Joint Separate Opinion of Judges Cot and Kelly

1. We agree with most of the findings of the Tribunal and have voted accordingly. But we have some difficulty with the reasoning of the Tribunal on the issue of exhaustion of local remedies. We accept the conclusion of the Tribunal on this point and consider that there was no obligation to exhaust local remedies before Panama submitted its dispute in the present case. But we disagree with the reasons advanced by the Tribunal.

2. That local remedies must be exhausted is a "well-established rule of customary international law", as the International Court of Justice ("Court") recognized in the *Interhandel* case (*I.C.J. Reports 1959*, p. 6, at p. 27). The rule applies when an international claim is presented by a State in respect of an injury to a national or, as in the present case, in respect of an injury to a ship-owner concerning a ship flying the national flag. The rule does not apply if a claim is presented in respect to direct injury to the State concerned.

3. In practice, as noted by the International Law Commission ("ILC") in its Draft Articles on Diplomatic Protection, it is difficult to decide whether a claim is "direct" or "indirect" when it is mixed in the sense of containing elements of injury both to the flag State and to the ship-owner, as in the present case (draft article 14, Commentary, para. 10).

4. The Tribunal has decided to follow the approach taken in its Judgment in the *M/V "SAIGA" (No. 2) Case* (Judgment, para. 155):

> 155. It should be recalled in this respect that the Tribunal in the *M/V SAIGA (No. 2) Case*, faced with a similar situation, proceeded to examine the nature of the rights which Saint Vincent and the Grenadines claimed had been violated by Guinea (see *M/V "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment, ITLOS Reports 1999*, p. 10, at p. 45, para. 97). The Tribunal will follow the approach of the *M/V "SAIGA" (No. 2) Case* in the present case.

5. But, in our opinion, the finding by the Tribunal in *M/V "SAIGA"* (*No. 2*) does not reflect the present state of international law on the subject. That decision came at a time when the issue of mixed cases had not been thoroughly examined and the case law of international courts and tribunals had not been correctly assessed in the Judgment on the *M/V "SAIGA"* (*No. 2*).

6. Even in 1999, certain doubts were expressed within the Tribunal as to the arguments advanced in paragraphs 98 and 99 of the Judgment (see Wolfrum, Separate Opinion, paras. 46 and ff., pp. 107 and ff.)

7. *M/V "SAIGA"* (*No. 2*) referred to article 22 of the Draft Articles on State Responsibility in relation to the treatment accorded to aliens (Judgment, para. 98). But that conclusion was an intermediate assessment at the time. It was dropped by the ILC in the final Draft Articles on State Responsibility. The ILC re-examined the issue in its Draft Articles on Diplomatic Protection in 2006 and took a very different position in article 14.3 of the draft, which states:

> 3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

8. We believe it is time for this Tribunal to take a fresh look at the situation and reassess its position on the issue.

9. The starting point is article 295 of the Convention:

> *Article 295*
> *Exhaustion of local remedies*
>
> Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

10. Article 295 explicitly refers to "international law", i.e. general public international law. There is no *lex specialis* in the law of the sea on this point, quite to the contrary. The *travaux préparatoires* of the Convention confirm this conclusion. Local remedies must be exhausted, unless there is a specific reason to depart from the rule.

11. The present case is a case of diplomatic protection, by Panama, in respect of the rights claimed on behalf of the *M/V "Virginia G"* and its owner. The Parties agree on the legal qualification of the case. Panama states in its Memorial, Chapter 1, paragraph 15: "Panama is bringing this action against Guinea Bissau within the framework of diplomatic protection." It then adds:

> 17. The U.N. Draft Articles on Diplomatic Protection (2006), in Article 1, state that diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view of implementation of such a responsibility.

