# Minutes of Public Sittings – Procès-verbal des audiences publiques

# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
# TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

## MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD FROM 20 TO 22 SEPTEMBER 2016

*The M/V "Norstar" Case (Panama* v. *Italy),*
*Preliminary Objections*

## PROCES-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
TENUES DU 20 AU 22 SEPTEMBRE 2016

*Affaire du navire « Norstar » (Panama c. Italie),*
*exceptions préliminaires*

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the revised verbatim records.

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En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux révisés.

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Note by the Registry: The corrected verbatim records are available on the Tribunal's website at www.itlos.org.

Note du Greffe : Les procès-verbaux corrigés sont disponibles sur le site Internet du Tribunal : www.tidm.org.

# Minutes of the Public Sittings held from 20 to 22 September 2016

# Procès-verbal des audiences publiques tenues du 20 au 22 septembre 2016

20 September 2016, a.m.

**PUBLIC SITTING HELD ON 20 SEPTEMBER 2016, 10 A.M.**

**Tribunal**

*Present:* *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

**Panama is represented by:**

Dr Nelson Carreyó Collazos Esq.
LL.M, Ph.D., ABADAS (Senior Partner), Attorney at Law, Panama,

*as Agent;*

*and*

Mr Hartmut von Brevern,
Attorney at Law, Hamburg, Germany,

Dr Olrik von der Wense,
LL.M., ALP Rechtsanwälte (Partner), Attorney at Law, Hamburg, Germany,

Ms Swantje Pilzecker,
ALP Rechtsanwälte (Associate), Attorney at Law, Hamburg, Germany,

*as Counsel;*

Ms Janna Smolkina,
M.A./M.E.S., Ship Registration Officer, Consulate General of Panama in Hamburg, Germany,

Mr Arve Einar Mörch,
owner of the *Norstar*, Norway,

Mr Magnus Einar Mörch,
Norway,

*as Advisers.*

**Italy is represented by:**

Ms Gabriella Palmieri,
Deputy Attorney General,

*as Agent;*

*and*

Minister Plenipotentiary Stefania Rosini,
Deputy Head, Service for Legal Affairs, Diplomatic Disputes and International Agreements,
Ministry of Foreign Affairs and International Cooperation,

Commander Massimo di Marco,
Italian Coast Guard Headquarters – International Affairs Office,

*as Senior Advisers;*

Dr Attila Tanzi,
Professor of International Law, University of Bologna,

Dr Ida Caracciolo,
Professor of International Law, University of Naples 2, Member of the Rome Bar,

Dr Francesca Graziani,
Associate Professor of International Law, University of Naples 2,

Mr Paolo Busco,
LL.M. (Cantab), Lawyer, Member of the Rome Bar,

*as Counsel and Advocates;*

Dr Gian Maria Farnelli,
Research Fellow of International Law, University of Bologna,

Dr Ryan Manton,
University of Oxford, United Kingdom, Member of the New Zealand Bar,

*as Legal Assistants.*

20 septembre 2016, matin

**AUDIENCE PUBLIQUE TENUE LE 20 SEPTEMBRE 2016, 10 H 00**

**Tribunal**

*Présents :* M. GOLITSYN, *Président* ; M. BOUGUETAIA, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

**Le Panama est représenté par :**

M. Nelson Carreyó Collazos,
LL.M., docteur en droit, ABADAS (associé principal), avocat (Panama),

*comme agent* ;

*et*

M. Hartmut von Brevern,
avocat, Hambourg (Allemagne),

M. Olrik von der Wense,
LL.M., ALP Rechtsanwälte (associé), avocat, Hambourg (Allemagne),

Mme Swantje Pilzecker,
ALP Rechtsanwälte (collaboratrice), avocate, Hambourg (Allemagne),

*comme conseils* ;

Mme Janna Smolkina,
M.A./M.E.S., fonctionnaire chargée de l'immatriculation des navires, Consulat général du Panama, Hambourg (Allemagne),

M. Arve Einar Mörch,
propriétaire du *Norstar* (Norvège),

M. Magnus Einar Mörch
(Norvège),

*comme conseillers*.

**L'Italie est représentée par :**

Mme Gabriella Palmieri,
procureure générale adjointe,

*comme agent* ;

*et*

Mme Stefania Rosini,
Ministre plénipotentiaire, Directrice adjointe du Service des affaires juridiques, des différends diplomatiques et des accords internationaux, Ministère des affaires étrangères et de la coopération internationale,

M. Massimo di Marco,
capitaine de frégate, Direction centrale des garde-côtes – Bureau des affaires internationales,

*comme conseillers principaux* ;

M. Attila Tanzi,
professeur de droit international, Université de Bologne,

Mme Ida Caracciolo,
professeure de droit international, Université de Naples 2, membre du barreau de Rome,

Mme Francesca Graziani,
professeure associée de droit international, Université de Naples 2,

M. Paolo Busco,
LL.M. (Cambridge), avocat, membre du barreau de Rome,

*comme conseils et avocats* ;

M. Gian Maria Farnelli,
chargé de recherche en droit international, Université de Bologne,

M. Ryan Manton,
Université d'Oxford (Royaume-Uni), membre du barreau de Nouvelle-Zélande,

*comme assistants juridiques.*

OPENING OF THE ORAL PROCEEDINGS – 20 September 2016, a.m.

