extent that these letters and the notes verbales indicated that the case could be brought before the Tribunal, they were referring to a court which, at that time, evidently did not have competence. Apart from that, reference was made to the initiating of a prompt release procedure. This case, however, is clearly not a prompt release case. These facts should have been taken into account when the relevant documents were assessed.

18. Although we would not deny the relevance of these facts, we do not consider this line of arguing by Italy to be convincing. All these communications indicate that the arrest and detention of the M/V "*Norstar"* was challenged legally. The fact that Italy did not respond to these communications cannot be used to deny the existence of a legal dispute, although the definition of a legal dispute requires, among others, that "it must be shown that the claim of one party is positively opposed by the other". To rule out silence as a means of disqualifying a controversial situation from constituting a legal dispute is a matter of logic. It would be an easy way out of an obligation to settle legal disputes peacefully if a lack of response or non-participation in the proceedings were to mean the end of such proceedings. We understand Panama's reliance on the statement of the ICJ in the *Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), *Judgment of 1 April 2011, I.C.J. Reports 2011*, p. 70 at p. 84 (paragraph 30) that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" to mean exactly this.

*Scope of the dispute*

19. Accepting that a legal dispute does exist between Panama and Italy, the question remains as to what its scope is and whether it concerns the interpretation and application of the Convention. Attention should be drawn in this connection to article 24, paragraph 1, of the Statute and article 54, paragraphs 1 and 2, of the Rules.

20. In the *M/V "Louisa"* Judgment, quoted above, the Tribunal held as follows in this respect in paragraph 99, while relying on the jurisprudence of the ICJ:

> To enable the Tribunal to determine whether it has jurisdiction, it must establish a link between the facts advanced by Saint Vincent and the Grenadines and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by Saint Vincent and the Grenadines.

21. This statement is also of relevance for this case. The relevant facts as well as the provisions advanced by the Applicant, which are meant to sustain the case, ultimately establish the scope of the dispute.

22. The scope of a dispute has to be determined on an objective basis, the starting point of such determination being the Application of Panama of 17 December 2015. According to the established jurisprudence of the ICJ "it is for the Applicant, in its Application, to present to the Court the dispute which it wishes to seise the Court and to set out the claims which it is submitting to it" (*Fisheries Jurisdiction* (*Spain* v. *Canada*), *Jurisdiction of the Court, I.C.J. Reports 1998*, p. 432, at p. 447, paragraph 29). The Judgment of the Tribunal in the *M/V "Louisa" Case* (quoted above) refers to this jurisprudence at paragraph 95.

23. In this case, it falls upon Panama to establish that its rights as a flag State have been violated by Italy. Although the final decision is to be taken on the merits, Panama must, as already indicated, in this phase of the proceedings establish that the facts advanced can sustain its claim or claims based upon rights under the Convention. It is not sufficient just to mention provisions of the Convention or to claim compensation for damages suffered. It is essential to clarify which standard is to be applied by the Tribunal in assessing whether the facts and the legal reasoning advanced by Panama have sufficient substance for the Tribunal to conclude that they may sustain its case. Two different aspects are of relevance: namely, the interpretation and application of the relevant provisions, in particular article 87 of the Convention, in relation to the facts such as the arrest of the vessel in Spanish internal waters, detention, initiation of the arrest and detention by Italian authorities.

24. In this respect, Panama was, in our view, not able to demonstrate that the facts and the legal reasoning advanced can sustain its claims. Actually, without going into the merits, the facts and the legal reasoning advanced by Panama show the contrary.

25. The starting point has to be the Application of Panama. In the Application, Panama submits three claims. It claims that: (1) Italy has violated articles 33, 73(3) and (4), 87, 111, 236 and 300 of the Convention; (2) the Applicant is entitled to damages proven in the case on the merits, which are provisionally estimated at US$10 million; and (3) that the Applicant is entitled to all attorney's fees, costs and incidental expenses (Application of 16 November 2015).

26. Further, account has to be taken of Panama's declaration under article 287 of the Convention, which refers to "the interpretation and application of the Convention that arose from the detention of the Motor Tanker NORSTAR" with no mention of compensation for damages. On the other hand, going through the letters sent by Mr Carreyó on behalf of the ship-owners or on behalf of Panama, it is evident that, initially, the matter of compensation was at the forefront of the claim; for example, paragraph 1 of the letter of 15 August 2001 only speaks of "obtain[ing] a damage compensation for damages caused by the arrest of MC Norstar". There is no specific mention of a violation of the Convention apart from a reference to its article 297 and to the two *M/V "SAIGA"* cases. The other letters referred to in the Judgment as well as the two notes verbales refer back to the letter of 15 August 2001 or are of a procedural nature. Subsequently, the focus of Panama's claim shifted so as to include claims concerning a violation of the Convention by Italy.