12. Guinea-Bissau concurs in paragraph 2 of its Oral Submissions in relation to the claim:

> 2. The claims submitted by Panama are inadmissible due to the nationality of VIRGINIA G, the absence of a right of diplomatic protection concerning foreigners, or the lacking exhaustion of local remedies, and should therefore be dismissed.
> (Judgment, para. 54)

13. It is not enough to say that Guinea-Bissau has violated the direct rights of the flag State and that there is no obligation to exhaust local remedies simply because there has been a direct injury to these rights. The Tribunal must assess the overall situation and legally qualify the dispute brought before it.

14. To proceed differently, as the Tribunal did in the *M/V "SAIGA"* (*No. 2*) *Case*, would amount to striking article 295 out of the Convention by considering that, whenever there is a violation of a provision of the Convention, there

is no necessity to exhaust local remedies. As Vice-President Wolfrum noted in 1999, "If . . . disputes concerning the interpretation or application are only disputes between States Parties arising from alleged violations of States' rights, article 295 of the Convention would be meaningless." (*ITLOS Reports 1999*, pp. 109–110, para. 51). Such an interpretation would run contrary to the natural and ordinary meaning of article 295 and defeat the object and purpose of the provision.

15. It is up to the Tribunal and not to the Parties to decide upon the nature of the dispute submitted to it and whether exhaustion of local remedies is called for.

16. The ILC, in its Draft Articles on Diplomatic Protection, has adopted the test of preponderance. In the present case, the Tribunal must decide whether the dispute is principally one in respect of the rights of the State concerned – Panama as the flag State in this case – or one in respect of the rights of the individual concerned – the ship-owner in this case.

17. Recent case law has applied the preponderance test. To give a few examples: in the *United States Diplomatic and Consular Staff in Tehran* case, the Court considered the claim to be a direct violation of the claimant State's rights (*I.C.J. Reports 1980*, p. 3). In *Ahmadou Sadio Diallo* (*Preliminary Objections*), the Court referred to the draft articles of the ILC quite extensively (*I.C.J. Reports 2007*, p. 599, para. 39). The draft articles and their commentary may be considered as a reliable indication of the present state of the difficult issue of mixed claims. In the *Arrest Warrant of 11 April 2000* case, the Court found a direct injury to the Democratic Republic of the Congo with the arrest of its foreign minister (*I.C.J. Reports 2002*, p. 18, para. 40).

18. A recent example before this Tribunal was that of the *ARA Libertad*. The measures taken by the Ghanaian authorities against an Argentinian warship obviously inflicted a direct injury on Argentina despite ongoing judicial proceedings before the Ghanaian courts. Neither Party considered that Argentina needed to exhaust local remedies before bringing the case to the Tribunal.

19. In the *Interhandel* case, the Court found that the case was preponderantly indirect and that exhaustion of local remedies was called for:

> Without prejudging the validity of any arguments which the Swiss Government seeks or may seek to base upon that decision, the Court would confine itself to observing that such arguments do not deprive the dispute which has been referred to it of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national, Interhandel, for the purpose of securing the restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies.
> (*I.C.J. Reports 1959*, p. 6, at pp. 28–29)

20. In the *Elettronica Sicula S.p.A.* (*ELSI*) case, the Chamber of the Court considered there to be an obligation to exhaust local remedies (*I.C.J. Reports 1989*, p. 15, at p. 43, para. 53). After carefully considering the nature of the claim submitted by the United States, the Chamber concluded:

> the Chamber has no doubt that the matter which pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations], said to have resulted from the action of the Respondent.
> (*I.C.J. Reports 1989*, p. 15, at p. 43, para. 52)

21. In the present case, it is to be noted that the violation of article 73, paragraph 1, of the Convention was not the consequence of the arrest of the ship in the exclusive economic zone of Guinea-Bissau or of its detention in the port of Bissau. It was the consequence of the administrative decision to confiscate the ship and cargo after the Virginia G had been arrested and detained in the port, i.e. in the internal waters of Guinea-Bissau. The situation is very different from that prevailing in the *M/V "SAIGA" (No. 2) Case*, where the ship was arrested in the exclusive economic zone after an unjustified hot pursuit, the Master being prosecuted and convicted thereafter.