**Opening of the Oral Proceedings**
[ITLOS/PV.16/C25/1/Rev.1, p. 1–4; TIDM/PV.16/A25/1/Rev.1, p. 1–4]

**THE PRESIDENT:** Before we enter into today's hearing, I wish to note with deep regret the absence of Judge Antonio Cachapuz de Medeiros, Member of the Tribunal since 15 January 2016, who passed away last Friday. The Tribunal observed a minute of silence yesterday during the swearing-in ceremony of the Judges *ad hoc* in this case.

Today's hearing is devoted to the examination of the Preliminary Objections raised by Italy in the context of the *M/V "Norstar" Case (Panama* v. *Italy)*.

By an Application filed in the Registry of the Tribunal on 17 December 2015, the Republic of Panama instituted proceedings against the Italian Republic in a dispute concerning the arrest and detention of the *M/V "Norstar"*, a Panamanian-flagged vessel.

On 11 March 2016, within the time-limit set by article 97, paragraph 1, of the Rules of the Tribunal, Italy raised Preliminary Objections to the jurisdiction of the Tribunal and to the admissibility of Panama's Application.

I now call on the Registrar to summarize the procedure and to read out the submissions of the Parties.

**THE REGISTRAR:** Thank you, Mr President.

*(Poursuit en français)* Par ordonnance du 15 mars 2016, le Tribunal a fixé au 10 mai 2016 la date d'expiration du délai accordé au Panama pour la présentation de ses observations et conclusions écrites sur les exceptions préliminaires soulevées par l'Italie, et au 9 juillet 2016 la date d'expiration du délai de présentation par l'Italie de ses observations et conclusions écrites en réponse. Les deux Parties ont déposé leurs exposés dans les délais ainsi fixés. Par la même ordonnance, le Tribunal a suspendu la procédure au fond, conformément à l'article 97, paragraphe 3, du Règlement du Tribunal.

(*Continued in English*) I will now read out the submissions of the Parties in the phase of the case relating to the Preliminary Objections.

Italy requests the Tribunal to adjudge and declare that:

> (a) it lacks jurisdiction with regard to the claim submitted by Panama in its Application filed with the Tribunal on 17 December 2015; and/or that
>
> (b) the claim brought by Panama against Italy in the instant case is inadmissible to the extent specified in the preliminary objections.

Panama requests that the Tribunal

> FIRST, declare that
>
> 1. it has jurisdiction over this case;
>
> 2. the Application made by Panama is admissible; and
>
> 3. the Italian Republic has not complied with the rule of Due Process of Law;
>
> SECOND, that as a consequence of the above declarations the Written Preliminary Objections made by the Italian Republic under Article 294, paragraph 3 of the Convention are rejected.

**THE PRESIDENT:** Thank you, Mr Registrar.

By letter dated 16 August 2016, and received by the Registry on 22 August 2016, Panama submitted a request for

> A ruling concerning the scope of the subject matter based on the preliminary objections filed by Italy.
> In this document, Panama requested that
> new Objections and issues brought up by Italy for the first time in its Reply be rejected

and that

> [i]n the case that the Tribunal does not reject the new Objections made by Italy[,] … the Tribunal set an appropriate deadline for Panama to reply to these Objections in writing after the hearing.

By letter dated 23 August 2016, the Agent of Italy objected to the request made by Panama, stating that Italy finds Panama's document inadmissible, and reserving its right to reply on the merits of Panama's document, if found admissible, during the hearing.

The Parties were informed, by letter from the Registrar dated 29 August 2016, that this matter would be examined by the Tribunal on 19 September 2016.

On 19 September 2016, having considered the "Request of the Republic of Panama for a ruling concerning the scope of the subject matter based on the preliminary objections filed by Italy" dated 16 August 2016, and the response of Italy dated 23 August 2016, the Tribunal decided to allocate each Party additional speaking time of 30 minutes during the hearing to comment on the matter. The Parties were informed of the Tribunal's decision during consultations with the President held on 19 September.

Over the three days of oral proceedings, the Tribunal will hear the arguments of the Parties on the preliminary objections raised by Italy in the case. At today's hearing, Italy will present the first round of its oral argument. It will present its arguments this morning until approximately 1 p.m., with a break of 30 minutes at around 11.30 a.m., and then from 3 p.m. to 5:30 p.m., with a break of 30 minutes at 4.30 p.m. Panama will speak tomorrow from 10 a.m. to 1 p.m., also with a break of 30 minutes at around 11.30 a.m., and then from 3 p.m. to 5.30 p.m., with a break of 30 minutes at 4.30 p.m.