27. The two elements of the Application concerning entitlement to compensation for damages and compensation for costs of attorney's fees are ancillary to the claim that Italy has violated the Convention. Only after Panama established that the detention of the M/V *"Norstar"* may have violated the Convention would the Tribunal be able to consider the request for compensation of damages.

28. The Applicant claims that articles 33, 73(3) and (4), 87, 111, 226 and 300 of the Convention have been violated. Before turning to the assessment of the claims in this respect, it is necessary to address an issue on which the Parties disagree, namely the identification of Italy's act which has allegedly violated the Convention.

29. The Parties agree that the actual arrest was carried out by Spanish authorities in the internal waters of Spain. The Applicant has emphasized more than once that its claims are directed against Italy. The relevant act is not only an issue to be dealt with in the proceedings on the merits but also one to be addressed under the heading of jurisdiction. The Judgment has identified the Italian Public Prosecutor's Decree of Seizure against the M/V *"Norstar"* together with the request for judicial assistance (paragraph 122) as the relevant act without giving any reason for that approach.

30. Considering the Decree of the Prosecutor and its request for judicial assistance as the relevant "Italian acts" raises the question as to whether the Decree together with the request for judicial assistance alone may already constitute an illegal limitation of the freedom to which Panama is entitled under the Convention. This issue, although discussed controversially in the hearing, is not dealt with in depth in the Judgment. We do not feel that it is reasonable to state that the Decree of the Prosecutor together with the request for judicial assistance **alone** can be considered to constitute a limitation of the rights of Panama as the flag State of the M/V *"Norstar"* under the Convention. Without the detention by Spain, the M/V *"Norstar"* could have continued to enjoy the freedom of navigation on the high seas. From the point of logic, the detention is essential for a claim that the freedom of navigation has been violated. Moreover, according to the Declaration of Panama, this alone is the issue on which the Tribunal has jurisdiction ("concerning the interpretation or application of UNCLOS that arose from the detention of the Motor Tanker NORSTAR, flying the Panamanian flag"). The detention of the M/V *"Norstar"* by the Spanish authorities as well as both actions of Italy – the decree of seizure and the request for judicial assistance – are *a sine qua non* conditions for the ultimate limitation of the freedom of navigation of the vessel.

31. This means that the limits imposed upon the M/V *"Norstar"* materialized only with the detention of the vessel by Spain. Consequently, the acts of the Spanish authorities and the ones of the Italian authorities have to be seen as a unit. Taking such an approach could have consequences concerning the attributability and the decision as to whether the principle of the indispensable third party was to be applied. On this ground we differ from the reasoning of the Judgment in paragraphs 122 *et seq*.

32. The detention of the vessel is linked to the procedural questions at hand to such an extent that it should not have been considered as being exclusively of a preliminary nature.

33. We shall now turn to the main point where we differ from the Judgment, namely the interpretation of article 87 of the Convention. To fulfil the criteria under article 288 of the Convention, such detention of the M/V *"Norstar"* must constitute a violation of the rights of Panama under the Convention. Apart from article 87 and article 300 of the Convention, no other of the provisions referred to in Panama's Application can reasonably be utilized to make a sustainable case for a violation of Panama's rights under the Convention. This point was made in the Judgment (paragraphs 114–118 and 123–127) and we are in agreement with it.

34. Article 87 of the Convention, on which the Judgment relies, protects the freedom of navigation on the high seas. It would have been appropriate to deal already in this phase with the content of article 87 of the Convention, although neither Party dealt with it in great detail. Considering the object and purpose of article 87 of the Convention, this provision first and foremost protects the free movement of vessels on the high seas against enforcement measures by States other than the flag State or States so authorized by the latter.

35. The Judgment seems to advocate a broad interpretation of article 87 of the Convention when stating "The Decree of Seizure … against the *M/V "Norstar"* with regard to activities conducted by that vessel on the high seas … may be viewed as an infringement of the rights of Panama" (paragraph 122). It seems to argue that Italy's action in respect of the M/V *"Norstar"*, because it was supplying gasoil and other oils on the high seas, is sufficient to invoke a potential violation of article 87 of the Convention. No justification is given for that reasoning. As a matter of logic there is no connection between the second sentence of paragraph 122 quoted in its relevant part above and the third sentence of this paragraph which states: "Consequently, the Tribunal concludes that article 87 **is** relevant to the present case" (emphasis added).

