PART II

ANNEXES TO THE REPLY OF PANAMA
## LIST OF ANNEXES

<table>
<thead>
<tr>
<th>ANNEX NUMBER</th>
<th>CONTENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>E-mail message dated 27 May 2001 sent by Petter Vadis to the shipowner stating the amount of gasoil that was loaded in Algeria, and on board at the moment of the arrest, as well as a client list of yacht owners</td>
</tr>
<tr>
<td>2</td>
<td>Letter dated 16 September 1998 sent by Sparebanken NOR to the shipowner by fax denying a guarantee to lift the arrest, copy of the original</td>
</tr>
<tr>
<td>2</td>
<td>Letter dated 16 September 1998 sent by Sparebanken NOR to the shipowner by fax denying a guarantee to lift the arrest, Translation</td>
</tr>
<tr>
<td>3</td>
<td>Letter dated 17 August 2017 sent by Italy to the Tribunal</td>
</tr>
<tr>
<td>4</td>
<td>Photos</td>
</tr>
<tr>
<td>5</td>
<td>Power of Attorney dated 25 March 2003 granted to Mr. Kjell Hagen authorizing the inspection of the M/V &quot;Norstar&quot;</td>
</tr>
<tr>
<td>6</td>
<td>Note Verbale N° A.J. MIRE-2017-65630 sent by Panama to Italy to request evidence</td>
</tr>
<tr>
<td>7</td>
<td>Letter dated 19 September 2017 addressed by Italy to the Tribunal</td>
</tr>
<tr>
<td>8</td>
<td>Letter dated 6 October 2017 addressed by Panama to the Tribunal</td>
</tr>
<tr>
<td>9</td>
<td>Letter dated 11 October 2017 addressed by Italy to the Tribunal</td>
</tr>
<tr>
<td>10</td>
<td>Letter dated 6 November 2017 addressed by Panama to the Tribunal</td>
</tr>
<tr>
<td>11</td>
<td>Letter dated 16 November 2017 addressed by Italy to the Tribunal</td>
</tr>
<tr>
<td>12</td>
<td>Letter, dated 12 February 2002 sent by the Department of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy and received on 18 February 2002 by the Public Prosecutor of Savona</td>
</tr>
<tr>
<td>12</td>
<td>Letter, dated 12 February 2002 sent by the Department of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy and received on 18 February 2002 by the Public Prosecutor of Savona, Translation.</td>
</tr>
</tbody>
</table>
Annex 1

E-MAIL MESSAGE, DATED 27 MAY 2001, SENT BY PETTER VADIS TO THE SHIPOWNER STATING THE AMOUNT OF GASOIL THAT WAS LOADED IN ALGERIA AND ON BOARD AT THE MOMENT OF THE ARREST, AS WELL AS A CLIENT LIST OF YACHT OWNERS
Gas oil loaded on Algeria: 273.776mt

Gas oil sold to different owners:

<table>
<thead>
<tr>
<th>No.</th>
<th>Vessel</th>
</tr>
</thead>
<tbody>
<tr>
<td>01</td>
<td>Angle B</td>
</tr>
<tr>
<td>02</td>
<td>Space Master</td>
</tr>
<tr>
<td>03</td>
<td>Auriga</td>
</tr>
<tr>
<td>04</td>
<td>Alena</td>
</tr>
<tr>
<td>05</td>
<td>Tejati</td>
</tr>
<tr>
<td>06</td>
<td>Vagabondo</td>
</tr>
<tr>
<td>07</td>
<td>Passe partout</td>
</tr>
<tr>
<td>08</td>
<td>K. Serra</td>
</tr>
<tr>
<td>09</td>
<td>Gattopardo</td>
</tr>
<tr>
<td>10</td>
<td>Scadet</td>
</tr>
</tbody>
</table>

Total: 113.865 liter

Total Gas oil onboard when mv "Norstar" was arrested: 177.566mt

Broker:
Scandinavian Bunkering AS

Loading port:
Algeria

sg 0.8450
high quality MGO

28.05.01
Annex 2

LETTER, DATED 16 SEPTEMBER 1998, SENT BY SPAREBANKEN NOR TO
THE SHIPOWNER BY FAX DENYING A GUARANTEE TO LIFT THE ARREST,
COPY OF THE ORIGINAL
Re: Bankgaranti til "Nordetra".

Viser til gårdsagens telefonsamtale samt din fax medlegg.

Derfor må vi meddele at vi ikke kan stille den ønskede bankgaranti til "Nordetra". Årsaken er først og fremst at dette er en sak som må håndteres av en avdelingskontor i Hurren og det må da stilles en form for sikkerhet som kan deles ved å overføre håndter, eksempelvis kontantfløyet eller parti i fast mæten. I tillegg meddeles at avtaler som part i skifte som behøver med trøkk i denne sammenheng, grunnet mulighet til tilknytning av kredit INTER MARINE's finansielle stilling med dødsint end og hovt kontakt kan bli som ikke på lettern.

Dersom du kan stille en annen sikkerhet for garantien, vil vi se på saken om det. Vi stiller kontakten med Tom Pettersen på 32793734 eller Sture Ør at 32792739 ved vi kan komme på strede.

Med bilde

for Sparebanken NOR

Esper Kier
Re.: Bankgaranti M/V 'Nordstar'

Viser til gårdsagens telefonsamtale samt din fax m/vedlegg.

Desverre må vi meddele at vi ikke kan stille den ønskede bankgaranti med sikkerhet i M/V 'Nordstar'. Årsaken er først og fremst at dette er en sak som må håndteres gjennom vårt avdelingskontor i Hurum, og det må da stilles en form for sikkerhet som kontoret er vant med å håndtere, eksempelvis kontantdepot eller pant i fast elendom. I tillegg vurderer vi en eventuell pant i skipet som behøftet med risiko i denne sammenheng grunnet mulig tilbakeholdelse/arrest. INTER MARINE's finansielle stilling med dårlig likviditet og høy kortsiktig gjeld gjør ikke saken lettere.

Dersom du kan still annen sikkerhet for garantien vil vi se på saken på nytt. Ta i så fall kontakt med Tom Pettersen (tlf. 32793734) eller Stein Enger (tlf. 32793736) ved vårt kontor på Sætre.

Med hilsen
For Sparebanken NOR

[Signatur]
Espen Klaer
Annex 2

LETTER, DATED 16 SEPTEMBER 1998, SENT BY SPAREBANKEN NOR TO THE SHIPOWNER BY FAX DENYING A GUARANTEE TO LIFT THE ARREST,
TRANSLATION
Re.: Bank guarantee M/V 'Nordstar'

Reference is made to yesterday's telephone conversation and your fax with attachments.

Unfortunately, we must inform you that we cannot provide the desired bank guarantee with security in M/V 'Nordstar'. The reason for this is primarily that this is a matter which must be handled by our branch office in Hurum and in such case a form of security that the office is used to dealing with, such as a cash deposit or security in real estate, must be provided. In addition, we consider any security interest in the ship as being risky in this regard due to a possible detention/arrest. INTER MARINE's financial position, with poor liquidity and a high level of short-term debt, does not make this matter any easier.

If you can provide other security for the guarantee, we will take another look at the matter. In such case, contact Tom Pettersen (tel. no. 32793734) or Stein Enger (tel. no. 32793736) at our office in Sætre.

Best regards
For Sparebanken NOR

[Signature]
Espen Klaer

Certified to be a true translation of the attached document.
Oslo, 5 February 2018
Alison Sollie
Government Authorized Translator
Markalleen 28
1368 Stabekk
Norway
Annex 3

LETTER, DATED 17 AUGUST 2017, SENT BY ITALY TO THE TRIBUNAL
Dear Mr Gautier,

Italy is in receipt of the Tribunal’s letter of 14 August 2017, attaching Panama’s communication dated 11 August 2017. As already indicated in Italy’s previous correspondence, Italy has no objection to the Tribunal deciding the issue as to whether a second round of pleadings is necessary only after the submission of Italy’s counter-memorial.

Italy is however extremely surprised to read that Panama believes that the Tribunal has not determined the scope of the Norstar dispute in the merits in its Judgement of 4 November 2016. Italy wishes to bring to Panama’s attention that the Tribunal’s jurisdiction encompasses questions of interpretation and application of the Convention and that the Tribunal ruled that only Article 87 and Article 300, out of the several provisions of the Convention invoked by Panama in its Application of 16 November 2015, are relevant to the present dispute. These provisions therefore delimit the scope of the dispute between the Parties on the merits.

While Italy does not intend to exchange legal arguments by means of diplomatic correspondence on issues that, if at all necessary, will be the subject of judicial determination, it nevertheless wishes to state in clear terms that it will oppose any attempt by Panama to surreptitiously enlarge the scope of the dispute beyond what has already been determined by the Tribunal in its Judgment of 4 November 2016. Panama’s statement that the scope of the dispute between the Parties is yet to be determined is indeed not only contrary to ITLOS’s settled case law, but would also deprive of any significance the incidental proceedings already held in the present case.
Italy’s agreement to postponing the decision on whether a second round of pleadings is necessary until after the submission of Italy’s counter-memorial, therefore, should not be construed as agreement with Panama’s stated position on the scope of the dispute in the Norstar case. In this regards, Italy also takes this opportunity to inform the Tribunal and Panama that it does not intend to bring counterclaims in the present case.

I take the opportunity of this letter to send my best regards.

Yours sincerely,

[Signature]

Mrs. Gabriella Palmieri,
Agent of the Republic of Italy.

-------------------------------------------

Mr. Philippe Gautier
The Registrar
International Tribunal of the Law of the Sea
Am Internationalen Seegerichtshof 1
22609 Hamburg
Germany
Annex 4

PHOTOS
Mt Norstar 3FHB7
Deck front incl. hatch cover for cargo hold (cooling room)
mt Norstar 3FHB7 manifold and ventilators deck
mt Norstar 3FHB7
bridge
maneuvering console
Mt Norstar 3FHB7
cargo tank
epoxy coated
Mt Norstar 3FHB7
deck from bow
anchor chain and winch
mt Norstar 3FHB7
deck showing entrance to pump room and storage stb.side
Annex 5

POWER OF ATTORNEY, DATED 25 MARCH 2013, GRANTED TO KJELL HAGEN AUTHORIZING THE INSPECTION OF THE MV NORSTAR
POWER OF ATTORNEY

INSPECTION OF MT'NORSTAR' — CALL SIGN 3FH87

We hereby confirm that:

Mr Kiell Hagen, Norwegian citizen
Norwegian birth number: 150455 37371
Swedish b.number: 550415 7958
Resident in Allé gatan 4, S-682 31 Filipstad, Sweden
has been authorized to inspect the vessel mt'NORSTAR', call sign 3FH87
Panamanian registry and owned by above company,
laying in the port of Palma de Mallorca.

for and on behalf of

INTER MARINE & CO. AS

Chairman of the board

Signature:

Pirre Einar Mørch

K. Eide-Iversen

25/3-2013
APOSTILLE

Date: 2013-03-25

Karin Eik-Jensen
Notary Public

In the office of the County Court of Drammen

287/13

Drammen

I certify

Kurt Engen
Annex 6

NOTE VERBALE, N° A.J. MIRE-2017-65630, SENT BY PANAMA TO ITALY TO REQUEST EVIDENCE
The Ministry of Foreign Affairs - Directorate for Legal Affairs and Treaties - presents its compliments to the Honorable Ministry of Foreign Affairs and International Cooperation of the Republic of Italy, in reference to the case concerning the detention of MN Norstar, which is currently being addressed in The International Tribunal for the Law of the Sea.

The Ministry of Foreign Affairs, Directorate of Legal Affairs and Treaties, wishes to request the cooperation of the Honorable Ministry of Foreign Affairs and International Cooperation of the Republic of Italy, in order to obtain the following documentation from their respective local authorities:

1. Certified copies of the file relating to the arrest of the M/V Norstar, managed by the Ministry of Justice, Department for Affairs of Justice, General Directorate for Criminal Justice (Ministero Della Giustizia, Department of Criminal Investigations, Directorate General Della Giustizia Penale)

2. Certified copies of the file on the arrest of the M/V Norstar, managed by the Ministry of Foreign Affairs, Diplomatic Contentious Service for Treaties and Legislative Affairs (Ministero Degli Affari Esteri, Servizio del Contenzioso Diplomatico Dei Trattati e degli Affari Legislativi)

3. Certified copies of the file relating to the arrest of Norstar and the prosecution of Silvio Rossi, Captain Renzo Biggio, Arve Morch, Petter Emil Vadis and Captain Tore Hufesfest in the Criminal Court of Savona.

The Ministry of Relations, Juridical Affairs and Treaties, taking into account the urgency of the matter in question and respecting the procedural terms of the International Tribunal for the Law of the Sea, will greatly appreciate the Honorable Ministry of Foreign Affairs and International Cooperation of the Republic of Italy to comply with this request as soon as possible.

The Ministry of Foreign Affairs - Directorate for Legal Affairs and Treaties - expresses its appreciation for the kind cooperation of the Honorable Ministry of Foreign Affairs and International Cooperation of the Republic of Italy, and avails itself of this opportunity to renew to the assurances of its highest consideration.

August 8, 2017

To the Honorable
Ministry of Foreign Affairs and International Cooperation
Rome,
Italy
Annex 7

LETTER, DATED 19 SEPTEMBER 2017, ADDRESSSED BY ITALY TO THE TRIBUNAL
Dear Mr Gautier,

I write with regard to the request for disclosure and production of evidence formulated by Panama in Part IV of Panama’s Memorial of 11 April 2017, in its letter dated 17 April 2017, addressed to the Tribunal and to Italy, and further reiterated in a Note Verbale dated 24 August 2017, addressed to Italy (attached to the present letter for the benefit of the Tribunal).

With respect to Panama’s request, Italy is certainly ready to act cooperatively, in the interest of justice and of the prompt adjudication of the dispute by the Tribunal.

However, a request for disclosure of documents must be precise and punctual, and cannot refer generically to the entirety of a respondent’s file, or to all the documents in its possession, as Panama does in its Note Verbale of 24 August 2017 and in its other generically-worded requests. Italy therefore wishes to invite Panama to indicate specifically which documents it intends to seek disclosure of - based on Italy’s pleadings - and the reasons of their relevance to Panama’s claim. Once such request is received, Italy commits to assessing it expeditiously.

In this context, Italy also wishes to note that, since the facts related to the Norstar case occurred almost twenty years ago, and the case has long concluded in terms of Italian proceedings, the identification of certain documents may be lengthy or, in some cases, even impossible.

I take the opportunity to send you, Mr Registrar, and to the Agent of the Republic of Panama, my best regards.

Avv. Gabriella Palmieri
Agent of the Republic of Italy

[Signature]
Annex 8

LETTER, DATED 6 OCTOBER 2017, ADDRESSED BY PANAMA TO THE TRIBUNAL
Dr. Nelson Carreyo
CARREYO & ASOCIADOS

6 October 2017
By e-mail
Ref. Case N° 25 The M/V “Norstar” case (Panama v. Italy)

Dear Mr. Gautier,

I have the honour to acknowledge receipt of your communication dated 19 September 2017 together with the letter of Italy dated the same day in which Italy says that “a request for disclosure of documents must be precise and punctual, and cannot refer generically to the entirety of a respondent’s file”, and invites Panama “to indicate specifically which documents it intends to seek disclosure of.”

Panama wishes to remind that Italy took notice of the Panamanian request for evidence several months ago without any Italian objection being raised. The Panamanian request stated:

1. Certified copies of the file regarding the arrest of the M/V Norstar handled by the Ministry of Justice, Department of Justice for business, Direction of criminal justice (Ministero Della Giustizia, Dipartimento Per Gli Affari Di Giustizia, Direzione Generale Della Giustizia Penale)

2. Certified copies of the file regarding the arrest of the M/V Norstar handled by the Ministry of Foreign Affairs, Legal Service of Treaties and Legislative Affairs (Ministero Degli Affari Esteri, Servizio Del Contenzioso Diplomatico Dei Trattati E Degli Legisl Legislativo)

3. Certified copies of the file regarding the arrest of the m/v Norstar and the prosecution of Silvio Rossi, Captain Renzo Biggio, Arve Morch, Petter Emil Vadis, and Captain Tore Husefest at the Court of Savona (Corte di Savona).

Panama finds that the above mentioned documentary evidence consists of three specific and precisely identified files.