The second round of oral argument will take place on Thursday 22 September, with Italy taking the floor from 10 a.m. to 11.30 a.m., followed by Panama from 3 p.m. to 4.30 p.m.

I note the presence at the hearing of Agents, Counsel and Advocates of Italy and Panama. Italy, which has raised the preliminary objections in this case, will be heard first today. I now call on the Agent of Italy, Ms Gabriella Palmieri, to introduce the delegation of Italy.

**MME PALMIERI :** Je vous remercie, Monsieur le Président.

Monsieur le Président, Madame et Messieurs les juges, c'est un honneur et un privilège pour moi que de m'adresser à vous pour la première fois en tant qu'agent de la République italienne dans le cadre d'une procédure introduite contre mon pays par la République du Panama.

Permettez-moi tout d'abord d'exprimer la très haute estime que je porte aux membres du Tribunal de céans. Je souhaite également adresser mes félicitations personnelles et celles de mon Gouvernement à Messieurs Gudmundur Eiriksson et Tullio Treves pour avoir été désignés juges *ad hoc* en l'espèce.

Avec votre autorisation, Monsieur le Président, je vais maintenant présenter les membres de la délégation qui représentera l'Italie devant le Tribunal : Monsieur Attila Tanzi,

conseil ; Mesdames Ida Caracciolo et Francesca Graziani, également conseils ; et Maître Paolo Busco, lui aussi conseil. Les noms et les titres des autres membres de la délégation italienne ont déjà été dûment communiqués au Tribunal.

Monsieur le Président, comme cela nous a été demandé, après la présentation des conseils qui vont représenter la République du Panama, je reviendrai formuler au nom de l'Italie quelques observations préliminaires et présenter l'organisation de ses plaidoiries de ce matin. Je vous remercie, Monsieur le Président.

**THE PRESIDENT:** Thank you, Ms Palmieri.

I now call on the Agent of Panama, Mr Nelson Carreyó, to introduce the delegation of Panama.

**MR CARREYÓ:** I request Ms Janna Smolkina to introduce our delegation.

**MS SMOLKINA:** Mr President, distinguished Members of the Tribunal, I am Janna Smolkina and I am here today as a representative of Panama's diplomatic consular mission in Hamburg where I am responsible for vessel registration.

It is indeed an honour for me to be representing Panama before this distinguished Tribunal.

Panama is represented here today in the interests of its flag, its entities, the vessel *Norstar* and the persons associated with the vessel. The Panamanian flag and its protected entities are subject to circumstances that will be explained and appreciated during this week's hearings. We hope that these hearings will be conducive to a more detailed understanding of the case.

I will now introduce the members of the Panamanian delegation. I present first Panama's Agent, Dr Nelson Carreyó, an international maritime and admiralty law litigation attorney who has a wealth of experience including as a First Judge of the Maritime Court of Panama and Chairman of the Board of Labour Relations of the Panama Canal Authority.

Dr Nelson Carreyó will address the Tribunal in detail regarding the factual and legal circumstances of this matter. He is accompanied by Counsel, Dr Olrik von der Wense, a German lawyer who also practises international law of the sea. Together with Dr Carreyó he will discuss the points on which the Parties are in dispute. Mr Hartmut von Brevern, a German attorney at law, who will provide arbitral experience in international maritime and trade law, including before this esteemed Tribunal, acts as a Counsel of the Panamanian delegation. He will also set out and discuss the points of the dispute together with our Agent Dr Carreyó and Dr von der Wense. Ms Swantje Pilzecker, a German attorney at law, a specialist in European and international law is also a Counsel of the Panamanian delegation.

Your Honours, that concludes my brief introduction. Mr President, Members of the Tribunal, I thank you very much for your attention.

**THE PRESIDENT:** Thank you, Ms Smolkina.

I now request the Agent of Italy, Ms Palmieri, to begin her statement.

**Premier tour : Italie**

EXPOSÉ DE MME PALMIERI
AGENT DE L'ITALIE
[TIDM/PV.16/A25/1/Rev.1, p. 4–6]

**MME PALMIERI :** Je vous remercie beaucoup, Monsieur le Président.

Monsieur le Président, Madame et Messieurs les juges, avant de présenter l'organisation de notre exposé, permettez-moi quelques observations de caractère général et préliminaire au nom de l'Italie.

Même si mon gouvernement, à sa plus grande surprise et avec regret, a reçu le 17 décembre 2015 la requête du Panama devant cet éminent Tribunal, l'Italie ne se considère pas comme un Etat ayant un différend avec la République panaméenne, avec laquelle nous entretenons une amitié de longue date et espérons continuer de l'entretenir dans l'avenir.

Ceci ne représente pas seulement une première affirmation de caractère diplomatique qui devrait présider à l'examen de la requête panaméenne. Elle a aussi un fondement strictement juridique, comme il sera démontré dans les plaidoiries des conseils italiens par la suite.