36. Apart from our criticism that the Judgment does not apply an adequate standard of appreciation of the reasoning advanced by Panama commensurate with preliminary objections, we disagree with the whole approach underlying

paragraph 122 from a legal and factual point of view for the following reasons. Since paragraph 132 of the Judgment follows the same approach, we disagree with it on the same grounds.

37. The wording of paragraph 122 of the Judgment seems to mean that an act of a coastal State against a vessel – although this act has not yet had a direct impact upon the freedom of navigation of the vessel concerned – may be considered to be in violation of article 87 of the Convention. Any encroachment on a coastal State's jurisdiction beyond what is permitted under the Convention is to be regretted since it unravels the package achieved at the Third United Nations Conference on the Law of the Sea and reflected in the Convention. We therefore disagree with the interpretation of article 87 of the Convention as far as the freedom of navigation is concerned.

38. The decisive point is that article 87 protects against enforcement actions undertaken by a State different from the flag State which hinder the freedom of movement of the vessel concerned. In this case such an enforcement action on the high seas did not take place.

39. In that respect, we would like to emphasize that this case differs sharply from the *Arctic Sunrise* case (PCA Case No. 2014–02, *In the Matter of the Arctic Sunrise Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea* between The Kingdom of the Netherlands and The Russian Federation, Award of 14 August 2015, http://pcacases.com). In the latter case, enforcement measures were taken against the vessel on the high seas and the Arbitral Tribunal considered this a violation of article 87 of the Convention. We agree with this finding (paragraphs 226 *et seq*.)

40. But even if one were to accept the broader interpretation of article 87 of the Convention as advocated by the Judgment, which considers the Prosecutor's action an infringement of the freedom of navigation for the sole reason that the M/V "*Norstar"* was acting outside the territorial sea of Italy, it does not concord with the facts of the case. The Decree of Seizure of the Prosecutor qualified the purchase of gasoil and other oils exempt from taxes and thus to be used outside Italian territorial jurisdiction but instead used in Italy where taxes have to be paid as fraud. This is repeated in the request for judicial assistance to Spain in quite some detail. Assessing the judgment of the Court of Savona is telling in this respect. It based its verdict on Italian law,

which rules that gasoil and other oils held in store by pleasure boats is not taxable under certain conditions. This argumentation is based purely upon Italian tax law; the Convention was mentioned only indirectly. This means that the alleged criminal act – which, according to the judgment of the Court of Savona was not a criminal act – took place at the moment when the gasoil received from the M/V *"Norstar"* was transported by the mega yachts into the territorial sea of Italy. As a consequence thereof, the criminal act – if indeed there were a criminal act – took place in an area in which Italy enjoys territorial jurisdiction. The Court of Savona stated this clearly, which confirms our understanding of the facts: "It is up to domestic jurisdiction to establish whether goods have been introduced into a customs area or the territorial sea in breach of customs rules". Paragraph 122 of the Judgment does not cover the factual situation sufficiently.

41. To sum up: First, we do not consider it sustainable to argue that a detention order alone constitutes an infringement of the freedom of navigation. Second, we disagree with the interpretation of article 87 of the Convention. Third, the factual situation has not been sufficiently taken into account by the Judgment. As we see it, this is a case concerning Italian tax law and its applicability in the territorial sea of Italy rather than the interpretation and application of article 87 of the Convention.

42. Giving article 87 of the Convention a meaning which goes beyond protecting foreign vessels against enforcement measures on the high seas should be considered carefully. Account has to be taken of the fact that coastal States enjoy certain competences *vis-à-vis* foreign vessels navigating through their territorial seas (see articles 17 to 25) (see article 27 and 28 of the Convention). A broad interpretation of article 87 of the Convention would severely limit the exercise of such coastal rights, since the flag State of any vessel arrested outside the high seas for the violation of a coastal State's rights would be able to claim infringement of article 87 of the Convention. The interpretation and application favoured by the Tribunal would render it competent to deal with cases such as the bankruptcy of a ship-owner and the subsequent arrest of his vessels, for example. It is appropriate to quote at this point the finding of the Tribunal in the *M/V "Louisa" Case* (paragraph 109):

> The Tribunal notes that article 87 of the Convention deals with the freedom of the high seas, in particular the freedom of navigation, which applies to the high seas and, under article 58 of the Convention, to the exclusive economic zone … Article 87 cannot be interpreted in such a way as to grant the M/V "Louisa" a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it.