Since Italy knows that Panama has not ever had access to such files it is difficult to accept the validity of the Italian restraint.

Panama agrees with Italy that the Norstar case occurred almost twenty years ago and that the identification of certain documents may be lengthy. However, there has lapsed enough time for Italy to state whether it will allow access to those files or if it is impossible to do so in respect of any of them.

Panama proposes that Italy allows access to the above precisely identified files to then allow Panama to ascertain the specific documents to be used at the hearing, if any.

I take this opportunity to convey to the Tribunal and the Government of Italy through you Mr. Gautier the feelings of our sincere respect and consideration.

P.O. Box 0823-05630, Zona 7, Panama, Republic of Panama
Calle 1ra C Norte No. 94 Urbanización El Carmen
Teléfonos 264-8920/66 email: nelsoncarreyo@gmail.com webpage: www.abogadopanama.com
Yours sincerely,

Nelson Carreyo
Agent

To the Honourable
Mr. Phillipe Gautier
The Registrar
International Tribunal for the Law of the Sea
Am Internationalen Seegerichtshof 1
22609 Hamburg
Germany
Email: Gautier@itlos.org, RegistrarOffice@itlos.org

cc. Mr. Hartmut von Brevern
REchtsanwalt
Hohnsallee 29
20148 Hamburg
Email: hartmut.brevern@gmail.com
Annex 9

LETTER, DATED 11 OCTOBER 2017, ADDRESSED BY ITALY TO THE TRIBUNAL
RE: C25 The M/V Norstar Case. Request to produce documents.

Dear Mr. Gautier,

I acknowledge receipt of your communication dated 6 October 2017 attaching a letter of the same date in which Panama reiterates its request to Italy to produce documents with regard to the M/V Norstar case.

At the outset, Italy wishes to stress once again that it intends to act cooperatively with Panama, in the interest of justice and of its expeditious administration by this Tribunal. In this regard, Italy is not in general averse to Panama’s requests for the production of documents.

However, Italy cannot overlook the fact that Panama’s request is anomalous, and nothing like an ordinary request for the production of documents, to which Italy would immediately accede. Panama is effectively asking Italy to share the entirety of the documents concerning M/V Norstar case. The cooperation between the Parties before the Tribunal should not go to the detriment of fundamental principles of procedure that also deserve to be safeguarded, in the interest of this case, and of international litigation in more general terms.

While not directly applicable in this case, the IBA Rules on the Taking of Evidence in International Arbitration of 2010 provide guidance as to the current trend in international procedural law. Article 3(a) and (b) of those rules provides that a request to produce documents shall contain:

a) a description of each requested Document sufficient to identify it, or
b) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; (…);

c) a statement as to how the Documents requested are relevant to the case and material to its outcome; (…)."

In comparison to this, and to the more general trend in international litigation, Panama’s request for documents is remarkably unqualified and generic. In particular, Italy wishes to note the following:

a) Panama is asking Italy to produce “the file regarding the arrest M/V Norstar”. Since the entire case before the Tribunal concerns the arrest of the M/V Norstar, Panama is asking Italy to share all of the documents in its possession.

b) Panama claims that the request concerns “specific and precisely identified files”. However, asking for a “file” is not the same as asking for a “document”, as a file may contain - as it does in this case - several documents. A request to produce a file is therefore by definition generic and unqualified.
e) Specifying three different branches of the Italian Government from which the same unqualified file is requested does not render the request any more specific. Panama is still asking for the entirety of Italy’s documents concerning the arrest of the M/V Nostar.

d) Panama’s request dated 6 October is no more qualified, or specific, than its previous request to which Italy responded on 19 September.

Italy also wishes to point out that it finds it surprising and indeed worrying that Panama, as the applicant in this case, is to turn to Italy, after it filed its Application, to prove its own case, a case that it had almost 20 years to prepare. While cooperation between the Parties is a fundamental principle of international litigation, a respondent should not be asked to unqualifiedly assist a claimant in proving the case that it has brought against it, and in discharging the evidentiary burden that is placed on such claimant.

In light of this, Italy cannot agree to share the entirety of its evidentiary material concerning the M/V Norstar case, so that Panama may inspect it and decide what is relevant and useful for its own case.

In the interest of the expeditious administration of justice and in a spirit of cooperation, Italy would propose to submit Panama’s request for document production to the assessment of this Tribunal pursuant to Article 77 of its Rules. Italy is aware that the matter is of great systemic importance and transcends the specificities of Panama’s case against Italy and that, for these reasons, the Tribunal may wish to state its position on this aspect.

In the alternative, and after consultations with the Tribunal and Panama as appropriate, Italy would also be prepared to share a list of the documents that Italy’s files contain, subject to conditions of reciprocity with Panama with respect to its own files. It would then consider a specific and qualified request from Panama, made in accordance with the IBA Rules indicated above, and reserves the right to make a similar request to Panama.

Yours sincerely,

Avv. Gabriella Palmieri
Agent of the Republic of Italy
Annex 10

LETTER, DATED 6 NOVEMBER 2017, ADDRESSED BY PANAMA TO THE TRIBUNAL
Dear Mr. Gautier,

I have the honour to acknowledge receipt of the letter of Italy dated 11 October 2017 received through your good offices on 3 November 2017.

Although Italy manifests that it “intends to act cooperatively with Panama, in the interest of justice and of the expeditious administration of justice”, its attitude is evidencing the opposite.

Panama does not accept the Italian statements that Panama “is asking Italy to share the entirety of the documents concerning the Norstar case” or “the entirety of its evidentiary material concerning the m/V Norstar.”

Panama reiterates that its petition to have access to specifically identified files to then decide what is relevant is not against any international law principles or provisions. As stated on 6 October 2017 Panama requests access to files under the control of three different official branches of Italy as already mentioned in its own pleadings and documents, some of them even of unrestricted access to the parties interested such as criminal files already closed.

Italy excuses its procedural conduct of denying access to potential evidence, based in some provisions which Italy itself characterizes as not applicable to the present case stating that Panama turns to Italy “to prove its own case.”

Beyond its character of applicant, Panama is of the view that the burden of proof falls on both parties, especially on the one which is in better conditions to produce it. This does not ignore the classic rules but complement and refine them, making its eventual application more flexible in cases in which, as the present, the party which should produce the evidence according to the traditional rule, may be unable to do so for reasons completely alien to its will. This is based on the duty of cooperation and solidarity that parties must have towards the Tribunal, and put its weight on the shoulder of who can best do it.

Italy is the only party having the requested documentary evidence under its control. Therefore, there is a valid reason to urge it to cooperate\(^1\) in order to ensure fairness in the eventual application of the rule on burden of proof.\(^2\) Panama needs to have access to the requested evidence because it is aware of the rule *actori incumbit probatio* and needs to take every lawful reasonable step to comply with it.

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1 “It may be of some help to recall litigants’ duty to cooperate with international courts and tribunals in bringing forward evidence that will help them to decide the case.” See A Riddell and B Plant, *Evidence Before the International Court of Justice* (2009), p. .

2 Cfr. ICI, Judgement on the *Case Concerning Pulp Mills on the River Uruguay*, para. 163: “It is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it.”
It has already been held that this rule “does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be.”\(^3\) The Tribunal must ensure that neither party obtains some unfair advantage over the other, and the best way to accommodate the need for fairness is through a flexible rule on burden of proof which should mean to request access to the litigant with the best possibilities.

An asymmetry in the parties' ability to produce evidence to support their claims and defences is inherent in this case. Therefore flexibility is needed where Italy is the party having a monopoly over access to written evidence.

Panama wishes to accept the Italian proposal to allow non restricted access to any of the files related to the M/V Norstar under the control of any of the branches of the Panamanian Government and will make its best efforts to cooperate with Italy and the Tribunal to produce all and any written evidence it may have in its possession.

I take this opportunity to convey to the Tribunal and the Government of Italy through you Mr. Gautier the feelings of our sincere respect and consideration.

Yours sincerely,

\[\underline{\text{Nelson Carreyo}}\]
Agent

To the Honourable
Mr. Phillipe Gautier
The Registrar
International Tribunal for the Law of the Sea
Am Internationalen Seegerichtshof 1
22609 Hamburg
Germany
Email: Gautier@itlos.org  RegistrarOffice@itlos.org

c. Dr. Olrik von der Wense
ALP Rechtsanwälte
Am Kaiserkaai 69
20457 Hamburg
Email: wense@alprecht.de

\(^3\) Mexican-United States General Claims Commission (1923), para. 6, p. 39.
Annex 11

LETTER, DATED 16 NOVEMBER 2017, ADDRESSED BY ITALY TO THE TRIBUNAL
RE: C25 The Norstar Case. Request to produce documents.

Dear Mr. Gautier,

I acknowledge receipt of your communication dated 6 November 2017 attaching a letter by Panama of the same date.

Italy regrets that Panama’s letter entirely misinterprets Italy’s communication dated 11 October 2017 (sent on 3 November 2017) concerning Panama’s request to produce documents.

Indeed, there is not an issue between Italy and Panama over the existence of the duty of cooperation with the Tribunal and between the Parties on evidentiary matters. What is disputed is the extent to which a Respondent should be asked to assist the Claimant in proving its own case. Italy submits that requesting the Respondent to produce the entire “file regarding the arrest of the M/V Norstar” exceeds the reasonableness which presides over the application of any legal principle, including the one that prescribes cooperation on evidentiary matters.

In this regards, also Panama’s reference to legal authorities that point towards the existence of a duty for parties to cooperate with the Tribunal and between them is misplaced. Italy has already offered to give effect to such a duty in relation to the request to produce evidence made by Panama. However, Panama’s request should be in line with the procedural principles relevant to the matter at issue, as codified by the *IBA Rules on the taking of Evidence*, or at least with their inspiring principle of specificity.

Second, Panama also misinterprets Italy’s proposal “to share a list of the documents that Italy’s files contain”, based on reciprocity, in order for Italy to “consider a specific and qualified request from Panama”. Panama transforms such proposal into one “to allow non restricted access to any of the files related to the M/V Norstar”. For the avoidance of doubt, Italy’s proposal was that Panama should make a qualified request - in conformity with the procedural principles relevant to the matter at issue - which Italy would then consider promptly. Panama’s response appears to indicate that it has rejected Italy’s proposal.

Rome, 16th November, 2017
Third, Panama's assumption that Italy would be in a better position than Panama to discharge its burden of proof is simply a wrong assumption. For the Italian authorities the domestic judicial proceedings complained of in the present case were deemed to be over since 2005. On the contrary, as evidenced during the preliminary objections phase before this Tribunal, the details of such proceedings have been, since their inception, in the front of the mind of the Agent for Panama, as well as of the ship owner, Mr. Morch, who has been the addressee of all the relevant documentation, including from the Spanish authorities.

In light of the above, Italy can only reiterate its readiness to submit the assessment of Panama's request to the Tribunal pursuant to Article 77 of its Rules. As already indicated in its previous communications, Italy does so also in consideration of the systemic relevance of the matter at issue.

I take this opportunity, Mr Registrar, to send you and to the Agent of the Republic of Panama, my best regards.

Yours Sincerely,

Avv. Gabriella Palmieri
Agent of the Republic of Italy
Annex 12

LETTER, DATED 12 FEBRUARY 2002, SENT BY THE DEPARTMENT OF DIPLOMATIC LITIGATION, TREATIES AND LEGISLATIVE AFFAIRS OF THE MINISTRY OF FOREIGN AFFAIRS OF ITALY TO THE PUBLIC PROSECUTOR OF SAVONA
APPUNTO indirizzato a:

La questione di cui in oggetto è iniziata nell'autunno del 2001, con la comunicazione qui fatta pervenire da un legale panamense - Signor Nelson Carreyo - relativamente ad una richiesta di danni per il sequestro della M/C Norsiar in forza di un provvedimento cautelare disposta dalla Procura della Repubblica di Savona, per il reato di contrabbando in alto mare. Nella sua comunicazione il legale panamense si riservava di presentare ricorso al Tribunale del mare di Amburgo, nel caso in cui da parte italiana non venisse dato seguito alla richiesta di risarcimento.

Questo Servizio, richiesto dalla Segreteria Generale di trattare la pratica, si è interessato, sin dal settembre scorso, di appurare l'effettiva situazione di diritto nella quale si collocava la questione di cui in oggetto. Per comprensibili motivi sono state attinte informazioni e ragguagli presso il Tribunale di Amburgo in via confidenziale. L'intervento ha potuto accertare che:
- una eventuale azione per il pronto rilascio della M/C Norsiar che venisse presentata dallo Stato di bandiera (Panama) o, per conto di esso, contro l'Italia al Tribunale di Amburgo avrebbe pochissime possibilità di successo; infatti:
Il procedimento di pronto rilascio dell'articolo 292 della Convenzione sul diritto del mare del 1982 è concepito per situazioni d'urgenza, mentre, nel caso in esame la nave si trova sequestrata in Spagna da circa 3 anni;

- la nave è sequestrata dall'Autorità spagnola e pertanto il possibile Stato convenuto, a stregua del predetto articolo 292, dovrebbe essere la Spagna; non è chiara d'altra parte la connessione tra il sequestro spagnolo e quello dell'Autorità giudiziaria italiana;

- non sembra possibile ravvisare la violazione di quale norma della Convenzione, che prevede il pronto rilascio dietro ragionevole cauzione, possa essere "allagata" alla stregua del già menzionato articolo 292.

A complemento di quanto sopra esposto si può notare che la richiesta allo Stato italiano contenuta nella lettera del legale panamense del 15 agosto 2001 di provvedere al dissequestro della nave non tiene conto del principio della divisione dei poteri in quanto competente è solo l'Autorità giudiziaria.

In connessione a quanto sopra esposto ed in relazione all'allegato sollecito fatto pervenire dall'avvocato Carujo, si rimette per competenza e per ulteriore seguito la questione di cui si tratta, restando comunque disponibili per l'eventuale collaborazione che potrà essere richiesta in proposito.
Annex 12

LETTER, DATED 12 FEBRUARY 2002, SENT BY THE DEPARTMENT OF DIPLOMATIC LITIGATION, TREATIES AND LEGISLATIVE AFFAIRS OF THE MINISTRY OF FOREIGN AFFAIRS OF ITALY TO THE PUBLIC PROSECUTOR OF SAVONA, TRANSLATION
Subject: Damages claimed for the seizure of M/C Norstar with Panamanian flag, taken place in Spain in 1998, per the request of Savona judicial authorities.

References: Note from this Office No. 692/74, copy enclosed, by the Office of the Honourable Minister and the Embassy in Panama.

NOTE addressed to:
STAMP
PROSECUTOR for the REPUBLIC
SAVONA
18 FEB 2002
No. H.

Ministry of Grace and Justice - Office.
Prosecutor for the Republic via the Courts of Savona
and with the knowledge of
Office of the Honourable Minister
General Secretariat
DGAP – DGAO – DGIT
UN Rep., New York
Embassy in Panama
General Consulate in Hamburg

[Texto]

The matter in question began in the fall of 2001, with the communication herein enclosed, made by a Panamanian lawyer - Mr. Nelson Carreño - relating to a claim for damages for the seizure of M/C Norstar, as a result of an injunction established by the Office of the Prosecutor of the Republic in Savona, for the crime of contraband in the high seas. In his communication, the Panamanian lawyer intends to appeal to the International Tribunal for the Law of the Sea in Hamburg, in case the Italian party did not follow up on the request for compensation.

This Service, which the General Secretariat has requested deal with the matter, has been involved since last September, corroborating the effective legal situation, in which the matter in question took place. For understandable reasons, information and details have been obtained from the Tribunal in Hamburg, in a confidential manner. The intervention was able to verify that:

- A possible action to secure the early release of M/C Norstar, presented by the flag State (Panama), or on its behalf, against Italy before the Tribunal in Hamburg, would have very little chance of success; in fact:

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COURTS OF SAVONA
PRELIMINARY INQUIRY
JUDGE
The early release procedure established in Article 292 of the Convention on the Law of the Sea of 1982 was conceived for emergency situations, whereas, in the case in question, the ship has been seized in Spain for almost 3 years.

The ship was seized by the Spanish Authorities and therefore, the possible defendant State should be Spain, in accordance with the aforementioned Article 292; it is not clear, on the other hand, the connection between the Spanish seizure and the Italian judicial authorities.