En effet, sans préjudice des arguments qui seront présentés par l'équipe italienne le moment venu, il faut souligner que le cœur de l'affaire devant vous est essentiellement une question concernant des intérêts privés n'ayant aucune connexion véritable avec l'Etat panaméen. Cette question n'est pas régie par la Convention des Nations Unies sur le droit de la mer de 1982, vu que les droits invoqués par le Panama dérivant de la susnommée Convention et prétendument violés par l'Italie sont manifestement dépourvus de toute liaison réelle avec les faits de la présente affaire.

Monsieur le Président, Madame et Messieurs les juges, sur la base de cette prémisse et des arguments que nous expliquerons ensuite de manière plus détaillée, il est tout à fait évident que la seule question qui se pose en l'espèce est celle de savoir si cet éminent Tribunal peut valablement connaître de la demande présentée par le Panama. Considérant qu'il s'agit d'une question dont votre Tribunal n'a encore jamais eu à connaître, vous êtes appelés à prendre, sur ce sujet, une décision fort importante et de principe. Cette décision, en déterminant les limites des droits et des intérêts protégés par la Convention des Nations Unies sur le droit de la mer dans le cadre d'une procédure préliminaire, déterminera en même temps les limites pour recourir aux moyens judiciaires ou arbitraux de règlement des différends, conformément au chapitre XV de la même Convention. De cette manière, elle déterminera aussi les limites prévenant ainsi que des requêtes de la fonction judiciaire internationale ne soient présentées dans le futur.

Monsieur le Président, je voudrais souligner, une fois de plus, la nature principalement, sinon exclusivement, privée de l'affaire présentée devant vous. Par conséquent, je le souligne encore, l'Italie n'a aucun différend avec le Gouvernement du Panama. Toutefois, si ce Tribunal devait juger qu'il y avait un différend du type prétendu par le Panama au moment du dépôt de sa requête, le Gouvernement italien maintiendra, à titre subsidiaire, que la question ne peut être tranchée par cet éminent Tribunal conformément aux dispositions de la Convention de 1982 car d'autres conditions fondamentales pour établir sa compétence ne sont pas remplies. Comme il sera, en outre, démontré par les conseils italiens par la suite, il en va de même, à titre encore plus subsidiaire, des conditions requises par la même Convention. Elle réglera, d'une façon plus claire, les futures requêtes de la fonction judiciaire internationale dans les formes prévues par la susnommée Convention.

C'est à la lumière de ces considérations que l'Italie a présenté ses exceptions préliminaires le 8 mars 2016 au titre de l'article 294, paragraphe 3, de la Convention susnommée et conformément à l'article 97 du Règlement du Tribunal, tout en se fondant sur la

compétence de la « compétence » que le Tribunal de céans tire de l'article 288, paragraphe 4. Les raisons de cela ont été exposées de manière synthétique dans les observations écrites qui ont été présentées au Tribunal par le Gouvernement de la République italienne et ces mêmes raisons seront à présent développées de manière plus détaillée par les conseils italiens.

Monsieur le Président, Madame et Messieurs les juges, avec votre aval, j'aimerais maintenant vous présenter l'ordre de notre plaidoirie.

Premièrement, Monsieur le professeur Attila Tanzi traitera de façon succincte les réclamations du Panama, assez surprenantes – il faut le dire –, parvenues à l'Italie le 22 août 2016, et auxquelles l'Italie a répondu le 23 août suivant par note verbale.

Par la suite, Monsieur le professeur Tanzi présentera les arguments d'après lesquels le Tribunal de céans n'a pas de compétence pour connaître de la requête panaméenne du fait de l'inexistence d'un différend entre l'Italie et le Panama, ou du fait que le Panama n'a pas convenablement rempli la condition, requise par l'article 283, paragraphe 1, de la susnommée Convention, de procéder promptement à un échange de vues. Monsieur le professeur Tanzi traitera, par la suite, la question de la compétence de l'éminent Tribunal par rapport à l'absence manifeste de toute connexion véritable entre les faits de la présente espèce et les droits dérivant de la Convention dont la violation est invoquée par le Panama, avec une attention particulière au principe de la liberté de navigation. Il terminera sa présentation avec l'explication des limites de la compétence du Tribunal *ratione personae*.

Madame la professeure Ida Caracciolo expliquera que la nature principalement, sinon exclusivement, privée de la requête panaméenne dans le cadre des exceptions présentées par l'Italie à titre subsidiaire obère l'irrecevabilité de ladite requête. A cet effet, elle reviendra sur la question de l'absence manifeste de toute liaison réelle entre les faits de la présente espèce et les droits dérivant de la Convention dont la violation est invoquée par le Panama.

Madame la professeure Francesca Graziani démontrera par la suite comment la condition de recevabilité qu'est l'épuisement des recours internes, exigée par l'article 295 de la Convention susnommée, n'a pas été satisfaite relativement aux circonstances de la requête panaméenne.

Elle sera suivie par maître Paolo Busco qui traitera d'autres questions portant sur l'irrecevabilité de la requête panaméenne, notamment l'acquiescement, la prescription extinctive et la forclusion ou l'estoppel.