22. In the *M/V "Virginia G" Case*, the claim advanced by Panama concerns private property, i.e. the ship and cargo. It concentrates on reparation of the injury inflicted on the ship-owner by confiscation of the ship and cargo. In our

opinion, it is clear that the rights at issue in the *M/V "Virginia G" Case* were preponderantly those of the owner of the ship and cargo, not those of the flag State.

23. This conclusion is vindicated by the commentary of the ILC on article 14. The ILC notes that closely related to the preponderance test is the *sine qua non* or "but for" test, which asks whether a claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national (*ILC Commentary to Article 14*, para. 11).

24. In the case of the *Virginia G*, it is obvious that the claim would not have been brought to the Tribunal had there been no injury to the ship-owner. If the ship and cargo had not been confiscated, Panama would not have submitted its claim.

25. Other factors may be taken into consideration in deciding whether the claim is predominantly direct or indirect (ILC Commentary to article 14, para. 12): the subject of the dispute, the nature of the claim, the remedy claimed. Cases wherein courts have concluded that State rights entailing a direct injury were preponderant have concerned a Government official (*Arrest Warrant of 11 April 2000, I.C.J. Reports 2000*, p. 3, para. 40), diplomatic officials (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3), State property (*Corfu Channel, I.C.J. Reports 1949*, p. 4), and consular relations (*Avena*, *I.C.J. Reports 2004*, pp. 34–35, para. 40). By contrast, the claim advanced by Panama in the *M/V "Virginia G" Case* concerned strictly private property, i.e. the ship and cargo. To put it more simply, in the words of the Court, "this is one of the very cases which give rise to the application of the rule of exhaustion of local remedies" (*Interhandel*, *op. cit.*).

26. Considering the Judgment delivered in the *M/V "Virginia G" Case* on this issue, one is at pains to imagine any situation in which a violation of the Convention would amount to a direct injury to a State and, hence, lead to a waiver of the requirement of exhaustion of local remedies.

27. If the Tribunal had proceeded to a balanced assessment of the nature of the claim before it, we have no doubt that it would have concluded that the

claim was "brought preponderantly on the basis of an injury to a national" and would have called for exhaustion of local remedies.

28. By carrying out such a flawed overall assessment of the nature of the dispute and of the respective shares of direct and indirect injury in the mixed claim presented by Panama (para. 157 of the Judgment), the Tribunal has strayed far from the consolidated and accepted rules of international law on the subject. It has rendered Article 295 of the Convention meaningless.

29. We hope our Tribunal will seize an opportunity in the not too distant future to reconsider this most isolated and wobbly legal stance.

30. But that is not the end of the story. According to article 15 of the ILC Draft Articles on Diplomatic Protection:

> Local remedies need not to be exhausted where:
> (a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such a redress.

31. As the Court noted in *Ahmadou Sadio Diallo*, "[i]t is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted" (*I.C.J. Reports 2007*, p. 600, para. 44).

32. Guinea-Bissau certainly did not convince us that there were effective remedies in the domestic legal system offered to Panama and the ship-owner. The repeated intrusion of the political and administrative authorities of the country into the course of justice precluded the possibility of any effective redress or reparation. The situation prevailing at the time is encapsulated in the declaration of the Secretary of State at the Ministry of Finance on 30 November 2009 when ordering confiscation of the fuel on board the *M/V Virginia G*: "Notwithstanding the judicial order of suspension of the seizure . . . we order hereby that the Oil Tanker Virginia G be authorized to discharge its content estimated at 436 tons gas oil . . ." (Judgment, para. 76).

33. In such a situation, Panama had no alternative but to bring its claim directly to the Tribunal. For that reason, we agree with the Tribunal that there was no obligation to exhaust the local remedies before Panama submitted the dispute to the Tribunal.

(*signed*) Jean-Pierre Cot
(*signed*) Elsa Kelly