There does not seem to be a reasonably certain violation of this norm, which provides for a prompt release, and which can be "connected" to the intention of the aforementioned Article 292.

Additional to the foregoing, it has been noted that the request to the Italian State, contained in the Panamanian lawyer's communication of August 15, 2001, to release the ship from seizure, does not take into account the principle of separation of powers, since it only concerns the judicial authorities.

In relation to the foregoing and to the enclosed request, filed by the attorney Carreyo, the matter in question is submitted to the competent authorities, and for further follow-up, and we remain available for any possible collaboration that may be requested for this purpose.

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PART III

AUTHORITIES TO THE REPLY OF PANAMA
LIST OF AUTHORITIES

Doctrine


Riddell A. and Plant B., Evidence Before the International Court of Justice, British Institute of International and Comparative Law (2009).


Wendel, Philipp, State Responsibility for Interferences with the Freedom of Navigation in Public International Law, Springer.

Caselaw


Territorial Dispute between Chad and Libya, Judgment, I.C.J. Reports 1994.


Legal documents


high seas "shall be reserved for peaceful purposes." Moreover, under Article 89, "no State may validly purport to subject any part of the high seas to its sovereignty."

1. Freedom of Navigation and Exclusivity of the Flag State

The freedom of navigation is the oldest of the freedoms of the high seas and cannot be impaired, as stated under UNCLOS and international law. As UNCLOS Article 90 provides, "every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas." The underlying consequence is that a flag State has exclusive jurisdiction over the vessels flying its flag. Similarly, it can be understood from Articles 90 through 92, that each vessel must have only one nationality. Moreover, every State has the right to determine how it will grant nationality to a vessel.

Flag States have several duties listed in UNCLOS Article 94. Additionally, on the high seas, as in other sea zones, warships and government vessels used for non-commercial service have complete immunity. Furthermore, according to Article 97, in the event of a collision or any other accident of navigation involving the penal responsibility of a crewmember, only the flag State or the State of which the responsible person is a na-

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100 UNCLOS, supra note 1, art. 88 (Articles 88-115 also apply to the EEZ).
101 See PANCRAZIO, supra note 23, at 186.
103 For a discussion about convenience flags and vessels without nationality. See infra, Part III(A).
104 See UNCLOS, supra note 1, art. 91; Momtaz, supra note 95, at 354.
105 For example, a State must effectively exercise jurisdiction and control over vessels flying its flag; it must maintain a register of ships containing all particulars; it shall assume jurisdiction under its internal law over each vessel and its Master, officers and crewmembers; it must take measures to ensure safety at sea with regard to the construction, equipment and seaworthiness of the ship, the manning of the vessel and labor conditions, the use of signals, the maintenance of communication and the prevention of collision. In doing so, the State must conform to generally accepted international regulations, procedures and practices. See id. art. 94; see also JAMES C. F. WANG, HANDBOOK ON OCEAN POLITICS & LAW 398-404 (1992).
106 See UNCLOS, supra note 1, arts. 95 & 96; Momtaz, supra note 95, at 360-61.
The Vienna Conventions on the Law of Treaties

A Commentary

VOLUME I

Edited by

OLIVIER CORTEN
PIERRE KLEIN

OXFORD UNIVERSITY PRESS
1. A treaty being an instrument containing binding undertakings and creative of vested rights, the parties are under a legal obligation to carry it out.\textsuperscript{138}

That formulation was thus closer to the \textit{negotium} than to the \textit{instrumentum}. In other words, if there was an obligation to perform the \textit{pactum}, it was because it contained obligatory engagements (obligations or rights). However, it is necessary to go beyond the \textit{negotium/instrumentum} dichotomy, or, to recapture the distinction drawn by Paul Reuter,\textsuperscript{139} between ‘act’ and ‘norm’. Both aspects must be the object of the observance. The parties must perform the obligations ensuing both from the provisions relating to the mechanism of the juridical act constituting the treaty and the substantive norms contained in it.

38. Diplomatic and judiciary practice calling for the observance of treaties is particularly abundant. In the arbitral award of 30 April 1990, the \textit{Rainbow Warrior} case, the arbitral tribunal specifically invoked Article 26 as being applicable to the case. The issue under consideration was whether the violation of a treaty was a matter related to the law of treaties or to the law of international responsibility. The Tribunal held that:

both the customary Law of Treaties and the customary Law of State Responsibility are relevant and applicable. The customary Law of Treaties, as codified in the Vienna Convention, proclaimed in Article 26, under the title ‘\textit{Pacta sunt servanda}’ that

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This fundamental provision is applicable to the determination whether there have been violations of that principle, and in particular, whether material breaches of treaty obligations have been committed.\textsuperscript{140}

\textbf{The manner in which performance must take place: the observance of good faith}

39. Sir Gerald Fitzmaurice, in his Fourth Report, adopted the following wording:

2. A treaty must be carried out in good faith, and so as to give it a reasonable and equitable effect according to the correct interpretation of its terms.\textsuperscript{141}

The principle of good faith is a substantive principle which clarifies the interpretation of the obligation that must be performed. It took on a central role in Grotius’ final chapter of his work \textit{The Law of War and Peace}

\ldots comme le dit Cicéron, la Fidélité à tenir ce que l’on a promis est le fondement non seulement de tous les Etats, mais encore de cette grande Société qui embrasse toutes les Nations. Otez la bonne foi, il n’y aura plus de commerce entre les Hommes…\textsuperscript{142}

\textsuperscript{139} P. Reuter, ‘\textit{Le traité international, acte et norme}’, \textit{Archives de la philosophie du droit}, 1987, vol. 32, pp 111–18.
\textsuperscript{140} Paragraph 75 of the Award, \textit{RIA}, vol. XX, p 251.
\textsuperscript{141} Article 4, para. 1, \textit{YILC}, 1959, vol. II, p 42.
\textsuperscript{142} As Cicéron said, the Fidelity to keep one’s promises is not only the fundament of every State, but also of that great Society that embrace every Nations. Remove good faith, and there will be no more commerce between Humans

(Own translation; H. Grotius, \textit{Le droit de la guerre and de la paix} (trans. Jean Barbeyrac) (1724), book III, ch. 25, s 1. See also Bynkershoek, \textit{Quaestionum juris publici}, libri duo, II, cap. IX: 'Pacta privatorum tuetur jus civile, pacta principium bona fides'.

\textbf{SALMON}
The Vienna Conventions on the Law of Treaties

A Commentary

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2. Good faith, inter alia, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.\textsuperscript{150}

In its report of 1964,\textsuperscript{151} the Commission refined the text of the draft Article by presenting it in the following form, which remained unchanged until its adoption at the Vienna Conference:

A treaty in force is binding upon the parties to it and must be performed by them in good faith.

40. The second part of Sir Humphrey Waldock's proposal—'that a party must abstain from acts calculated to frustrate the objects and purposes of the treaty'—was considered by the Commission as 'implicit in the obligation to perform the treaty in good faith'.\textsuperscript{152} In its written comments, the Finnish government proposed to reintroduce in the text that 'a party must abstain from acts calculated to frustrate the objects and purposes of the treaty'.\textsuperscript{153} A similar proposition was advanced by Turkey.\textsuperscript{154} The Rapporteur supported the Commission's position\textsuperscript{155} and the Article remained unchanged. Nevertheless, the concept of the interpretation of the treaty in good faith was inserted in Article 31(1) of the Convention.

41. The relation between good faith and \textit{pacta sunt servanda} is, at first sight, demarcated by the preamble to the convention, which calls the former a principle and the latter a rule. As Sir Humphrey Waldock put it, '[t]he rule \textit{pacta sunt servanda} is itself founded upon good faith'.\textsuperscript{156} This statement calls for clarification, taking the discussion to the basis and scope of the rule \textit{pacta sunt servanda}. If the restrictive conception of the \textit{pactum} adopted by the Vienna Convention is refuted, the scope of the good faith principle extends well beyond the treaty concerned. The work by Robert Kolb, currently the authority on the issue of good faith, clearly demonstrates this proposition.\textsuperscript{157} First of all, the principle of good faith already applies \textit{before the entry into force of the treaty}.\textsuperscript{158} In addition, the principle of good faith governs all types of non-formal agreements. If the notion of \textit{pactum} is broadly construed, it is the respect of the word given in an exchange of consents, which is at the same time the foundation of both the obligation to respect this promise and the way in which it must be respected (in good faith). For this reason, the same obligation of good faith operates with regard to resolutions of international organizations conceived as interstate agreements, for acquiescence, etc. This was certainly the position of Manfred Lachs, who favoured a broad conception of the \textit{pacta sunt servanda} principle and who linked the principle of good faith to 'every manifestation of an interstate agreement'.\textsuperscript{159} The ICJ established the same connection for unilateral acts. In the \textit{Nuclear Tests} case of 1974, concerning formally and substantively unilateral acts, the Court considered that:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith....Just as the very rule of \textit{pacta sunt servanda} in the law of

\textsuperscript{150} Ibid.
\textsuperscript{151} Ibid, p 176.
\textsuperscript{152} Ibid, commentary on Art. 55, p 177, para. 2.
\textsuperscript{157} R. Kolb, supra n 32.
\textsuperscript{158} See the commentary on Art. 18 in this work.

SALMON
The Vienna Conventions on the Law of Treaties

A Commentary

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It is fitting to recall that these different ‘incursions’ can take place by different means, and that there exists no clear schema orchestrating the mechanisms foreseen by Article 31 and those simply induced. Each court has managed to find an angle allowing it to confirm its solution according to the legal syllogism that it has chosen and that it manipulates to this end.

52. Effet utile—the principle ut res magis valeat quam pereat—\textsuperscript{167} which it was feared, during the elaboration of the Convention, would develop into a stepping stone to teleological interpretation, has been mentioned in numerous decisions of international courts. In these cases, it has emerged that effectiveness can be used widely in a simple appeal to logic, or it can serve as a lever towards a broader interpretation. The ICJ has often sought to support preceding statements by relying on effectiveness, as a type of confirmation.\textsuperscript{168} The Court thus made careful use of the concept in the case of the Territorial Dispute between Chad and Libya,\textsuperscript{169} and in that of Kasikili/Sedudu Island.\textsuperscript{170} The ICTY, on the other hand, has used the concept to provide a wide interpretation of some notions, such as torture or rape.\textsuperscript{171} Conversely, the ICTY judged that a provision of its Regulations was deprived of effectiveness (and therefore that it was not necessary to use it) because of the attitude of Yugoslavia.\textsuperscript{172} However, amongst the courts with a universal vocation, it is perhaps the DSB that stands out by a quasi-systematic usage of effet utile. It is often invoked to support the search for the meaning of a treaty, as in the Alcoholic Beverages, Underwear, Poultry, and Shrimp cases, as well as the Cotton case.\textsuperscript{173} Effectiveness was also implicitly invoked in the Hormones case to narrow down the interpretation sought of an Agreement on the application of sanitary and phytosanitary measures (‘SPS Agreement’).\textsuperscript{174} The concept has also recurred in the case law of the ECtHR, in the often-cited formula according to which the European Convention aims to protect ‘rights that are not theoretical or illusory, but practical and effective’,\textsuperscript{175} or in the theory of ‘elements necessarily

\textsuperscript{167} Effectiveness being defined in the following way:
Règle—parfois invoquée au titre de principe—selon laquelle l’interprète doit présumer que les auteurs d’un traité, en adoptant les termes d’une disposition, ont entendu leur donner une signification telle que cette disposition puisse recevoir une application effective. (J. Salmon (ed.), Dictionnaire du droit international public (Brussel: Bruylant/AUF, 2001), p 416)

\textsuperscript{168} With, nevertheless, a certain suspiciousness which the Court had the opportunity to express in its Opinion of 18 July 1950 concerning the Interpretation of Peace Treaties where it specified that this could not lead to the revision of the treaty under the pretext of interpretation (ICJ Reports 1950, pp 228–9).

\textsuperscript{169} ICJ Reports 1994, pp 23–4, para. 47.

\textsuperscript{170} ICJ Reports 1999, supra n 78, para. 93.


\textsuperscript{172} Slavko Dokmanović, supra n 88, Trial Chamber, Judgment of 22 October 1997, IT-95–13a-P, para. 42.


\textsuperscript{174} Supra n 96, Report of the Appellate Body of 16 January 1998, para. 164. In this last case, the DSB also broached the issue of the precautionary principle as a means of interpretation, which it did not uphold in a case.

\textsuperscript{175} See, amongst the numerous judgments passed, that of 23 March 1995, Loisidou v Turkey (preliminary objections), Series A, no. 310, para. 72; that of 5 February 2002, Conka v Belgium, Series A, para. 46; or that of 9 October 2003, Biozohat A.E. v Greece, Application no. 61582/00, para. 31.
GOOD FAITH

1. Notion

The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them (→ Interpretation in International Law). The concept figures prominently in the → Vienna Convention on the Law of Treaties, which by virtue of its careful draftsmanship and wide ratification has assumed an authoritative place in international law on questions relating to the interpretation and enforcement of → treaties. Art. 31(1) of that Convention provides: “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.” These references to context and purpose demonstrate that the substance of the principle of good faith is the negation of unintended and literal interpretations of words that might result in one of the parties gaining an unfair or unjust advantage over another party.

A secondary notion of good faith in the context of explicit agreements pertains to the duties of signatories to a treaty prior to ratification. The early rule of international law to the effect that States had an obligation to ratify treaties that their diplomatic agents had signed has been replaced since the 18th century by the concept of discretionary ratification (→ Treaties, Conclusion and Entry into Force). This change came about as a result of the growth of parliamentary institutions within States that adopted constitutional checks and balances against the acts of the executive branch or its diplomatic agents abroad (→ Diplomatic Agents and Missions). Yet the new concept of discretionary ratification carried over the old notion to the extent that the executive branch, having signed the treaty through its agents, now had an obligation to make every effort in good faith to obtain the consent of the sovereign, and not to act in the interim period in such a way as to prejudice the unperfected rights of the signatories to the treaty. Art. 18 of the Vienna Convention on the Law of Treaties, while not explicitly referring to the principle of good faith, summarizes its substance by providing that a signatory, prior to ratification, “is obliged to refrain from acts which would defeat the object and purpose” of the treaty.

Finally, the principle of good faith may be said to apply, apart from treaties or other agreements, to the general performance of a State’s obligations under international law. According to a significant
GOOD FAITH

resolution of the → United Nations General Assembly passed in 1970, entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States”, the principle is proclaimed that “[e]very State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law” (→ Friendly Relations Resolution).

2. Historical Evolution of the Concept

In the early days of legal systems, including the international system, there was a strong tendency to interpret documents literally. The words of agreements, especially solemn international treaties or letters written on parchment and elaborately sealed, were invested with an almost magical literal power; this is illustrated by the historical fact that in the early days of contract, if the paper upon which a contract was written was itself lost or destroyed, the contract was regarded as dissolved. Thus if one party performed its obligation under a written contract and then lost (or was forcibly deprived of) the paper upon which the contract was written, the other party was entirely relieved of its reciprocal obligation.

Strict and literal construction of the earliest treaties often led to unintended and unjust consequences to one or more parties. As a result, the treaties began to include clauses designed to deal with questions of interpretation and performance. Early treaties concluded between kings of England and foreign monarchs contained separate clauses that the treaties were meant to be bona fidei negotia – that they were to be kept in good faith. As time went on, these clauses gradually were reduced in size and prominence because the principle of good faith was increasingly understood to be implicit in the treaties. Today it is clear that there need be no explicit mention of the principle of good faith in a treaty because, unless that principle were specifically negated, it is an implicit provision of all treaties.

The principle of good faith is rooted in a → natural law conception of → customary international law. The earliest systematic writers on international law, including Grotius, Pufendorf, and Suarez, conceived of international law as founded in natural law, by which they meant the dictates of right reason (→ History of the Law of Nations: Ancient Times to 1648). Natural law thus conceived was a constraint upon a nation to act in a manner that takes into account the reasonable expectations and needs of other nations in the international community. Under this view, a treaty should be implemented in a way that fulfils the purposes of the joint undertaking, including the exchange of reciprocal obligations. Natural law would exclude the exploitation of an advantage deriving from a literal but mutually unintended reading of a treaty or other international agreement.