Je vous remercie beaucoup, Monsieur le Président, et je vous demande de bien vouloir appeler à la barre Monsieur le professeur Tanzi. Merci beaucoup pour votre attention.

**THE PRESIDENT:** Thank you, Ms Palmieri.

I now give the floor to Mr Attila Tanzi.

NAVIRE « NORSTAR »

EXPOSÉ DE M. TANZI
CONSEIL DE L'ITALIE
[ITLOS/PV.16/C25/1/Rev.1, p. 23–32; TIDM/PV.16/A25/1/Rev.1, p. 6–26]

**M. TANZI :** Monsieur le Président, Madame et Messieurs les juges, c'est un honneur et un privilège de m'adresser à cet éminent Tribunal au nom de l'Italie, d'autant plus que cela arrive au moment où le Tribunal fête le 20ème anniversaire de sa mise en place.

Monsieur le Président, avant de commencer ma première plaidoirie, eu égard aux consultations d'hier, j'adresserai préliminairement les réclamations sur le caractère prétendument tardif de certaines objections préliminaires, soulevées par l'Italie, qui ont été soumises par le Panama le 16 août 2016.

Avec votre aval, Monsieur le Président, j'illustrerai les arguments italiens sur ce point en anglais.

(*Continued in English*) Mr President, Members of the Tribunal, I shall address the Request of the Republic of Panama for a ruling concerning the scope of the subject matter based on the preliminary objections filed by Italy, dated 16 August 2016 but received by the Tribunal and forwarded to Italy on 22 August. I will do so succinctly as most of the points that I am going to make will be complemented individually by the other members of the team.

Mr President, in its Request Panama alleges that Italy made six new preliminary objections in its Reply that should be declared inadmissible as untimely and contrary to article 97, paragraph 1, of the ITLOS Rules.

In its letter to the Tribunal dated 23 August, Italy reserved its right to reply on the merits of Panama's Request during the hearing, and I am very happy to do so now.

As already anticipated in writing, Italy respectfully submits that Panama's Request is manifestly unfounded. In fact, all of Italy's arguments made in its Reply of 8 July 2016, either developed and specified its objections first raised on 16 March or responded to arguments made by Panama in its observations of 5 May 2016; and I would stress the distinction between objections and arguments, for a specific argument substantiating a given objection is not the same thing as a new objection.

The equality of arms principle on which Panama relies has therefore been respected; and, in any event, the Tribunal has wide and inherent powers to ascertain its jurisdiction and the admissibility of the claim.

Mr President, Members of the Tribunal, as I anticipated, none of the six preliminary objections of which Panama complains was newly made in Italy's Reply. Italy raised all of these objections in its first written pleading in accordance with article 97, paragraph 1, of the ITLOS Rules. Panama in its observations acknowledged all of these objections, following which Italy simply elaborated upon them in its Reply. With your permission, Mr President, I will now address each of these objections individually.

Mr President, Italy's submissions concerning the irrelevance of the communications from Panama for lack of representative powers are part of Italy's objection that there exists no dispute between Italy and Panama. This objection was clearly raised in Italy's Preliminary Objections at paragraphs 18–20, and Panama acknowledged this objection having been made at paragraphs 6–9 of its Observations. Italy had also more specifically raised the issue of Panama failing to raise any dispute in a legally appropriate manner when, at paragraph 18 of its Preliminary Objections, it objected that

> In fact, no complaint, or protest, bearing on the facts complained of in the Application, has been raised in any legally appropriate manner by the Government of Panama with the Government of Italy, which the latter would resist or contest.

EXPOSÉ DE M. TANZI – 20 septembre 2016, matin

Mr President, allow me to turn to Italy's objection that the rights invoked by Panama are manifestly irrelevant to the instant case. Italy clearly raised this point in its Preliminary Objections. Paragraph 19 of that pleading precisely begins with the words "Apart from the manifest irrelevance of the UNCLOS provisions invoked by the Applicant to sustain its claim…". Panama acknowledged this when in its observations it recorded at paragraph 50 that "Nevertheless, Italy asserts that there is 'a manifest irrelevance of the UNCLOS provisions invoked by Panama'."

Mr President, Members of the Tribunal, as to the objection that the order for seizure of the *M/V Norstar* does not *per se* amount to a breach of an international obligation, Italy clearly raised it in its Preliminary Objections.

I draw your attention to paragraph 21 of the Preliminary Objections in question, where Italy submitted that "even though the order for seizure of the *M/V Norstar* has been issued by an Italian Public Prosecutor, the actual arrest and detention of the vessel has not been executed by Italian Enforcement Officials, but by the Spanish Authorities". Panama in turn acknowledged that Italy made this objection in paragraph 10 of its Observations.

Mr President, the same applies to the objection that no allegedly wrongful act in the present case is attributable to Italy. Italy addressed this point with the same language that I have just quoted and Panama has likewise acknowledged.

