

## Declaration of Judge *ad hoc* Treves

1. Together with Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad, I have signed a Joint Dissenting Opinion to the present Judgment. I fully share the arguments set out therein explaining our vote against the key paragraphs of the operative part of the Judgment. In the present Declaration I would like to draw from the present case some lessons for the future, especially in light of the fact that the *M/V "Norstar"* case is the first in which the Tribunal has been called on to decide on preliminary objections.

2. The Judgment has to be seen together with the Judgment on Preliminary Objections of 4 November 2016.<sup>1</sup> The latter Judgment based its decision affirming jurisdiction on the finding that the Decree of seizure and the Request for its execution issued by the Prosecutor of the Court of Savona "*may be viewed* as an infringement of the rights of Panama under article 87" and that "*article 87 is relevant* to the present case" (para. 122, emphasis added). The terms "may be" and "relevant" show hesitation in the Tribunal. In particular, "relevant" is a vague term, too vague to be the basis of a judgment affirming jurisdiction. Prudence, and also a correct assessment of the implications of the reference to article 87, would have, at least, suggested that the objections of Italy were not to be considered of an exclusively preliminary character.

3. The imprecise and questionable argument accepted in the judgment on jurisdiction had an echo in the merits phase. The meaning of the Judgment on Preliminary Objections was discussed as Parties diverged on the interpretation of its paragraph 122 and tried to lead the Tribunal to reconsider matters of jurisdiction. More notably, the asserted "relevance" of article 87 led the Tribunal to find that the article was indeed applicable and had been violated, losing sight of the fact that, with the decision so adopted, it casts doubt on the international legitimacy of the exercise of State sovereignty in prosecuting alleged crimes committed in the territory of the State and in securing control of an *instrumentum criminis* in internal waters far from the high seas. Moreover,

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<sup>1</sup> *M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44.

the Tribunal was led to examine claims for damages for recovering the vessel, whilst there were mechanisms available under Italian law.

4. The lesson for the future is that preliminary objections is a blunt instrument that should be used with prudence by the parties and by the adjudicating bodies. The party rising the objection risks being confronted with a binding decision affirming jurisdiction or admissibility and taken without considering all aspects of the case. The judge affirming his jurisdiction by rejecting the objection risks finding himself with his hands tied in deciding the case once all arguments and materials have been submitted and discussed.

5. These observations, of course, do not mean that well-founded preliminary objections do not have a useful function, especially for the purpose of economizing on judicial activity. They simply support the idea that the standard for assessing jurisdiction in deciding preliminary objections should be sufficiently high. This applies not only to the standard for deciding, with the binding effect of a judgment, to uphold the preliminary objection, thus denying the existence of jurisdiction or the admissibility of the claim, but also to the decision to reject the preliminary objection and thus affirm the existence of jurisdiction or the admissibility of the claim.

6. The judge deciding on preliminary objections cannot rely on the low standard of *prima facie* assessment of jurisdiction he may resort to when deciding on a request for provisional measures. If the high standard to be adopted leads the judge to consider that a decision to affirm his jurisdiction might constrain his assessment in the settlement of the dispute on the merits, he should consider attentively the alternative set out in article 97, paragraph 66, of the Rules of the Tribunal (corresponding to article 79, paragraph 9, of the Rules of the International Court of Justice (hereinafter "ICJ")) declaring that "the objection, in the circumstances of the case, does not possess an exclusively preliminary character." This seems particularly opportune in cases before the Tribunal because, unlike what is provided in the Rules of the ICJ, its Rules require that preliminary objections be in all cases submitted within 90 days from the institution of proceedings, i.e., before the materials and arguments set out in the Memorial have become available.

(signed) Tullio Treves