The principle of good faith thus owes its present authoritative status to the natural law foundations of general international law, to customary international law as derived from the articulation of that custom in numerous treaties, and to its explicit encapsulation in the aforementioned Art. 31(1) of the Vienna Convention on the Law of Treaties. Significantly, with respect to a member State’s specific obligations to the → United Nations, Art. 2(2) of the → United Nations Charter explicitly provides that those obligations shall be fulfilled in good faith.

3. Relation to Abuse of Rights

Good faith may be said to cover the somewhat narrower doctrine of → “abuse of rights”, which holds that a State may not exercise its international rights for the sole purpose of causing injury, nor fictitiously to mask an illegal act or to evade an obligation. While these specifications would indeed appear to follow from the principle of good faith, perhaps the better view is that there is no need for an independent, even if subsidiary, concept of abuse of rights. For if a State in the exercise of its rights were to cause injury to the entitlements of another State, then, upon analysis, the first State has not in fact exercised a “right” under international law. Rather, it has violated a rule of international law that obliged it not to cause a legally cognizable injury to another State.

4. Application

The → International Court of Justice, in two important recent cases, had occasion to consider the substantive impact of the principle of good faith. In the → North Sea Continental Shelf Case, the Court based its judgment on the general precepts of justice and good faith. However, good faith in those cases required the application of traditional claims to title over territory, and thus
INTERNATIONAL AIR LAW

RES IPSA LOQUITUR IN AVIATION

John Fenston

What are the legal consequences when an aircraft either crashes in mountainous or desolate country and there are no survivors, or vanishes while flying over the high seas without any trace?

In the common law countries, when the dependents of the victims endeavour to obtain damages from the carrier for the negligence of their servants, they must, under the existing jurisprudence, prove fault. How can the plaintiff, in the instant cases, prove anything beyond the bare fact of the death of the de cujus due to the crash of the aircraft, or the total disappearance of the plane?

In such cases, it is generally contended that the doctrine of *Res Ipsa Loquitur* applies; the facts speak for themselves. It is no longer necessary for the plaintiff to prove fault, but it becomes incumbent on the carrier of the aircraft to exculpate himself of any fault. It is asserted that under the doctrine of *Res Ipsa Loquitur* the burden of proof is shifted, and is therefore attributed to the carrier.

*Res Ipsa Loquitur* is not a novel institution in the law of negligence and, like many another theory, saw daylight in the English common law almost 150 years ago. The doctrine has been transplanted into every Commonwealth county where the English common law prevails and into the United States of America.

In a recent case, decided by the Supreme Court of Canada, the majority laid down the proposition that this doctrine applied to actions of negligence in the Province of Quebec, under the Civil Code. Without entering into an extended elaboration of the reasons for judgment, the writer's impression is that this case does not establish jurisprudence for the Province of Quebec.

It should be stated at the outset, that the courts apply this doctrine to actions based on negligence resulting from flights which have a national

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†To a very large extent, the present article has been drawn from the dissertation which the writer presented to the Faculty of Graduate Studies and Research of McGill University, in candidacy for his degree of Master of Laws.

*LL.B. (Sask.); L.L.M. (McGill); Graduate, Institute of International Air Law, McGill University; President, Institute of International Air Law Association; member of the Bars of Saskatchewan and Quebec.

character, as well as to actions resulting from flights which have an international character, but which latter actions have not been regulated by, or do not form the subject of specific legislation passed by International Conventions.

Actions which are based on negligence, as a result of international flight, specifically described and defined as such in International Conventions, are regulated and governed exclusively by the provisions of such International Conventions.

Whether we designate *Res Ipsa Loquitur* as a doctrine, principle, maxim, theory or axiom, whether it pertains to substantive or adjectival law, the fact remains that it grew up in a manner similar to the whole of the common law of England.

It may not be without interest to briefly describe the growth of the common law, as referred to in an address delivered on October 24, 1937, by Lord Wright at the University of London Law Society, under the heading “The Study of Law”.

The doctrine of *stare decisis*, says the learned Judge, “is contrasted with systems based on the Civil Law in which governing a priori principles have been expounded by commentators and institutional writers, cited in the courts as authorities from which particular application can be deduced by logic”. In English law “principles follow from concrete decisions, in place of decisions following from principles.”

“Indeed in one sense the scientific study of existing English law is impossible. Its growth has been determined in part by logic, it is true, but in part also by convenience, in part by artificial or procedural requirements, in part by the pressure of social ideas and conditions which have now ceased to exist, in part by pure accident, in part by the survival of primitive habits of mind.”

“... There is still the difference between knowing them (cases) in a literal and mechanical fashion, and knowing them both synthetically and critically. In the latter case they are seen in the light of principles and not as dead precedents.

“... Indeed there is often a danger in taking the statement of a rule by a judge as absolute and unqualified whereas he only made the statement in view of the facts and questions he was considering. What he said, correct enough in the context, becomes misleading when torn from the context and applied to alien situations.”

“... its (the English law) character is essentially empirical. It has grown through the centuries. It can only be understood by reference to history:

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254 L.Q.R. 185.
3ibid. 186.
4ibid. 187.
5ibid. 190.
(→ Sea-Bed and Subsoil) subjacent to the territorial sea of Abu Dhabi?

(2) Did the concession area also include the subsoil of any, and if so, what submarine area lying outside territorial waters?

The umpire rendered his decision in September 1951. Before addressing these substantive issues, he had first to rule on the law to be applied in construing the contract; the parties had set forth in the agreement that its interpretation (→ Interpretation in International Law) was to follow “a fashion consistent with reason”. The umpire found that this clause ruled out the applicability of any body of municipal law; in particular, he rejected the prima facie assumption of the applicability of the law of Abu Dhabi on the ground that no legal principles could be found in this legal system which were applicable to modern commercial instruments. Due to the absence of an applicable municipal order, the umpire interpreted the contract in the light of “principles rooted in the good sense and common practice of the generality of civilised nations—a sort of ‘modern law of nature’”. A part of these principles is, according to the umpire, the rule of English common law which attributes paramount importance to the actual language used in the written document for its interpretation. Whereas the principle expressio unius est exclusio alterius was placed on the level of universal validity in the judgment, the umpire did not accord the same to the notion verba chartarum fortius accipitur contra preferentem.

With respect to the substantive issues, the umpire held on the first question that the sea-bed subjacent to the territorial waters of Abu Dhabi was part of the concession area because at the time of the concluding of the contract it belonged to the Sheikh and was also covered by the wording of Art. 2 of the Agreement.

In answer to the second question, the umpire held that the submarine area outside the territorial zone of Abu Dhabi was not covered by the Agreement (→ Maritime Boundaries, Delimitation). The umpire based his reasoning on the fact that the concept of the → “continental shelf” had no accepted meaning either at the time of the drafting of the contract in 1939 nor at the time of the rendering of the award. The major part of the judgment examined this latter issue of the state of → customary international law with regard to the continental shelf in 1951; the origins of the legal theories on the continental shelf, State practice and the work of the → International Law Commission up to 1951 were also carefully reviewed. No decisive weight was placed in the binding judgment upon the fact that Abu Dhabi itself had issued a unilateral proclamation in 1949 by which she claimed exclusive → jurisdiction and control of parts of the sea-bed beyond the territorial waters (→ Continental Shelf, Delimitation; → Territorial Sovereignty): this proclamation did not constitute an “agreement” within the meaning of Art. 2 of the Agreement, nor did it concern “land” as specified in that provision.


J.Y. BRINTON, Territorial Sea and the Continental Shelf, Revue égyptienne de droit international, Vol. 8 (1952) 103–128, at pp. 114–121.
R. YOUNG, Lord Asquith and the Continental Shelf, AJIL, Vol. 46 (1952) 512–515.

RUDOLF DOLZER

ABUSE OF RIGHTS

1. Notion

(a) General concept

In international law, abuse of rights refers to a → State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State (see also → Internationally Wrongful Acts).

The concept of abuse of rights implies the negation of a rigid conception of international law, and of law in general, summarized by the maxim neminem laedit qui suo iure utitur, meaning that nobody harms another when he exercises his own
rights. *Summum jus*, the maximum of law, may thus become *summa injuria*, a maximum of injustice. The principle of Roman law, *sic utere tuo ut alienum non laedas*, prescribing the exercise of individual rights in such a way that others would suffer no injury, is therefore the very fundament of the concept of abuse of rights. A clear violation of an existing specific obligation cannot constitute an abuse of right, since in such a case the State which acted had no right at all. There should thus be no confusion between abuse of rights and situations where a State acts *ultra vires*, since in the latter case it has exceeded the limits of its rights, i.e. it has no right at all.

The concept also implies a distinction between the existence of an individual right and the exercise of such a right. Some authors consider such a distinction artificial. In reality, the distinction seems to be generally adopted in practice not only in international law, but also in municipal law systems, and in civil as well as in administrative law. The distinction is illustrated by control exercised on the way individuals or authorities make use of their rights or competences, such as property rights or decisions of administrative organs.

(b) Specific situations

A closer inquiry shows that the concept of abuse of rights may arise in three distinct legal situations. In the first case, a State exercises its rights in such a way that another State is hindered in the enjoyment of its own rights and, as a consequence, suffers injury. Such a situation can result, for example, from the inconsiderate use of a shared natural resource, such as an international watercourse or a migratory species or the radio-electronic spectrum. Here, the States sharing the same resource suffer a reduction in their enjoyment of the resource to which they are entitled. In reality, however, the existing rights and the legitimate interests of the States concerned have to be balanced in such cases. It can be considered that an abuse of rights exists only when the injury suffered by the aggrieved States exceeds the benefit resulting for another State from the enjoyment of its own right.

In the second case, a right is exercised intentionally for an end which is different from that for which the right has been created, with the result that injury is caused. This is the concept of *détourneren de pouvoir*, well known in administrative practice within States. It has been identified in general inter-State practice, and it plays a growing role inside international organizations, since the competences conferred upon member States or the organs of the institutions themselves may be exercised in a way very different from that originally intended.

In the third case, the arbitrary exercise of its rights by a State, causing injury to other States but without clearly violating their rights, can also amount to an abuse of rights. In contrast to the preceding situation, bad faith or an intention to cause harm are not necessary to constitute this form. Broader objectives concerning the social function of the right which has been exercised are at stake here, for example in the case of the unjustified if not illegal measures imposed upon → aliens, including arbitrary expulsion (→ Aliens, Expulsion and Deportation) or → expropriation.

2. Prohibition of Abuse of Rights

On the whole, it may be considered that international law prohibits the abuse of rights. However, such prohibition does not seem to be unanimously accepted in general international law, while it is not contested in the law of international institutions. Hence the two aspects have to be examined separately.

(a) General international law

As far as international law doctrine is concerned, many publicists, including practically all the earlier ones, do not even mention prohibition of the abuse of rights. The principle prohibiting abuse of rights seems to have been formulated for the first time at an inter-State level by the Committee of Jurists preparing the Draft Statute of the → Permanent Court of International Justice (PCIJ) in 1920. In their attempt to define the → general principles of law which would form the legal basis for the Court’s decisions, that Committee referred to the prohibition of abuse of rights as an example, together with the principle of *res judicata*.

Following this reasoning, several writers have reviewed different municipal law systems in order to find out whether such a prohibition could be considered as general, i.e. whether it was to be considered as relevant to Art. 38(1) of the Statute of the PCIJ. This wording (which is the same as
that of Art. 38(1) (c) of the Statute of the → International Court of Justice) lists among the sources of international law the "general principles of law recognized by civilized nations". Most of these authors came to the conclusion that in civil law countries, whether European or not, as well as in socialist countries, the abuse of rights was, along with détournement de pouvoir, prohibited. As far as common law countries are concerned it was submitted that, although a decision in a given case may be based upon principles of the law of torts, when a court looks into the motives of an actor the legal theory applicable is indistinguishable from that of abuse of rights. This, it was held, supports the contention that the theory is accepted in the private law of common law countries. In addition, the existence of controls over the discretionary powers of public authorities should be taken into account, though there are many variants on the means or methods of such controls. Some authors have concluded, therefore, that since the concept of abuse of rights is known in many countries it may be said to be a general principle of law.

However, even among writers who accept the principle of the prohibition of the abuse of rights, there is no agreement on the analysis of its significance and theoretical basis. This divergence of opinion results at least partly from the different forms in which the exercise of an existing right can cause injury to another State, amounting to a summa injuria. Some distinguished authors question the importance of the principle in international relations, or object to its lack of precision for practical use. Others consider it to be lacking in value as an independent rule, asserting that it consists essentially of an application of other uncontested concepts such as → good faith, reasonableness, good neighbourliness or even equity (→ Equity in International Law).

In inter-State practice, abuse of rights has often been alleged by governments. Diplomatic discussions and opinions of legal advisors in various ministries of foreign affairs show that the prohibition of the abuse of rights has been used not only as an argument against other States, but also to impose upon the State concerned the duty to avoid acts which would amount to a violation of this principle. The most complete collection of arguments based on this principle can be found in memorials submitted to international tribunals as well as in oral statements made before such tribunals. Abuse of rights was expressly made the basis of a claim before the ICJ in the → Barcelona Traction Case (ICJ Reports (1970) p. 3, at p. 17). It has also been submitted that the British claim against Belgium in the → Chinn Case was essentially an allegation of abuse of right (PCIJ, Series A/B, No. 63, at p. 70).

However, no international judicial decision or arbitral award has so far been explicitly founded on the prohibition of abuse of rights. The principle has been mentioned in several cases as a possible basis for a condemnation for violation of international law, but without having been actually used for that purpose. In one of the → German Interests in Polish Upper Silesia cases, the PCIJ concluded that a misuse had not taken place (PCIJ, Series A, No. 7, at pp. 30 and 37 to 38). In the → Free Zones of Upper Savoy and Gex Case the Court stressed that a reservation had to be made regarding the case of abuses of rights, but it added that an abuse could not be presumed by the Court (PCIJ, Series A/B, No. 46, at p. 167).

On the other hand, a series of decisions and awards can be mentioned where the court or arbitral tribunal examined the way in which a State exercised a right, the existence of which was not contested. Authors refer in this regard in particular to the → United States Nationals in Morocco Case (ICJ Reports (1952) p. 176, at p. 212) in the practice of the ICJ as well as to arbitral awards in the → Trail Smelter Arbitration, the → Delagoa Bay Railway Arbitration, the → El Triunfo Case and to some of the Venezuelan arbitrations (reported in RIAA, Vols. 9 and 10; → Preferential Claims against Venezuela Arbitration). Dissenting opinions of judges at the PCIJ and at the ICJ have also frequently adverted to the principle, but some of them expressed hesitation before applying it, without ever rejecting outright its place in international law.

The provisions of certain → treaties enunciate the principle prohibiting the abuse of rights in inter-State relations, even outside the area of international institutions. States sharing a river or a lake have often entered into bilateral and multilateral conventions for the purpose of utilizing to mutual advantage the natural resource represented by such surface waters. In a sense, treaty clauses providing for the application and implementation of the measures agreed in good faith may be considered as involving the prohibition of any abuse of the rights which those treaties confer upon the contracting parties. In this
connection, it should be noted that Art. 26 of the Vienna Convention on the Law of Treaties declares that every treaty in force must be performed in good faith by the parties.

However, more specific prohibitions have also been provided for. One may consider as such the obligation not to defeat the object and purpose of a treaty prior to its entry into force, set out in Art. 18 of the Vienna Convention on the Law of Treaties. It may also be recalled that Art. 1 of the 1985 Convention on the High Seas adds to the definition of the various aspects of freedom of the high seas that these freedoms, and others which are recognized by the general principles of international law, are to be exercised by all States with reasonable regard to the interests of other States. The most explicit recognition of the prohibition of any abuse of rights is to be found in the Convention adopted in 1982 by the Third United Nations Conference on the Law of the Sea (Conferences on the Law of the Sea) in Art. 300:

"States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdictions and freedoms recognized in this Convention in a manner which would not constitute an abuse of right" (UN Doc. A/CONF. 62/122).

Inter-State practice and international judicial proceedings show that the main fields where abuse of rights have been alleged are the law of the sea, international rivers and lakes, transfrontier pollution, international trade, nationality, the non-application of certain foreign legislative provisions and the treatment of aliens in general, but in particular alien property rights and expulsion.

(b) International institutions

Within international institutions, competences and discretions are granted to the member States and to specified organs. The abuse of rights is a danger to be avoided. A general tendency is therefore found to prohibit such abuse in two of its principal forms: arbitrary use of rights and détournement de pouvoir. Here again, it may be recalled that the general obligation to fulfill in good faith the rights and obligations resulting from membership or from institutional competences is the overall basis for the prohibition of the abuse of rights (see United Nations Charter, Art. 2(2)).