As far as the espousal nature of the claim is concerned, Mr President, Italy clearly also raised this objection in its first written pleading. Italy stated in the title to Chapter 3.II.A of its Preliminary Objections that "[t]he claim is one of Diplomatic Protection" and the objection was raised more specifically in paragraphs 28 and 29. Panama acknowledged this in paragraph 52 of its Observations.

Mr President, as to acquiescence, prescription and estoppel, there is again no doubt that Italy clearly raised the point in its first written pleading, and I may call your attention to Chapter 3.II.B of our first written pleading. Its title is "Time Bar and Estoppel". Panama acknowledged that Italy made these objections in its Preliminary Objections at paragraph 52 of its Observations.

In summary, Mr President, given that Italy has raised all of these objections in its first written pleading and Panama has acknowledged this in its Observations, it is clear that they have been timely made in accordance with article 97, paragraph 1, of the ITLOS Rules.

Mr President, Members of the Tribunal, in light of the submissions that I have just made, there can be no basis for Panama to claim that any breach of the principle of equality of arms may have occurred.

Panama has had ample opportunity to respond to these objections and it has the further ability to respond to these objections during this hearing. Indeed, one of the very purposes of this hearing is to allow Panama the opportunity to respond further to the preliminary objections that Italy has made.

In addition to this, the Tribunal has already afforded the Parties the opportunity to present their cases as fully as possible by extending the allotted time. In these circumstances we respectfully submit that permitting any post-hearing pleadings, as Panama has requested, would unnecessarily prolong these proceedings.

Finally, Mr President, Italy acknowledges that the Tribunal in any event has wide and inherent powers to consider its jurisdiction and the admissibility of the claim. These wide and inherent powers extend to empowering a tribunal to consider jurisdiction and admissibility where objections have not been timely made – and even if they have not been made at all – is part and parcel of general international law.

Allow me to recall that the ICJ made this clear in *Appeal relating to the Jurisdiction of the ICAO Council* when it considered whether a jurisdictional objection raised at the merits stage of proceedings could still be considered. The Court explained that

> It is certainly to be desired that objections to the jurisdiction of the Court should be put forward as preliminary objections for separate decisions in advance of the proceedings on the merits. The Court must, however, always be satisfied that it has jurisdiction and must if necessary go into that matter *proprio motu*.[1]

That reasoning applies *a fortiori* where, as here, proceedings remain at the stage of preliminary objections.

Any concerns that Panama has with its opportunity to respond on issues of jurisdiction and admissibility can be accommodated during this hearing – such as they already have been accommodated through the extension of time that the Tribunal has permitted.

Mr President, Members of the Tribunal, for these reasons Italy respectfully submits that its preliminary objections are all admissible. The preliminary objections have been made in a timely manner in accordance with article 97, paragraph 1, of the ITLOS Rules, the equality of arms principle has been respected and, in any event, the Tribunal has wide and inherent powers to determine its jurisdiction and the admissibility of the claim.

I thank you, Mr President. With your permission, I will now turn to my first pleading.

*(Poursuit en français)* Monsieur le Président, avec votre aval, je reviens sur ma première plaidoirie. Aujourd'hui, ma tâche principale est de démontrer que le Tribunal n'a pas compétence pour statuer sur la requête soumise par le Panama le 17 décembre 2015.

Monsieur le Président, l'Italie conteste la compétence de ce Tribunal dans la présente affaire sur la base des trois exceptions préliminaires suivantes : premièrement, l'inexistence d'un différend entre les Parties ; deuxièmement, le fait que Panama n'a pas rempli l'obligation de procéder à des échanges de vues au titre de l'article 283 de la Convention ; la troisième exception porte sur l'absence de compétence *ratione personae*. J'illustrerai cette exception dans ma seconde intervention.

Avant de revenir sur mes arguments, Monsieur le Président, permettez-moi de souligner, comme le mentionnait à l'instant l'agent du Gouvernement italien, que nous présentons ces arguments avec le plus grand respect. Nous sommes convaincus que le Tribunal tiendra compte qu'une exception solide à sa compétence revient à affirmer son autorité, tout en réaffirmant sa « compétence de la compétence ».

Monsieur le Président, je reviens maintenant à la première question juridictionnelle soulevée par l'Italie, celle de l'inexistence d'un différend entre les Parties.

Comme l'a indiqué la Cour internationale de Justice dans les affaires des *Essais nucléaires*, « l'existence d'un différend est [...] la condition première de l'exercice de sa fonction judiciaire »[2].

Or, dans l'affaire relative à la *Compétence en matière de pêcheries*, la même Cour a souligné qu' « il incombe à la Cour [...] de définir elle-même, sur une base objective, le différend qui oppose les Parties en examinant la position de l'une et de l'autre »[3].

Il ressort très clairement de la jurisprudence internationale que la détermination de l'existence d'un différend n'appartient pas unilatéralement au demandeur. Elle exige une vérification objective qui reste dans le domaine exclusif de la compétence du tribunal saisi.

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[1] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46, at p. 52, para. 13.

[2] *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 476, par. 58.