43. Notwithstanding the above, we voted in favour as, on the merits, the Decree of the Prosecutor, the request for judicial assistance and the *locus standi* of Spain will have to be analysed in detail and the interpretation of article 87 of the Convention will have to be substantiated.

*Indispensable third party principle*

44. As to whether Spain is to be considered an indispensable third party depends on whether the act considered to have violated the rights of Panama is the issuing of the Decree of the Italian Prosecutor to seize the M/V "*Norstar"* or its request for judicial assistance to Spain or whether the act in question is the actual arrest of the M/V *"Norstar"* by Spanish authorities. In other words, it is determinant as to whether Italy alone is responsible for any infringements of freedom or Italy and Spain together.

45. In our view, the Tribunal does not take into account sufficiently the Order of the Court of Savona of 18 March 2003 to release the vessel and to report back as to whether the owner had taken back its property. How Spanish authorities reacted *vis-à-vis* the owner has not been reported to the Tribunal. This shows that the authorities of Spain played an independent role concerning the detention of the M/V *"Norstar".*

*Espousal nature of Panama's claim and exhaustion of local remedies*

46. In the *M/V "Virginia G"* case, Panama argued that it was bringing the case as one of diplomatic protection. In the case before the Tribunal, Panama argues that its case is not one of diplomatic protection. This has been stated clearly in ITLOS/PV16/C25/4, p. 3, lines 36–39:

> [t]his claim is not one of diplomatic protection, nor is it espousal or based on indirect violations. Rather, Panama contends that the present case is one involving a direct violation of its rights accorded by the Convention and, as a consequence of those violations, damages inflicted must be compensated.

47. However, the statements of Panama in this respect are not fully coherent. In the Observations of Panama it is stated that "due to the wrongful act of Italy, Panama has not received the vessel registration fees, taxes, and other duties owed by the M/V Norstar since its improper seizure". This clearly points towards Panama's referring to its own rights rather those of the M/V "*Norstar*"s owners. The following sentence points in a different direction when Panama states that it "is obligated to act on Norstar's behalf" (paragraph 57). There are several statements from Panama that it is also acting on behalf of the *Norstar*'s owners (Observations, paragraphs 54 and 80; PV3, p. 9, lines 39–42; PV 6, p. 9, lines 29–34); for example, note verbale 97 refers to Nelson Carreyó as "Legal Representative of the Republic of Panama and of the interests of the owners of the motor vessel Norstar." The same terminology is used in note verbale 227. The Application again only refers to the loss of the vessel as no damages are claimed on behalf of Panama. The situation was completely different in the *M/V "SAIGA" (No. 2) Case* (*Saint Vincent and the Grenadines* v. *Guinea*), Judgment of 1 July 1999, ITLOS Reports 1999, p. 10 at paragraph 28. In that case, it was much more evident as St. Vincent and the Grenadines pursued its own interests. Its final submission under no. 5: "the citing of St. Vincent and the Grenadines as the flag state of the m/v "Saiga" in the criminal courts and proceedings instituted by Guinea violates the rights of St. Vincent and the Grenadines under the 1982 Convention;"

48. Nevertheless, assuming that article 87 of the Convention has been infringed, a right vested in Panama as the flag State, besides the claim made by the owner of the vessel, renders the claim a mixed one.

49. Italy argues that this is preponderantly a case of diplomatic protection and that, therefore, local remedies have to be exhausted. It points to a provision of its civil code according to which the owners of M/V *"Norstar"* had five years to file a claim for compensation in Italian courts. Panama did not

respond to that point in detail but stated that it had the right to seek compensation nationally or before an international court, which is, in our view, not a satisfactory answer.

50. In this respect the Judgment follows the jurisprudence in the *M/V "Virginia G" Case* where, as in this case, the State-to-State dispute depended on the alleged violation of the freedom of navigation and the interpretation and application of the relevant provisions, in particular article 87 of the Convention, in relation to the known facts. This approach we endorse although it, *de facto*, renders the application of article 295 of the Convention moot in mixed cases. This approach was controversially discussed in the *M/V "Virginia G" Case* and it is to be hoped that this case finally stabilizes the jurisprudence of the Tribunal which dates back to the *M/V "SAIGA" (No. 2) Case*.

(*signed*) R. Wolfrum
(*signed*) D. Attard