The prohibition of abuse of rights was emphasized, as far as the rights of member States of the United Nations are concerned, in dissenting opinions by five judges in the Advisory Opinion on the Admission of a State to Membership (ICJ Reports (1947–1948) p. 57, at pp. 91–92 and (1950) p. 1, at pp. 15 and 20) and in the South West Africa Cases (Second Phase) by Judge Forster (ICJ Reports (1966) p. 6, at pp. 480–481).

The 151 Treaty instituting the European Coal and Steel Community (ECSC) (Art. 10) explicitly authorized the Court of Justice of the European Communities (CJEC) to declare null and void abusive vetos by member States in the designation of the members of the High Authority.

In other institutional frameworks, prohibitions are found of certain abuses of rights which can be enjoyed by other than member States. Art. 86 of the Treaty instituting the European Economic Community (EEC) prohibits any States' abuse of dominant position within the Common Market. Art. 27 of the European Convention on Human Rights states that the European Commission of Human Rights must consider inadmissible any petition submitted by individuals or groups of individuals which it considers an abuse of the right of petition.

The principle prohibiting the abuse of rights within international organizations is quite frequently applied in order to control the exercise of powers by international organs. Art. 33 of the Treaty instituting the ECSC provides for jurisdiction of the CJEC over appeals by a member State or by the Council for the annulment of decisions and recommendations of the High Authority, on the grounds of abuse of power. The same principle appears in Art. 173 of the EEC Treaty and in Art. 146 of the Treaty establishing the European Atomic Energy Community.

In reality, most cases where international organs are found to have abused their rights concern the exercise of their competences and discretions in relation to members of their staff. In a number of decisions of the United Nations Administrative Tribunal, of the International Labour Organization Administrative Tribunal and of the CJEC, it has been held that the prejudice suffered by the plaintiffs resulted from détournement de pouvoir.

3. Implementation of the Prohibition

It seems that the fact of injury resulting from an abuse of rights is a fundamental element in the implementation of that principle. The arbitrators
in the Trail Smelter arbitration stressed that the abuse should be "of serious consequence" and the injury "established by clear and convincing evidence" (RIAA, Vol. 3, p. 1907, at p. 1965). When an injury is alleged, an international body or States, through diplomatic inquiry, may examine the circumstances in which the relevant rights have been exercised. Such a procedure of verification appears in several cases submitted to the ICJ, including the → Nottebohm Case (ICJ Reports (1955) p. 4, at pp. 21–24) and the United States Nationals in Morocco Case (ICJ Reports (1952) p. 176, at p. 212).

Abuse of rights provides a ground for international responsibility (→ Responsibility of States: General Principles: → International Organizations, Responsibility). There can be no defence that a State or an international organization which has exceeded its powers could not have committed an illegal act, having simply exercised its proper rights, once it is admitted that a general principle exists in international law prohibiting abuse of rights, a principle which is thus superior to specific rules recognizing individual rights. Of course, the second condition of international responsibility, namely, conduct attributable to the State concerned, has also to be fulfilled. It does not seem, however, that intention to harm other States is required: an injurious or arbitrary use of rights, competences or discretions can be considered sufficient in this regard.

The problem of the proof of the existence of an abuse of rights is a fundamental one. In both cases where the PCIJ referred to the possibility of an abuse of rights, it was stressed that such an abuse cannot be presumed by the Court (German Interests Case, PCIJ, Series A, No. 7, at p. 30 and Free Zones Case, PCIJ, Series A/B, No. 46, at p. 167). In the German Interests Case, the Court added that the burden of proof rested with the party alleging an abuse of rights. When arbitrary use of powers or a détournement de pouvoir is alleged, proof should also be brought that the right has been used in disregard of the purpose for which it was originally intended.

4. Conclusion

The idea that a subject of rights and competences (→ Subjects of International Law) can misuse them seems to be inherent to legal thinking and to have roots in all legal systems. The idea leads to the establishment of controls on the use of recognized rights. However, the prohibition of abuse of rights in international law is problematic because of differences in the content of the concept itself: it may include, indeed, a conflict of sovereign rights, an arbitrary exercise of competences or discretions or a détournement de pouvoir. Nevertheless these last two forms seem to play a growing role within the framework of the law of international institutions.

The evolutive role of the concept of prohibition of abuse of rights has been stressed by several authors. Conflicts where an abuse of rights is alleged or is likely to exist can lead the States involved to adopt specific rules which are designed to solve the problem for the future. At a general level, the concern to avoid such conflicts can result in the long term in the emergence of new customary rules, for example, in the case of the development of international law concerning transfrontier pollution (see also → Customary International Law).

N. Politi, Le problème des limitatious de la souveraineté et la théorie de l’abus des droits dans les rapports internationaux, RCL, Vol. 6 (1925) 1–121.
A.C. Kiss, L’abus de droit en droit international (1953).

[1984]

Alexandre Kiss

Académie de droit international

The Académie de Droit International de La Haye (Hague Academy of International Law), founded on the initiative of the → Carnegie Endowment for International Peace and the → Institut de Droit International, was inaugurated on July 14, 1923. The initial capital was donated before World War I by T.M.C. Asser, the 1911 Nobel Peace Prize Laureate, and A.E.H. Gockoop, owner of the property adjacent to the

BERNARD H. OXMAN

I. INTRODUCTION

The law regarding the sea, including what we would today characterize as the municipal law of admiralty, is as old as humanity’s use of the sea. Since time immemorial, political entities have had to define the relationship between their authority and activities at sea, and judges have had to deal with disputes arising from such activities. But for those who trace the origins of modern international law to the writings of Hugo Grotius, his essay Mare Liberum establishes the law of the sea as one of the “original” fields of international law. It has been the object of systematic and continuous attention by governments and publicists ever since.

There are ancient foundations for human rights law, both international and municipal. The natural law environment in which Grotius worked was itself more hospitable to the idea of governmental obligations to individuals than the state-centered positivism that succeeded it. But for those who regard as seminal events the French Declaration of the Rights of Man and the American Bill of Rights, even municipal human rights law is “younger” than the modern law of the sea, and international human rights law younger still.

One of the ways to recognize distinct fields of law is to look for distinct guilds of lawyers. With the disappearance of formal guilds to guide us, this becomes a matter of perspective. Viewed from afar, all lawyers constitute a single guild. Many lawyers would regard “international law” as a single guild. Viewed up close, international lawyers concerned with protecting individual rights to private property may be perceived, and may perceive themselves, as functioning in a different guild from international lawyers concerned with protecting individual rights of expression.

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The approach to selecting the potential objects of human rights law is therefore very broad, probably broader than many experts believe reflects the actual, or even appropriate, state of human rights law. Readers may select from the menu as they wish, and will find the more traditional fare as well as information of what Louis Henkin has aptly termed the "commonage."

II. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The United Nations Convention on the Law of the Sea is not ordinarily considered a human rights instrument. With few exceptions, its role in advancing human rights is not obvious or direct. But neither is it negligible. That role merits consideration because of three characteristics of the Convention:

It is a global convention that applies to all activities regarding a vast area of the planet. Its scope ratione loci and ratione materiae rivals that of all but the most comprehensive of global human rights conventions.

A large and increasing majority of states is party to the Convention. From the perspective of ratification, it rivals the most successful global human rights conventions.

Its parties accept binding arbitration or adjudication of most disputes arising under the Convention. In this respect, it represents a potential advance on many existing human rights instruments, both global and regional.

From the perspective of those interested in human rights, the law of the sea may seem to be primarily about natural resources and the environment. Although there is much in the law of the sea that merits analysis from that perspective, the Convention also addresses traditional

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3. Except in specific instances, the Convention does not however confer mandatory jurisdiction over actions brought by private persons.

4. Thus, for example, while non-governmental organizations interested in economic development and environmental protection were active during the negotiation of the Convention at the Third United Nations Conference on Law of the Sea, human rights organizations concerned with traditional individual liberties and procedural due process generally were not.
human rights preoccupations with the rule of law, individual liberties and procedural due process.

III. THE RULE OF LAW

It is generally, although perhaps not universally, recognized that the existence of the rule of law is an indispensable condition for the protection of human rights. This is no less true of economic and social rights than it is of civil and political rights. Although international law ordinarily plays only a background role in the establishment of the rule of law for most individuals, that role is of particular importance at sea. This is because of the transitory nature and geographic reach of many activities at sea, and the complex jurisdictional structure this entails. Much like conflict on land, disputes between states regarding their respective rights to use and to control the sea can affect individuals caught in the dispute, and too often have affected individual rights adversely.

In its most general sense, the Convention promotes the rule of law at sea by allocating authority to govern and by imposing qualifications on that authority in different situations. It articulates the relevant rights and duties of states in precise written form, converts those written articulations into binding treaty obligations expressly accepted by governments pursuant to their constitutional procedures, and subjects most of those articulations to binding arbitration or adjudication. It thus provides an international legal order whose existence is itself necessary for the maintenance of order under municipal law.

Effective governance is an essential precondition for, although not by itself a guarantee of, the rule of law. The Convention is less sanguine than some other treaties about the assumption that the right to govern ensures the fulfillment of the duty to govern and to do so effectively. In addition to its basic preoccupation with the duties of states to ensure that their nationals and vessels respect the interests of others, the Convention also seeks to provide for effective governance at sea. Extensive duties of governance are elaborated with respect to the flag states of ships, particularly with regard to labor conditions, safety and pollution.5 Similarly, international elaboration of the duty of the

5. See Convention, supra note 2, arts. 58(2), 94, 211(2), 217. While the pollution enforcement obligations apply “irrespective of where a violation occurs,” the obligations under article 94 do not apply as such in waters landward of the exclusive economic zones. This is unlikely to pose significant legal problems. Many of the obligations under article 94 are
Routledge Handbook of Maritime Regulation and Enforcement

Edited by Robin Warner and Stuart Kaye
Port state control vs port state enforcement

As Kasoulides points out, implementation of international conventions through port state control ‘does not imply an extension of the port state’s enforcement authority over violations in the high seas or in foreign coastal waters’ but only control over the various aspects covered in the conventions such as ships and their equipment, discharge at sea, crew competence and working conditions. ‘The rectification of these conditions,’ he says, ‘is well within the jurisdiction of the port state’ since it relates to matters occurring while a vessel is ‘present’ in the port state’s waters.¹⁰ In other words, the port state is only enforcing domestic legislation which just happens to incorporate internationally agreed standards in respect of breaches of that legislation committed by non-nationals that have occurred within its territory.

Port state enforcement, however, refers to the power of the port state not only to police and control but also to exercise judicial or administrative jurisdiction to prosecute and punish non-compliance by foreign-flagged vessels.¹⁰ While historically the port state, has enjoyed enforcement powers in respect of violations occurring within its waters, no right of sanction has applied in respect of activities that took place on the high seas or within the maritime zones of other states before a vessel entered a port state’s waters. However, with the adoption of the LOSC, international law specifically recognized a right of port state enforcement in respect of vessel source pollution occurring on the high seas and in the maritime zones of other states.

The provision for port state enforcement in respect of high seas activities is found in Article 218 of the LOSC which provides that where a vessel is voluntarily in a port the port state may not only investigate but may also institute proceedings in respect of any discharge from that vessel which has occurred outside the area of waters under the port state’s jurisdiction in violation of applicable international rules and standards. In other words, the port state is exercising extra-territorial universal jurisdiction to enforce internationally agreed standards in respect of breaches of international standards committed by foreign-flagged vessels that occurred outside its territory. The rationale for port state enforcement in this context rests on the acceptance that environmental degradation is contrary to the interests – both political and economic – of all states. Admittedly primary competence for environmental protection has been given to coastal states through the medium of the EEZ. Nevertheless, as Article 218 makes clear, states also recognize the need for regulation of activities on the high seas and within the waters of other states in order to make this protection wholly effective. Where such regulation cannot or will not be effected by flag states, port states may intervene. The collective effect of this is to create a new legal basis for port state enforcement in response to what was, and remains, a pressing problem.¹⁰ Although it should be noted that the right remains subject to the right of flag state pre-emption provided for in Article 228.

Regarded as a radical development when the LOSC was adopted, whether port state enforcement could be extended to situations involving the violation of conservation and management measures adopted by regional fisheries management organizations (RFMOs) in respect of high seas fisheries was one of the most contentious issues during the FSA negotiations.¹¹ The Revised Negotiating Text prepared by the Chairman of the negotiations at the third session would have allowed port state detention pending flag state action.¹² In the end, however, the FSA very specifically avoided use of the term ‘port state enforcement’ or reference to the power of the port state to detain or prosecute the vessel.¹³ The best that could be achieved was Article 23 which, as noted above, confirms both the right and the duty of port states to ‘take measures in accordance with international law, to promote the effectiveness of subregional, regional and global
EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE

ANNA RIDDELL AND BRENDAH PLANT

British Institute of International and Comparative Law
only would parties be hindered in their attempts to prepare their pleadings but they may also be prompted to draft more expansive pleadings than the dispute properly requires, or even to request additional rounds of pleadings, which would produce the undesirable consequence of increasing the workload of the Court and undermining its ability to deliver a just result swiftly.

2. A general duty of disclosure?

While the Statute of the ICJ lacks any explicit statement of an obligation incumbent upon the parties to produce evidence, its general provisions and the regulations embodied in the Rules certainly contemplate a full disclosure by the parties of evidence in their control. As Judge Lauterpacht said in his Separate Opinion in the case concerning Application of the Convention of 1902 Governing the Guardianship of Infants:

A State invoking an exception [from the normal application of the Convention] cannot be too forthcoming in producing evidence in justification of it. It ought not to limit itself to vague—and, from the point of view of ordinary rules of evidence, probably inadmissible—allusions as to the possible contents of the evidence which, by its own decision, it has failed to produce.5

Aguilar Mawdsley and Laliv both argue that the parties to ICJ proceedings not only have the right to provide the evidence necessary to support their claims but are also under a duty to do so. Furthermore, they maintain that parties have the duty to furnish the Court with all the evidence it requires to consider each of the matters of fact and law involved in the dispute.6 According to these writers, this obligation stems from an implicit but fundamental requirement of cooperation which underpins the Court's evidentiary system. On this view, when a State becomes a party to the Statute of the ICJ, it necessarily accepts the obligation to produce before the Court all evidence available to it in any case it contests.

However, the Court lacks the means to enforce such an obligation, since it possesses no power to compel the production of evidence by the parties. As discussed below in section 3.2.B, the Court is only capable of requesting the parties to produce additional evidence, and is unable to penalize the parties in any way if they fail or refuse to produce the requested evidence.7

5 Application of the Convention of 1902 Governing the Guardianship of Infants 100 (Sep Op Judge Lauterpacht).
6 Mawdsley 539; Laliv 83.
7 See section 6.3-II for a discussion of the circumstances in which the Court may draw inferences from a party's non-production of evidence.
Human Rights and the Law of the Sea

Tullio Treves
vene the Convention. The Court stated two main reasons for this decision. The first is the fact that the guarantee, after 83 days of detention, had been paid by insurer of the ship owner “by virtue of the contractual legal relationship which existed between the ship’s owners and their insurers.”

The second reason, more relevant to the present Article, has to do with the international concern for marine pollution. The court relies on a variety of domestic and international law, including the LOS Convention, and concludes that it cannot overlook the growing and legitimate concern both in Europe and internationally about offences against the environment. It notes in that connection States’ powers and obligations regarding the prevention of marine pollution and the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and impose sanctions on them.

Values emerging in the Law of the Sea generally are assessed by the EHCR to determine whether they should be balanced against values set out in the European Convention.

IV.
CONCLUSIONS

The Law of the Sea and the law of human rights are not separate planets rotating in different orbits. Instead, they meet in many situations. Rules of the Law of the Sea are sometimes inspired by human rights considerations and may or must be interpreted in light of such considerations. The application of rules on human rights may require the consideration of rules of the Law of the Sea.

When cases involving these overlaps are subject to judicial assessment, the nature and task of the adjudicating body may be decisive. Each adjudicating body has its own perspective, which may bring it to read the same rules differently. This is not, in my view, fragmentation of international law. It is recognition of the complexity of the law and a consequence of the fact that a growing number of specialized courts and tribunals exist for settling disputes arising within this complex regime.