[3] *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 448, par. 30.

EXPOSÉ DE M. TANZI – 20 septembre 2016, matin

Il résulte des exposés écrits des Parties qu'elles sont en accord sur ce qui constitue un « différend », conformément à l'énonciation bien connue dans l'*Affaire Mavrommatis*[4] que je ne vais pas vous répéter.

Comme, en effet, il a été affirmé par ce Tribunal dans les *Affaires du thon à nageoire bleue*[5], cette définition a été reprise et développée par la Cour internationale de Justice dans l'*Affaire du Sud-Ouest africain* en soulignant : « Il faut démontrer que la réclamation de l'une des Parties se heurte à l'opposition manifeste de l'autre »[6].

Monsieur le Président, permettez-moi de vous présenter deux considérations préliminaires sur la base de la jurisprudence citée.

En premier lieu, une des conditions pour assurer l'objectivité de la détermination en question exige qu'une situation d'opposition entre les Parties existe au moment de l'introduction de la requête. A défaut, tout Etat demandeur peut unilatéralement déterminer l'existence d'un différend par le seul fait d'introduire une requête qui sera, par la suite, opposée au défendeur en justice.

En deuxième lieu, les intérêts qui font l'objet d'une opposition doivent être des intérêts étatiques protégés par des règles du droit international. Il en découle que la détermination objective qu'il est demandée à cet éminent Tribunal de prendre sur l'existence ou non d'un différend devra porter sur la vérification : a) de sa nature interétatique, b) de sa pertinence par rapport aux règles de la Convention.

Monsieur le Président, l'Italie est pleinement consciente que, dans cette détermination objective, le Tribunal devra tenir compte du comportement des deux Parties.

A ce propos, l'Italie partage tout à fait le *dictum* de la Cour internationale de Justice dans l'affaire *Géorgie c. Fédération de la Russie* d'après lequel : « L'existence d'un différend peut être déduite de l'absence de réaction d'un Etat à une accusation dans des circonstances où une telle réaction s'imposait »[7].

Nous sommes convaincus que tous les arguments que je vais vous illustrer dans un instant pourront démontrer que, dans le cas d'espèce, nous nous trouvons précisément dans une des circonstances où une telle réaction ne s'imposait pas.

Monsieur le Président, j'illustrerai l'exception italienne en question en expliquant, premièrement, que jusqu'à la date de l'introduction de son instance, le Panama n'avait pas communiqué au Gouvernement italien de façon diplomatiquement convenable et juridiquement valable l'expression d'une réclamation à laquelle l'Italie aurait dû s'opposer ou, de toute façon, exprimer son désaccord.

Deuxièmement, dans le cas où ce Tribunal considérerait que les communications de Monsieur Carreyó sont réputées attribuables au Gouvernement panaméen, j'expliquerai comment ces communications ne se référaient à aucun des droits découlant des dispositions de la Convention qui ont été par la suite invoqués par le Panama dans sa requête.

Même si l'on pouvait déduire de la correspondance panaméenne, soi-disant panaméenne, l'invocation d'un droit qui pourrait être rattaché de quelque façon que ce soit à la Convention, j'expliquerai comment ces droits ne sont nullement pertinents dans le cas d'espèce, et cela de façon tout à fait manifeste.

Monsieur le Président, permettez-moi une dernière considération préliminaire.

Toutes les exceptions soulevées par l'Italie qui découlent des mêmes faits se trouvent inextricablement liées à l'exception sur l'inexistence d'un différend. Il ressortira de cela que les

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[4] *Concessions Mavrommatis en Palestine (Grèce c. Royaume Uni), arrêt n° 2*, 1924, *C.P.J.I. série A n° 2*, p. 11.

[5] *Thon à nageoire bleue (Nouvelle-Zélande c. Japon; Australie c. Japon), mesures conservatoires, ordonnance du 27 août 1999, TIDM Recueil 1999*, par. 44.

[6] *Sud-Ouest africain, exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 328.

[7] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011*, p. 84, par. 30.

arguments à l'appui de chacune des objections à la compétence de ce Tribunal démontrent qu'aucune réaction ne s'imposait aux réclamations de Monsieur Carreyó ou du Panama.

Monsieur le Président, l'inexistence d'une situation susceptible de produire un désaccord entre les Parties est principalement due à l'absence du caractère représentatif de Monsieur Carreyó.

Monsieur le Président, Messieurs les juges, Monsieur Carreyó est apparu aux yeux des fonctionnaires italiens, dans sa première lettre du 15 août 2001[8], comme un sujet privé sans aucun pouvoir de représentation pour négocier au nom du Gouvernement du Panama.

Vous pouvez trouver cette lettre dans vos dossiers à l'onglet n° 3, page 1, et j'aimerais attirer votre attention sur les dernières lignes ici projetées à l'écran.