However, questions in which the Law of the Sea and the law of human rights overlap are not always brought to a specialized Law of the Sea or human rights court or tribunal. Cases may be brought to the International Court of Justice under general jurisdictional clauses, which exempt the Court from having to adopt the point of view of the specific instrument under which the case is submitted to it. In these cases the ICJ should reconcile the two sets of principles, or state a justifiable preference for one or the other. Legal advisers of the States

54. Id. at ¶ 41.
Philipp Wendel

State Responsibility for Interferences with the Freedom of Navigation in Public International Law

Springer
Chapter I: The perpetual conflict between freedom and security in the Law of the Sea

Research in the existent public international law cannot and must not be isolated from factual matters and policy concerns. In fact, it is very likely that respect of public international law will increase if international lawyers are well aware of these factual matters while applying international law. Furthermore, public international law seems to be more flexible than other legal systems because custom plays a great role as one of its sources and because the analysis of State practice constitutes a major part of the interpretation of treaties.

This thesis will therefore start by confronting the two overriding concerns involved in any interference on the seas. First, the freedom of navigation and its importance for the modern, world-wide economy will be presented. Secondly, this thesis will analyze all major security concerns and outline in how far interferences with navigation on the high seas would be able to alleviate these concerns. As one can presume, the management of these contradicting goals cannot be “sink or swim”, but instead a reasonable balance between them should be the goal. Therefore, in a third part, potential legal limits to abusive interferences including an efficient liability\(^1\) regime will be presented.

A. The freedom of navigation – cornerstone of the Law of the Sea

The freedom of navigation represents the overriding principle of the Law of the Sea and has traditionally been one of the most important principles in the law of the sea and in public international law in general. Its content can be described in two parts. First, the freedom of navigation includes the right to enter upon the oceans and to pass them unhindered by efforts of other states or entities to prohibit that use or to subject it to regulations unsupported by a general consensus among

\(^1\) The terms liability and responsibility, generally and for the sake of this study, have the same meaning, the former rather used in domestic legal systems, the latter for the regime of State responsibility under public international law, cf. Amersinghe, Chitharansan F., “The Essence of the Structure of International Responsibility”, in Ragazzi, Maurizio (ed.), “International Responsibility Today – Essays in Memory of Oscar Schachter” (Leiden: Nijhoff, 2005), pp. 3 et seq., at 4.
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

THE "CAMOUCO" CASE
(PANAMA v. FRANCE)
List of cases: No. 5

PROMPT RELEASE

JUDGMENT OF 7 FEBRUARY 2000

2000

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU « CAMOUCO »
(PANAMA c. FRANCE)
Rôle des affaires : No. 5

PROMPTE MAINLEVÉE

ARRÊT DU 7 FÉVRIER 2000
of the Convention on exhaustion of local remedies, while observing at the same time that "strict compliance with the rule of the exhaustion of local remedies, set out in article 295 of the Convention, is not considered a necessary prerequisite of the institution of proceedings under article 292".

56. The Applicant rejects the argument of the Respondent and maintains that its taking recourse to local courts in no way prejudices its right to invoke the jurisdiction of the Tribunal under article 292 of the Convention.

57. In the view of the Tribunal, it is not logical to read the requirement of exhaustion of local remedies or any other analogous rule into article 292. Article 292 of the Convention is designed to free a ship and its crew from prolonged detention on account of the imposition of unreasonable bonds in municipal jurisdictions, or the failure of local law to provide for release on posting of a reasonable bond, inflicting thereby avoidable loss on a ship owner or other persons affected by such detention. Equally, it safeguards the interests of the coastal State by providing for release only upon the posting of a reasonable bond or other financial security determined by a court or tribunal referred to in article 292, without prejudice to the merits of the case in the domestic forum against the vessel, its owner or its crew.

58. Article 292 provides for an independent remedy and not an appeal against a decision of a national court. No limitation should be read into article 292 that would have the effect of defeating its very object and purpose. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period.

59. At this stage, the Tribunal wishes to deal with the submissions of the Applicant requesting it to declare that the Respondent has violated article 73, paragraphs 3 and 4, of the Convention. The scope of the jurisdiction of the Tribunal in proceedings under article 292 of the Convention encompasses only cases in which "it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security". As paragraphs 3 and 4, unlike paragraph 2, of article 73 are not such provisions, the submissions concerning their alleged violation are not admissible. It may, however, be noted, in passing, that there is a connection between paragraphs 2 and 4 of article 73, since absence of prompt
CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA
(NICARAGUA v. UNITED STATES OF AMERICA)

JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION

JUDGMENT OF 26 NOVEMBER 1984

1984

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI
(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

COMPÉTENCE DE LA COUR ET RECEVABILITÉ DE LA REQUÊTE

ARRÊT DU 26 NOVEMBRE 1984
cannot adjudicate the merits of the complaints alleged does not require the conclusion that international law is neither directly relevant nor of fundamental importance in the settlement of international disputes, but merely that in this respect the application of international legal principles is the responsibility of other organs set up under the Charter.

100. Nicaragua contends that, inasmuch as the United States questions whether the Court would have at its disposal vital evidence necessary to resolve the dispute, the problem is not so much the nature of the dispute as the willingness of the Respondent fully to inform the Court about the activities of which it is accused. Nicaragua also points to the Corfu Channel case as showing, as the Court has noted above (paragraph 96), that the Court does exercise its judicial functions in situations of armed conflict. The Court will decide in the light of the evidence produced by the Parties, and enjoys considerable powers in the obtaining of evidence. Nicaragua disputes that the judicial function, being governed by the principle of res judicata, is “inherently retrospective”, and therefore inapplicable to a fluid situation. Nicaragua concedes that a judgment delivered by the Court must be capable of execution, but points out that such a judgment does not by itself resolve — and is not intended to resolve — all the difficulties between the parties. The Court is not being asked to bring an armed conflict to an end by nothing more than the power of words.

101. The Court is bound to observe that any judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law. A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for this (Corfu Channel, I.C.J. Reports 1949, p. 18; United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 10, para. 13). Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible in limine on the basis of an anticipated lack of proof. As to the possibility of implementation of the judgment, the Court will have to assess this question also on the basis of each specific submission, and in the light of the facts as then established; it cannot at this stage rule out a priori any judicial contribution to the settlement of the dispute by declaring the Application inadmissible. It should be observed however that the Court “neither can nor should contemplate the contingency of the judgment not being complied with” (Factory at Chorzów, P.C.I.J., Series A, No. 17, p. 63). Both the Parties have undertaken to comply with the decisions of the Court, under Article 94 of the Charter; and

“Once the Court has found that a State has entered into a com-
Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the North Sea Continental Shelf cases:

“[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it” (I.C.J. Reports 1969, p. 47, para. 85).

142. What is required in the present case by the rule pacta sunt servanda, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that “Every treaty in force is binding upon the parties to it and
must be performed by them in good faith.” This latter element, in the Court’s view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith oblige the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared.

Since the Court has found that the Treaty is still in force and that, under its terms, the joint régime is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agencies of that contracting party in the jointly prescribed manner.

The Court is of the opinion that the works at Čunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Čunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a de facto status into a treaty-based régime.

It appears from various parts of the record that, given the current state
COUR PERMANENTE DE JUSTICE INTERNATIONALE

SÉRIE A/B
ARRÊTS, ORDONNANCES ET AVIS CONSULTATIFS

FASCICULE N° 46

AFFAIRE DES ZONES FRANCHES
DE LA HAUTE-SAVOIE
ET DU PAYS DE GEX

ARRÊT DU 7 JUIN 1932
XXVème SESSION

1932

XXVth SESSION
JUDGMENT OF JUNE 7th, 1932

PERMANENT COURT OF INTERNATIONAL JUSTICE

SERIES A./B.
JUDGMENTS, ORDERS AND ADVISORY OPINIONS

FASCICULE No. 46

CASE OF THE FREE ZONES
OF UPPER SAVOY
AND THE DISTRICT OF GEX

LEYDE
SOCIÉTÉ D'ÉDITIONS
A. W. SJITHOFF

LEYDEN
A. W. SJITHOFF'S
PUBLISHING COMPANY
disputed by Switzerland. On the other hand, Switzerland disputes the right of France to collect duties and taxes at her political frontier even though these charges are not duties and taxes on the importation or exportation of goods but are duties and taxes also levied on the same articles produced or manufactured in France. Switzerland, in fact, has in her draft decision (Art. 3, para. 2) proposed that imports from Switzerland to the free zones shall be free of any duties and taxes whatsoever, a suggestion which has met with lively opposition on the part of France.

In this connection, the Court observes that no such limitation necessarily ensues from the old provisions relating to the free zones; that in case of doubt a limitation of sovereignty must be construed restrictively; and that while it is certain that France cannot rely on her own legislation to limit the scope of her international obligations, it is equally certain that French fiscal legislation applies in the territory of the free zones as in any other part of French territory.

The legitimacy of the imposition of fiscal taxes within the zones as apart from customs duties at the frontier, is shown by Article 4 of the Manifesto of the Royal Sardinian Court of Accounts of September 9th, 1829, relating to the zone of Saint-Gingolph:

"The laws at present in force in the said communes included in the new zone relating to excise and other duties (gabelles)—with the sole exception of the laws concerning the customs—shall continue to be observed as heretofore."

A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon. But an abuse cannot be presumed by the Court.

The tax to which the Swiss Agent had drawn the particular attention of the Court is the tax on importation, a form of the turnover tax which is levied at the frontier on goods imported as the result of a contract. It is impossible at present to say whether this tax, which was instituted by the French law of June 25th, 1920, is now levied at the
PUBLICATIONS DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE

SÉRIE B — N° 17
Le 31 juillet 1930

RECUEIL DES AVIS CONSULTATIFS

QUESTION DES « COMMUNAUTÉS » GRÉCO-BULGARES

PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE.

SERIES B.—No. 17
July 31st, 1930

COLLECTION OF ADVISORY OPINIONS

THE GRECO-BULGARIAN “COMMUNITIES”

LEYDE
SOCIÉTÉ D’ÉDITIONS
A. W. SUITHOFF
1930

LEYDEN
A. W. SUITHOFF’S
PUBLISHING COMPANY
1930
in law of a community which has in fact ceased to exist and is dissolved.

Entirely different is the question whether Article 12, securing to persons who had emigrated before the coming into force of the Convention the value of property left behind them in the country which they have quitted, also gives them the right to claim the value of the property of communities of which they were members and which have been dissolved as a consequence of their emigration.

In regard to this it should be observed that the object of Article 12 is to allow certain persons to have the benefit of the Convention to whom Articles I to XI are not applicable. Though it would be contrary to all sound rules of interpretation to change the system of these articles by extending their application to persons not contemplated by them, it seems on the other hand to be in harmony with the aim and spirit of this article to give to persons who have already emigrated in respect of the “property left by them” the same economic advantages as are secured by the Convention to future emigrants. It follows that just as persons emigrating subsequently to the Convention participate in the property of the community the dissolution of which is brought about by their emigration, so former refugees ought to have the possibility of participating in the proceeds of the liquidation of property belonging to a community of which they were members and the dissolution of which resulted from their departure.

5° “If the application of the Convention of Neuilly is at variance with a provision of internal law in force in the territory of one of the two Signatory Powers, which of the conflicting provisions should be preferred—that of the law or that of the Convention?”

In the first place, it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.

In the second place, according to Article 2, paragraph 1, and Article 15 of the Greco-Bulgarian Convention, the two
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
KASIKILI/SEDUDU ISLAND
(BOTSWANA/NAMIBIA)

JUDGMENT OF 13 DECEMBER 1999

1999

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE
DE L'ÎLE DE KASIKILI/SEDUDU
(BOTSWANA/NAMIBIA)

ARRÊT DU 13 DÉCEMBRE 1999
92. Namibia disputes this argument. It claims, for its part, that the wording of the question in the Special Agreement is clear and
requires the Court to consider any evidence or submissions of the parties grounded in general rules and principles of international law equally with submissions based on the 1890 Treaty”.

According to Namibia,

“Botswana’s attempt to treat the reference to the ‘rules and principles of international law’ as if it were not included in the Special Agreement contravenes fundamental rules of treaty interpretation.”

It stresses the contradictory nature of the position taken by Botswana, which, on the one hand, suggests that the expression “rules and principles of international law” covers only the rules and principles concerning treaty interpretation and, on the other, itself acknowledges that international law rules concerning treaty interpretation are comprehended in the first clause of the question referring to the 1890 Treaty. Namibia also reproaches Botswana for ignoring the dual nature of the argument it has put forward that

“either the subsequent conduct operates as a ‘practice . . . which establishes the agreement of the parties regarding [the] interpretation’ of the Treaty; or it stands as an independent root of title based on the doctrine of prescription and/or acquiescence”.

93. The Court notes that under the terms of Article I of the Special Agreement, it is asked to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the Island “on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law”. Even if there had been no reference to the “rules and principles of international law”, the Court would in any event have been entitled to apply the general rules of international treaty interpretation for the purposes of interpreting the 1890 Treaty. It can therefore be assumed that the reference expressly made, in this provision, to the “rules and principles of international law”, if it is to be meaningful, signifies something else. In fact, the Court observes that the expression in question is very general and, if interpreted in its normal sense, could not refer solely to the rules and principles of treaty interpretation. The restrictive interpretation of this wording espoused by Botswana appears to be even less well-founded, in that Article III of the Special Agreement specifies that “[t]he rules and principles of international law applicable to the dispute shall be those set forth in the provisions of Article 38, paragraph 1, of the Statute of the International Court of Justice”. This wording shows that the Parties had no intention of confining the rules and principles of law applicable in this case solely to the rules and principles of international law relating to treaty interpretation.
In the Court’s view the Special Agreement, in referring to the “rules and principles of international law”, not only authorizes the Court to interpret the 1890 Treaty in the light of those rules and principles but also to apply those rules and principles independently. The Court therefore considers that the Special Agreement does not preclude the Court from examining arguments relating to prescription put forward by Namibia.

94. According to Namibia, four conditions must be fulfilled to enable possession by a State to mature into a prescriptive title:

1. The possession of the ... state must be exercised à titre de souverain.
2. The possession must be peaceful and uninterrupted.
3. The possession must be public.
4. The possession must endure for a certain length of time.”

Namibia alleges that in the present case Germany was in peaceful possession of the Island from before the beginning of the century and exercised sovereignty over it from the time of the establishment of the first colonial station in the Caprivi in 1909, all in full view and with the full knowledge of the Bechuanaland authorities at Kasane, only a kilometre or two from the Island. It states that this peaceful and public possession of the Island, à titre de souverain, was continued without interruption by Germany’s successor until accession of the territory to independence. Finally, it notes that, after itself becoming independent in 1966, Botswana, which was aware of the facts, remained silent for almost two further decades.

In support of its allegations, Namibia emphasizes the importance of the presence on the Island of Masubia people from the Eastern Caprivi “from the beginning of the colonial period at least, and probably a good deal further back than that”. It asserts that

“[c]olonial records of German, British and South African authorities and the testimony of members of the Masubia community in the Kasika district before the JTTE [Joint Team of Technical Experts] [in 1994] conclusively show that the Masubia people of Eastern Caprivi have occupied and used Kasikili Island since time immemorial”

and points out that “[t]he Masubia of the Caprivi Strip have used and occupied Kasikili Island as a part of their lands and their lives”. Although Namibia admits that, in order to establish sovereignty by operation of prescription, acquiescence and recognition, it must show more than the use of the disputed territory by private individuals for their private ends, it maintains that:

“Namibia’s predecessors exercised continuous authority and jurisdiction over Kasikili Island. From 1909 until the termination of the Mandate in 1966, German, Bechuanaland and South African officials consistently governed the Eastern Caprivi through Masubia chiefs, whose jurisdiction extended to Kasikili Island. After termina-

It went on to say that

"It is . . . natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier." (Ibid.)

Similarly, in 1959 in the case concerning Sovereignty over Certain Frontier Land, the Court took note of the Preamble to a Boundary Convention as recording the common intention of the parties to "fix and regulate all that relates to the demarcation of the frontier" and held that

"Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the status quo the determination of the right of one State or the other to the disputed plots would be incompatible with that common intention." (I.C.J. Reports 1959, pp. 221-222.)

48. The Court considers that Article 3 of the 1955 Treaty was aimed at settling all the frontier questions, and not just some of them. The manifest intention of the parties was that the instruments referred to in Annex I would indicate, cumulatively, all the frontiers between the parties, and that no frontier taken in isolation would be left out of that arrangement. In the expression “the frontiers between the territories . . .”, the use of the definite article is to be explained by the intention to refer to all the frontiers between Libya and those neighbouring territories for whose international relations France was then responsible. Article 3 does not itself define the frontiers, but refers to the instruments mentioned in Annex I. The list in Annex I was taken by the parties as exhaustive as regards delimitation of their frontiers.

49. Article 3 of the 1955 Treaty refers to the international instruments “en vigueur” (in force) on the date of the constitution of the United Kingdom of Libya, “tels qu’ils sont définis” (as listed) in the attached exchange of letters. These terms have been interpreted differently by the Parties. Libya stresses that only the international instruments in force on the date of the independence of Libya can be taken into account for the determination of the frontiers; and that, as the agreements mentioned in Annex I and relied on by Chad were, according to Libya, no longer in force on 24 December 1951, they could not be taken into consideration. It argues also that account could be taken of other instruments, relevant and in force, which were not listed in Annex I.

50. The Court is unable to accept these contentions. Article 3 does not refer merely to the international instruments “en vigueur” (in force) on the date of the constitution of the United Kingdom of Libya, but to the international instruments “en vigueur” on that date “tels qu’ils sont définis”
5. For the future guidance of the respective Agents, the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law", or "the general theory of law", and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted.

6. As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure. On the contrary, it holds that it is the duty of the respective Agencies to cooperate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented. The Commission denies the "right" of the respondent merely to wait in silence in cases where it is reasonable that it should speak. To illustrate, in this case the Mexican Agency could much more readily than the American Agency ascertain who among the men ordering typewriting materials from Parker and signing the receipts of delivery held official positions at the time they so ordered and signed, and who did not. On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a prima facie case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is incumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be.

7. For the future guidance of the Agents of both Governments, it is proper to here point out that the parties before this Commission are sovereign Nations who are in honor bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them. The Commission, therefore, will confidently rely upon each Agent to lay before it all of the facts that can reasonably be ascertained by him concerning each case no matter what their effect may be. In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision. The absence of international rules relative to a division of the burden of proof between the parties is especially obvious in international arbitrations between Governments in their own right, as in
SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

Agreement with the dispositif of the Order — Reasoning insufficiently explicit on one point — Relationship between the merit of the requesting party's claims and the ordering of the provisional measures — Writers' view as to a clear separation between issues regarding the existence and extent of the disputed rights and issues concerning the need for provisional measures — Misguided nature of this view — Need for the Court to take account of the existence of conflicting rights — Respondent's fundamental right to act as it chooses provided that its actions are in compliance with international law — Connection between the issue under discussion and the mandatory nature of provisional measures, as affirmed in the LaGrand Judgment — Need for some minimum review in respect of the existence of the right claimed by the requesting State — Criterion of fumus boni juris well known to other courts — Three requirements to be met to enable the Court to impose a provisional measure ordering the respondent to adopt a certain course of conduct — Futility of considering all these requirements where any one of them is unmet.

1. I fully subscribe to the conclusion reached by the Court in the present Order, i.e., that indicating the provisional measures requested by the Applicant would not have been justified under the circumstances as they now stand. There is however a question of principle in respect of which I do not find the reasoning in the Order sufficiently explicit: the question of the relationship between the merit, or prima facie merit, of the arguments asserted by the party requesting the measures in respect of the right that it claims, which is the subject-matter of the main proceedings, and the ordering of the urgent measures it seeks from the Court.

2. I am well aware that the Court was not required to address this much-debated issue in detail, since the circumstances of the case are such that it could base its decision in law on grounds which were both necessary and sufficient, without the need to decide a point which, while argued by the Parties, could be deferred without impairing the coherence or completeness of the reasoning adopted in reaching the decision rendered.

I am of course not opposed to a certain economy of reasoning, and I do not think it within the Court's duties to propound a general theory on each and every issue argued in the cases before it.

Yet I think that the Court, without departing too far from the sound rule mandating good husbandry of resources, could in the present case have seized the opportunity presented by this Order to shed some light on a question which — it must be admitted — remains quite abstruse.
other party's conduct infringing that right is not manifestly to be ruled out. The requirement of *fumus boni juris* then gives way to that of *fumus non mali juris*. But, in all honesty, these are subtleties and there exists a great range of intermediate degrees, each capable of expression in somewhat vague terms: the requesting party should establish the possible existence of the right claimed, or the apparent existence of such right, etc.

In my view, the most important point is that the Court must be satisfied that the arguments are sufficiently serious on the merits — failing which it cannot impede the exercise by the respondent to the request for provisional measures of its right to act as it sees fit, within the limits set by international law.

11. To sum up, I would say that the Court must satisfy itself of three things before granting a measure ordering the respondent to act or to refrain from acting in a particular way, so as to safeguard a right claimed by the applicant.

Firstly, that there is a plausible case for the existence of the right.

Secondly, that it may reasonably be argued that the respondent's conduct is causing injury, or is liable to cause imminent injury, to the right.

Thirdly and finally, that the circumstances of the case are such that urgency justifies a protective measure to safeguard the right from irreparable harm.

12. As these three requirements are cumulative, the Court is not always compelled to rule on the satisfaction of each: where any one remains unmet, the Court is relieved of the need to examine the other two.

13. This is especially the case when the third requirement is not satisfied: where urgency has not been shown, it does not matter whether the respondent is violating the applicant's rights; that issue does not reacquire relevance until the merits are considered. In the present case, the Court has essentially based its decision on the lack of urgency and the absence of any demonstrated danger of irreparable harm, thus making it possible to avoid most of the issues on the merits, and I am in full agreement with this approach.

(Signed) Ronny Abraham.
The application of this principle is well illustrated by the *Chorzów Factory Case* (Jd.) (1927). The Polish Government had appropriated the Chorzów Factory in virtue of her laws of July 14, 1920, and June 16, 1922, without following the procedure laid down in the Geneva Convention of 1922. As regards procedure, the Convention had provided that no dispossession should take place without prior notice to the real or apparent owner, thus affording him an opportunity of appealing to the Germano-Polish Mixed Arbitral Tribunal (Art. 19). Poland, by failing to follow the procedure laid down in the Geneva Convention, had illegally deprived the other party of the opportunity of appealing to the Mixed Arbitral Tribunal. The Permanent Court held that Poland could not now prevent him, or rather his home State, from applying to the Court, on the ground that the Mixed Arbitral Tribunal was competent and that, since no appeal had been made to that Tribunal, the Convention had not been complied with.

Another instance where the same principle was applied is *The Tattler Case* (1920), where the Tribunal held that:

"It is difficult to admit that a foreign ship may be seized for not having a certain document when the document has been refused to it by the very authorities who required that it should be obtained."

The refusal was wrongful.

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The situation is slightly different where a State's acquiescence in a breach of its own law amounts to connivance. In such a case the State is prevented from invoking the breach to the disadvantage of the other party either to found a right or as a defence.

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A *fortiori*, where a State has directly requested another to do a certain thing it may not subsequently put forward a claim against the latter founded on this very act. Thus, if the President of a State has requested the naval authorities of another State to help capture a rebel, declared to be a pirate, his State may not afterwards present a claim in respect of his capture. As Commissioner Wadsworth of the Mexican-United States Claims Commission (1868) held, the State would be "estopped." This kind of estoppel is but an application of the principle *nullus commodum capere de sues injuria propria*.

In the Advisory Opinion on the Interpretation of Peace Treaties (2nd Phase) (1950), Judge Read, in a dissenting opinion used the term "estoppel" in the same sense and was of the view that "in any proceedings which recognised the principles of justice," no government would be allowed to raise an objection which would "let such a government profit from its own wrong."

The International Court of Justice, in that case, was concerned with the interpretation of the following provision of the Peace Treaties of 1947:

"... any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article..."
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE TERRITORIAL DISPUTE (LIBYAN ARAB JAMAHIRIYA/CHAD)

JUDGMENT OF 3 FEBRUARY 1994
French Equatorial Africa on the one hand, and the territory of Libya on the other, are those that result from the international instruments in force on the date of the constitution of the United Kingdom of Libya as listed in the attached Exchange of Letters (Ann. I).”

The Treaty was concluded in French and Arabic, both texts being authentic; the Parties in this case have not suggested that there is any divergence between the French and Arabic texts, save that the words in Arabic corresponding to “sont celles qui résultent” (are those that result) might rather be rendered “sont les frontières qui résultent” (are the frontiers that result). The Court will base its interpretation of the Treaty on the authoritative French text.

40. Annex I to the Treaty comprises an exchange of letters which, after quoting Article 3, reads as follows:

“The reference is to [Il s’agit de] the following texts:

— the Franco-British Convention of 14 June 1898;
— the Declaration completing the same, of 21 March 1899;

— the Franco-Italian Agreements of 1 November 1902;
— the Convention between the French Republic and the Sublime Porte, of 12 May 1910;
— the Franco-British Convention of 8 September 1919;
— the Franco-Italian Arrangement of 12 September 1919.

With respect to this latter arrangement and in conformity with the principles set forth therein, it was recognized by the two delegations that, between Ghat and Toummo, the frontier traverses the following three points, viz., the Takharkhoumi Gap, the Col d’Anai and Landmark 1010 (Garet Derouet el Djemel).

The Government of France is ready to appoint experts who might become part of a Joint Franco-Libyan Commission entrusted with the task of marking out the frontier, wherever that work has not yet been done and where either Government may consider it to be necessary.

In the event of a disagreement in the course of the demarcation, the two Parties shall each designate a neutral arbitrator and, in the event of a disagreement between the arbitrators, they shall designate a neutral referee to settle the dispute.”

It has been recognized throughout the proceedings that the Convention referred to as of 12 May 1910 is actually that of 19 May 1910 mentioned in paragraph 30 above.

41. The Court would recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context
and in the light of its object and purpose. Interpretation must be based
above all upon the text of the treaty. As a supplementary measure
recourse may be had to means of interpretation such as the preparatory
work of the treaty and the circumstances of its conclusion.

42. According to Article 3 of the 1955 Treaty, the parties “recognize
/reconnaissent/ that the frontiers . . . are those that result” from certain
international instruments. The word “recognize” used in the Treaty indi-
cates that a legal obligation is undertaken. To recognize a frontier is
essentially to “accept” that frontier, that is, to draw legal consequences
from its existence, to respect it and to renounce the right to contest it in
future.

43. In the contention of Libya, the parties to the 1955 Treaty intended
to recognize only the frontiers that had previously been fixed by the
international instruments: where frontiers already existed (as between
Tunisia and Libya), they were confirmed by the 1955 Treaty, but where
there was no frontier (as in the south), the treaty did not create one. The
Court is unable to accept this view; it has no difficulty either in ascer-
taining the natural and ordinary meaning of the relevant terms of the
1955 Treaty, or in giving effect to them. In the view of the Court, the
terms of the Treaty signified that the parties thereby recognized complete
frontiers between their respective territories as resulting from the com-
bined effect of all the instruments listed in Annex I; no relevant frontier
was to be left undefined and no instrument listed in Annex I was super-
fluous. It would be incompatible with a recognition couched in such
terms to contend that only some of the specified instruments contributed
to the definition of the frontier, or that a particular frontier remained
unsettled. So to contend would be to deprive Article 3 of the Treaty and
Annex I of their ordinary meaning. By entering into the Treaty, the par-
ties recognized the frontiers to which the text of the Treaty referred: the
task of the Court is thus to determine the exact content of the undertak-
ing entered into.

44. Libya’s argument is that, of the international instruments listed in
Annex I to the 1955 Treaty, only the Franco-Ottoman Convention of
1910 and the Franco-Italian arrangement of 1919 had produced frontiers
binding on Libya at the time of independence, and that such frontiers
related to territories other than those in issue in this case. In the view of
Libya, the 1899 Franco-British Declaration merely defined, north of the
15th parallel, a line delimiting spheres of influence, as distinct from a
territorial frontier; neither the 1919 Franco-British Convention nor
French effectivité conferred on that line any other status; furthermore
the latter instrument was never opposable to Italy. The 1902 Franco-
Italian exchange of letters, in Libya’s view, was no longer in force, either
because Italy renounced all rights to its African territories by the 1947
Peace Treaty (paragraph 34 above), or for lack of notification under
Article 44 of that Treaty.
RECUEIL DES ARRÊTS

N° 13

AFFAIRE RELATIVE À
L’USINE DE CHORZÓW
(DEMANDE EN INDEMNITÉ)
(FOND)

COLLECTION OF JUDGMENTS

No. 13

CASE CONCERNING
THE FACTORY AT CHORZÓW
(CLAIM FOR INDEMNITY)
(MERITS)
It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossessionship, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia—since it would be tantamount to rendering lawful liquidation and unlawful dispossessionship indistinguishable in so far as their financial results are concerned.

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for the maintenance of economic life in Upper Silesia on the basis of respect for the status quo. The dispossessionship of an industrial undertaking—the expropriation of which is prohibited by the
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

THE M/V "LOUISA" CASE
(SAINT VINCENT AND THE GRENADINES v. KINGDOM OF SPAIN)
List of cases: No. 18

JUDGMENT OF 28 MAY 2013

2013

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU NAVIRE « LOUISA »
(SAINT-VINCENT-ET-LES GRENADINES c. ROYAUME D'ESPAGNE)
Rôle des affaires: No. 18

ARRÊT DU 28 MAI 2013
[...] the Applicant... has drastically modified its position during this oral phase, ditching all the Convention articles that were invoked at the written stage and forgetting all the arguments that it put forward.

141. The Tribunal observes that both the Application and the Memorial focus on alleged violations by Spain of articles 73, 87, 226, 245 and 303 of the Convention and reparations arising therefrom. These two documents do not refer to article 300 of the Convention and its applicability to the facts of this case. After the closure of the written proceedings, Saint Vincent and the Grenadines presented its claim as one substantively based on article 300 and the alleged violations of human rights by Spain.

142. The Tribunal considers that this reliance on article 300 of the Convention generated a new claim in comparison to the claims presented in the Application; it is not included in the original claim. The Tribunal further observes that it is a legal requirement that any new claim to be admitted must arise directly out of the application or be implicit in it (see Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, at p. 266, para. 67).

143. In this context, the Tribunal wishes to draw attention to article 24, paragraph 1, of its Statute. As noted earlier, this provision states, inter alia, that when disputes are submitted to the Tribunal, the "subject of the dispute" must be indicated. Similarly, by virtue of article 54, paragraph 1, of the Rules, the application instituting the proceedings must indicate the "subject of the dispute". It follows from the above that, while the subsequent pleadings may elucidate the terms of the application, they must not go beyond the limits of the claim as set out in the application. In short, the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character.

144. The Tribunal may also refer in this connection to the jurisprudence of the Permanent Court of International Justice and the ICJ in interpreting the corresponding provisions in their Statutes and Rules.

145. The Permanent Court of International Justice stated:

[U]nder Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein.
151. For the foregoing reasons, the Tribunal concludes that no dispute concerning the interpretation or application of the Convention existed between the Parties at the time of the filing of the Application and that, therefore, it has no jurisdiction *ratione materiae* to entertain the present case.

152. In view of this finding, the Tribunal is not required to deal with the contention of Spain that Saint Vincent and the Grenadines has failed to satisfy the obligation under article 283 of the Convention to exchange views and that this has precluded its access to the Tribunal.

153. Since it has no jurisdiction to entertain the Application, the Tribunal is not required to consider any of the other objections raised to its jurisdiction or against the admissibility of the claims of Saint Vincent and the Grenadines.

154. While the Tribunal has concluded that it has no jurisdiction in the present case, it cannot but take note of the issues of human rights as described in paragraphs 59, 60, 61 and 62.

155. The Tribunal holds the view that States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances (see *Juno Trader* (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release, Judgment, ITLOS Reports 2004, p. 17, at pp. 38-39, para. 77; *Tomimaru* (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005–2007, p. 74, at p. 96, para. 76).

V. Costs

156. In its final submissions, Saint Vincent and the Grenadines requests the Tribunal to “award reasonable attorneys’ fees and costs associated with this request, as established before the Tribunal, of not less than €500,000”. For its part, Spain, in its final submissions, requests that “the Applicant be ordered to pay the costs incurred by the Respondent in connection with this case, as determined by the Tribunal, but in an amount no less than US$500,000”.

157. During the proceedings relating to the request for the prescription of provisional measures, each party requested the Tribunal to award costs in its favour for expenses incurred in connection with that phase of the proceedings. In the Order of 23 December 2010, the Tribunal decided to reserve “for consideration in its final decision the submissions made by both parties for costs in the present proceedings”.
INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

THE M/V "SAIGA" (No. 2) CASE
(SAINT VINCENT AND THE GRENADINES v. GUINEA)
List of cases: No. 2

JUDGMENT OF 1 JULY 1999

1999

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU NAVIRE « SAIGA » (No. 2)
(SAINT-VINCENT-ET-LES-GRENADINES c. GUINÉE)
Rôle des affaires : No. 2

ARRÊT DU 1ER JUILLET 1999

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48. Saint Vincent and the Grenadines asserts that this provision permits Guinea to raise only the objection to jurisdiction and precludes objections to admissibility. According to Saint Vincent and the Grenadines, reservation of the specific objection to jurisdiction implies that all other objections to jurisdiction or admissibility were ruled out by the parties.

49. Saint Vincent and the Grenadines further argues that Guinea has lost the right to raise objections to admissibility because it failed to meet the time-limit of 90 days specified by article 97 of the Rules for making such objections. It points out that Guinea’s objections to admissibility were made in the Counter-Memorial submitted on 16 October 1998, more than 90 days after the institution of the proceedings on 22 December 1997.

50. Guinea replies that by agreeing to paragraph 2 of the 1998 Agreement it did not give up its right to raise objections to admissibility. It also contends that article 97 of the Rules does not apply to its objections to admissibility. Guinea submits that, in any case, its objections were made within the time-limit specified in article 97 of the Rules, because, in its opinion, the proceedings were actually instituted by the submission of the Memorial filed by Saint Vincent and the Grenadines on 19 June 1998.

51. In the view of the Tribunal, the object and purpose of the 1998 Agreement was to transfer to the Tribunal the same dispute that would have been the subject of the proceedings before the arbitral tribunal. Before the arbitral tribunal, each party would have retained the general right to present its contentions. The Tribunal considers that the parties have the same general right in the present proceedings, subject only to the restrictions that are clearly imposed by the terms of the 1998 Agreement and the Rules. In the present case, the Tribunal finds that the reservation of Guinea’s right in respect of the specific objection as to jurisdiction did not deprive it of its general right to raise objections to admissibility, provided that it did so in accordance with the Rules and consistently with the agreement between the parties that the proceedings be conducted in a single phase. The Tribunal, therefore, concludes that the 1998 Agreement does not preclude the raising of objections to admissibility by Guinea.

52. The Tribunal must now consider the contention of Saint Vincent and the Grenadines that the objections of Guinea are not receivable because they were raised after the expiry of the time-limit specified in article 97, paragraph 1, of the Rules. This paragraph states:
COUR PERMANENTE DE JUSTICE INTERNATIONALE.

Audience du 17 août 1923.

Présents :

MM. LODER, Président
WEISS, Vice-Président

Lord FINLAY,

MM. NYHOLM,
MOORE,
DE BUSTAMANTE,
ALTAMIRA,
ODA,
ANZIOLTI,
HUBER,
WANG,
SCHÜCKING,

Juges titulaires.

Juge suppléant
Juge national allemand

AFFAIRE DU VAPEUR « WIMBLEDON »

Entre

Le Gouvernement de Sa Majesté britannique, représenté par
Sir Cecil Hurst, Conseiller juridique du Foreign Office,

Le Gouvernement de la République française, représenté par
M. Basdevant, Professeur à la Faculté de Droit de Paris,

Le Gouvernement de Sa Majesté le Roi d’Italie, représenté
par M. le Commandeur Pilotti, ancien juge au Tribunal
de Rome,

Le Gouvernement de Sa Majesté l’Empereur du Japon,
représenté par M. N. Ito, Premier Secrétaire de Légation,
Chargé d’Affaires a.i. du Japon à La Haye,

Demandeurs,

Le Gouvernement de la République polonaise, représenté par
M. Gustave Olechowski, Premier Secrétaire de Léga-
tion, temporairement détaché du Ministère des Affaires
étrangères près la Légation de Pologne à La Haye,

Intervenant,
powder and explosives and other articles of war material is prohibited in so far as these articles are consigned to the territories of the Polish Republic or of the Federal Socialist Republic of the Russian Soviets.

A detailed list of the substances and articles, the export and transit of which are forbidden, was given some days later in a further Order, dated July 30th, 1920.

The export prohibition contained in the German Neutrality Orders clearly could not apply to the passage through the Canal of the articles enumerated when such articles were despatched from one foreign country and consigned to another foreign country. Nor does the word "transit" appear to refer to the Kiel Canal; it no doubt only refers to the German territory to which the stipulations of Article 380 are not applicable. In any case a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace.

Since Article 380 of the Treaty of Versailles lays down that the Kiel Canal shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany, it is impossible to allege that the terms of this article preclude, in the interests of the protection of Germany's neutrality, the transport of contraband of war. The German Government had not at the time when the "Wimbledon" incident took place claimed any right to close the Canal to ships of war of belligerent nations at peace with Germany. On the contrary, in the note of the President of the German Delegation to the President of the Conference of Ambassadors of April 20th, 1921, it is expressly stated that the German Government claimed to apply its neutrality orders only to vessels of commerce and not to vessels of war. The Court is not called upon to give an opinion in regard to the legal effect of such statement; but if, as seems certain, it contains, in regard to the passage of belligerent war vessels through the Kiel Canal, an accurate interpretation of the Treaty of Versailles, it follows a fortiori that the passage of neutral vessels carrying contraband of war is authorised by Article 380, and cannot be
imputed to Germany as a failure to fulfil its duties as a neutral. If, therefore, the "Wimbledon", making use of the permission granted it by Article 380, had passed through the Kiel Canal, Germany's neutrality would have remained intact and irreproachable.

From the foregoing, therefore, it appears clearly established that Germany not only did not, in consequence of her neutrality, incur the obligation to prohibit the passage of the "Wimbledon" through the Kiel Canal, but, on the contrary, was entitled to permit it. Moreover under Article 380 of the Treaty of Versailles, it was her definite duty to allow it. She could not advance her neutrality orders against the obligations which she had accepted under this Article. Germany was perfectly free to declare and regulate her neutrality in the Russo-Polish war, but subject to the condition that she respected and maintained intact the contractual obligations which she entered into at Versailles on June 28th, 1919.

In these circumstances it will readily be seen that it would be useless to consider in this case whether the state of war between Russia and Poland, and with it Germany's neutrality, had or had not terminated at the date on which the "Wimbledon" incident occurred. In war time as in peace time the Kiel Canal should have been open to the "Wimbledon" just as to every vessel of every nation at peace with Germany.

B.

The Court having arrived at the conclusion that the respondent, Germany, wrongfully refused passage through the Canal to the vessel "Wimbledon", that country is responsible for the loss occasioned by this refusal, and must compensate the French Government, acting on behalf of the Company known as "Les Affréteurs réunis", which sustained the loss.

The claim for compensation formulated is tabulated as follows in the Case filed by the Applicants:
The application of this principle is well illustrated by the *Chorzów Factory Case* (Id.) (1927). The Polish Government had appropriated the Chorzów Factory in virtue of her laws of July 14, 1920, and June 16, 1922, without following the procedure laid down in the Geneva Convention of 1922.\(^5\) As regards procedure, the Convention had provided that no dispossession should take place without prior notice to the real or apparent owner, thus affording him an opportunity of appealing to the Germano-Polish Mixed Arbitral Tribunal (Art. 19). Poland, by failing to follow the procedure laid down in the Geneva Convention, had illegally deprived the other party of the opportunity of appealing to the Millet Arbitral Tribunal. The Permanent Court held that Poland could not now prevent him, or rather his home State, from applying to the Court, on the ground that the Millet Arbitral Tribunal was competent and that since no appeal had been made to that Tribunal, the Convention had not been complied with.\(^5\)

Another instance where the same principle was applied is *The Tattler Case* (1920), where the Tribunal held that:

"It is difficult to admit that a foreign ship may be seized for not having a certain document when the document has been refused to it by the very authorities who required that it should be obtained."\(^5\)

The refusal was wrongful.

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"The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose."\(^5\)

No one should be allowed to reap advantages from his own wrong.

The situation is slightly different where a State's acquiescence in a breach of its own law amounts to connivance. In such a case the State is prevented from invoking the breach to the disadvantage of the other party either to found a right or as a defence.\(^1\)

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A fortiori, where a State has directly requested another to do a certain thing it may not subsequently put forward a claim against the latter founded on this very act. Thus, if the President of a State has requested the naval authorities of another State to help capture a rebel, declared to be a pirate, his State may not afterwards present a claim in respect of his capture. As Commissioner Wadsworth of the Mexican-United States Claims Commission (1868) held, the State would be "estopped."54. This kind of estoppel is but an application of the principle *nullus commodum capere de suae injuria propria*.55

In the Advisory Opinion on the Interpretation of Peace Treaties (2nd Phase) (1950), Judge Read, in a dissenting opinion used the term "estoppel" in the same sense and was of the view that "in any proceedings which recognised the principles of justice," no government would be allowed to raise an objection which would "let such a government profit from its own wrong."56

The International Court of Justice, in that case, was concerned with the interpretation of the following provision of the Peace Treaties of 1947:

"... any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article
Draft articles on
Responsibility of States for Internationally Wrongful Acts,
with commentaries
2001

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract. 73

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (a)—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to Chapter II, while Chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (b)—which states that such conduct must constitute a breach of an international obligation—corresponds to the general principles stated in Chapter III, while Chapter V deals with cases where the wrongful conduct, which would otherwise be a breach of an obligation, is precluded.

(12) In subparagraph (a), the term "attribution" is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term "imputation" is also used. 74 But the term "attribution" avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is "really" that of someone else.

73 For examples of analysis of different obligations, see United States Diplomatic and Consular Staff in Tehran (footnote 58 above), pp. 30-33, paras. 62-68; "Rainbow Warrior" (footnote 46 above), pp. 256-267, paras. 107-110; and WTO, Report of the Panel, United States—Sections 301-310 of the Trade Act of 1974 (WT/DS152/R), 22 December 1999, paras. 7.41 et seq.

(13) In subparagraph (b), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term "obligation" is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an "obligation" is limited to an obligation under international law, a matter further clarified in article 3.

Article 3. Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Commentary

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of PCIJ in the Treatment of Polish Nationals case. 75 The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the ground that:

according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted —[Conversely, a State cannot adduce as against another State its own Constitution with a view to exuding obligations incumbent upon it under international law or treaties in force]... The application of the Danzig Constitution may... result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law... However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City. 76

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. Interna-

76 Ibid., pp. 24-25. See also "Lotus", Judgment No. 9, 1927, PCIJ, Series A No. 10, p. 24.
The principle was reaffirmed many times:

it is a generally accepted principle of international law that in the relations between Powers who are contracting a treaty, the provisions of municipal law cannot prevail over those of the treaty; ... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations; ... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.

A different facet of the same principle was also affirmed in the advisory opinions on Exchange of Greek and Turkish Populations42 and Jurisdiction of the Courts of Danzig.43

The principle has also been applied by numerous arbitral tribunals.

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State responsibility, as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The Commission's draft Declaration on Rights and Duties of States, article 13, provided that:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

(6) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

In their replies, States agreed expressly or implicitly with this principle (see League of Nations, Conference for the Codification of International Law, Basis of Discussion for the Conference drawn up by the Preparatory Committee, vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners (document C.75.M.69.1929.VI, p. 16). During the debate at the 1930 Hague Conference, States expressed general approval of the ideas embodied in point I and the Third Committee of the Conference adopted article 5 to the effect that "A State cannot avoid international responsibility by invoking the state of its municipal law" (document C.351/M.3/M.145c.1930.V; reproduced in Yearbook ... 1956, vol. II, p. 225, document A/CONF.4/6, annex 3).

In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law.42

[Note: Footnotes and citations have been omitted for brevity and clarity.]
contributed to the damage by some wilful or negligent act or omission. Its focus is on situations where in national law systems are referred to as "contributory negligence", "comparative fault", "faute de la victime", etc.523

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more-arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the LaGrand case, ICJ recognized that the conduct of the claimant State could be relevant in determining the form and extent of reparation. There, Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that “Germany may be criticized for the manner in which these proceedings were filed and for their timing”, and stated that it would have taken this factor, among others, into account “had Germany’s submission included a claim for indemnification”.625

(4) The relevance of the injured State’s contribution to the damage in determining the appropriate reparation is widely recognized in the literature524 and in State practice.525 While questions of an injured State’s contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.626 While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being “serious” or “gross”, the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.627 The phrase “account shall be taken” indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or “any person or entity in relation to whom reparation is sought”. This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

CHAPTER III
SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Commentary

(1) Chapter III of Part Two is entitled “Serious breaches of obligations under peremptory norms of general international law”. It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; and secondly, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (art. 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (art. 41).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.628 The issue was underscored by ICJ in the Barcelona Traction case, when it said that:

624 LaGrand. Judgments (see footnote 119 above), at p. 487, para. 57, and p. 508, para. 116. For the relevance of delay in terms of loss of the right to invoke responsibility, see article 45, subparagraph (b), and commentary.
626 In the Delagada Bay Railway case (see footnote 561 above), the arbiters noted that: “[a]ll the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter’s liability and warrant a reduction in reparation.” In S.S. “Wimbledon” (see footnote 34 above), p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. PCIJ implicitly acknowledged that the captain’s conduct could affect the amount of compensation payable, although he held that the captain had acted reasonably in the circumstances. For other examples, see Gray, op. cit. (footnote 432 above), p. 23.
627 This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.
628 It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the “responsible” State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage, see paragraph (11) of the commentary to article 31.
STATEMENT BY

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Freedom of Navigation: New Challenges
I. Introduction

Freedom of navigation is one of the oldest and most recognized principles in the legal regime governing ocean space. It may safely be said that – since it was enshrined in the chapter 'De mare liberum' (‘On the freedom of the sea’) in the treatise – actually it was a legal opinion – of Hugo Grotius ‘De iure praedae’ of 1609 – this principle constitutes one of the pillars of the law of the sea and was at the origins of modern international law. It is still worth re-emphasizing the arguments Grotius advanced in defence of this principle. Amongst other things, he stated that the sea was the fundamental avenue for communication and cooperation among States and therefore such avenue should be free and not controlled by one State – in his time, this would have been Spain or Portugal. He further argued that a resource or an area which could be used by all without deterioration or depletion should not be monopolized by one State but should be open to all. And finally he argued that a State could only claim an area which it was able to administer and control effectively, emphasizing that no State could control the sea permanently and effectively. This latter argument may not be as convincing today as it was at the beginning of the 17th century. Still, it is worth remembering. In particular, John Selden argued against the freedom of the sea as a principle in his treatise ‘De mare clausum’ of 1635 but in fact he meant the freedom to fish, also proclaimed by Hugo Grotius, rather than the freedom of navigation.

The United Nations Convention on the Law of the Sea (hereinafter “the Convention”) makes ample reference to the freedom of navigation, for example in article 36 (freedom of navigation in straits used for international navigation), article 58 (freedom of navigation in the exclusive economic zone), article 78 and article 87 (high seas). In this context, the right of innocent passage in the territorial sea and through archipelagic waters as specified in articles 17 to 26 and 52 of the Convention should also be mentioned, as well as the freedom of transit passage in straits used for international navigation (article 38 of the Convention). The three freedoms mean the same – freedom of movement of ships. What distinguishes them is the different influence coastal States may exercise on the freedom of movement.

It is impossible to go through all the challenges faced by or limitations placed on the freedom of movement of ships. This presentation will concentrate on two, namely environmental considerations and attempts to strengthen security at sea, for example against the threat of terrorism and the proliferation of weapons of mass destruction. What makes the ensuing limitations or attempted restrictions on the freedom of movement so problematic is that they are undertaken multilaterally, by involving competent international organizations, as well as unilaterally or bilaterally. Such limitations are not easy to harmonize since they have different legal bases. Furthermore, it is their cumulative impact on the freedom of navigation/right of innocent

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