> (*Continued in English*)
> The undersigned therefore respectfully requests that the Italian State, within reasonable time decides if it wants to release the vessel and pay the damages caused by the illegal procedure.[9]

*(Poursuit en français)* Le soussigné de cette lettre n'était ni un fonctionnaire du Gouvernement du Panama ni l'Ambassadeur du Panama à Rome. Sa signature a été certifiée par un notaire du Panama et apostillée conformément à la Convention de La Haye de 1961[10].

Pour ce qui concerne la confirmation de la nature privée qui ressort de cette certification et apostille, avec votre aval, Monsieur le Président, je vous renvoie au paragraphe 11 des objections de la réponse de la République d'Italie du 8 juillet 2016.

Il en va de même, Monsieur le Président, pour ce qui est des lettres envoyées par la suite par Monsieur Carreyó, en particulier celle du 7 janvier 2002, celle du 6 juin 2002 et celle des 3 et 31 août 2004[11]. Vous les trouverez sous l'onglet n° 3, aux pages 3, 5, 7 et 11, de vos dossiers.

Monsieur le Président, j'ai dit ceci avec tout le respect de la fonction de Monsieur Carreyó aujourd'hui en tant qu'agent devant cet éminent Tribunal.

Toutefois, même si je viens de parler de l'apparence aux yeux des fonctionnaires italiens, il ne s'agit pas seulement d'une question d'apparence, mais aussi d'une réalité en fait comme en droit car, Monsieur le Président, on ne peut pas confondre le pouvoir d'ester en justice avec celui de représenter un Etat dans les relations diplomatiques.

La Commission du droit international, dans le commentaire de son projet d'articles sur la responsabilité internationale de l'Etat, que vous pouvez trouver dans vos dossiers à l'onglet n°5, qui est aussi projeté à l'écran – j'espère en ce moment -, a souligné ce qui suit :

> La règle générale est donc que le seul comportement attribué à l'Etat sur le plan international est celui de ses organes de gouvernement ou d'autres entités qui ont agi sous la direction, à l'instigation ou sous le contrôle de ces organes, c'est-à-dire en qualité d'agents de l'Etat[12].

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[8] Lettre adressée par M. Carreyó au Ministre des affaires étrangères italien le 15 août 2001 (exceptions préliminaires, annexe F).
[9] *Ibid.*
[10] Convention du 5 octobre 1961 supprimant l'exigence de la légalisation des actes publics étrangers (La Haye, 5 octobre 1961 ; entrée en vigueur : 24 janvier 1965).
[11] Lettre adressée par M. Carreyó au Ministre des affaires étrangères italien le 7 janvier 2002 (exceptions préliminaires, annexe G) ; lettre adressée par M. Carreyó à l'ambassade italienne à Panama, 6 juin 2002 (exceptions préliminaires, annexe H) ; lettre adressée par M. Carreyó à l'ambassade italienne à Panama, 3 et 6 août 2004 (réponse, annexe G) ; télécopie adressée par M. Carreyó à l'ambassade italienne à Panama, 31 août 2004 (réponse, annexe H).
[12] Projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite, *Annuaire de la Commission du droit international*, 2001, vol. II(2), p. 20, p. 40, par. 2, commentaire du chapitre 2.

EXPOSÉ DE M. TANZI – 20 septembre 2016, matin

Monsieur le Président, une autorisation à ester en justice est toute autre chose.

Ce sont précisément ces deux rôles distincts qui ont été confondus par Monsieur Carreyó au fil des années, à partir de 2001. Evidemment, la même confusion a été faite par le Panama au moment où il a autorisé la présente demande en justice, mais aussi auparavant.

Cette confusion ressort très clairement de la communication de Monsieur Carreyó du 31 août 2004. Elle est reproduite dans l'annexe H, qui se trouve dans vos dossiers à l'onglet 3, page 11.

Il s'agit d'un fax d'accompagnement. On y trouve un langage fort généreux dans son interprétation très extensive du document que ce fax transmettait : « Please find enclosed a document authorizing Nelson Carreyó to act on behalf of the Government of Panama in the case of *M/V Norstar.* »[13]

Ce langage ne correspond pas du tout au texte du document que ce fax accompagne. Celui-ci consiste seulement en une lettre du Ministère des affaires étrangères panaméen envoyée au Greffier de ce Tribunal quatre ans auparavant, le 2 décembre 2000. Il se trouve dans l'annexe 1 sous l'onglet 4, page 1 de vos dossiers.

Je voudrais attirer votre attention sur les mots suivants : « ... was authorized to represent the Panamanian Government before this Honorable Tribunal as laid down in article 292 of the United Nations Convention on the Law of the Sea ».[14]

Comme vous le voyez, Monsieur le Président, ce document n'autorise certainement pas Monsieur Carreyó à intervenir au nom du Gouvernement du Panama dans l'*Affaire du navire « Norstar »,* tout court, comme l'annonçait le fax qu'a envoyé à l'Italie Monsieur Carreyó.

Revenons aux mots de la Commission du droit international ; il ne ressort pas de ce document que Monsieur Carreyó agissait d'aucune façon « sous la direction, à l'instigation ou sous le contrôle du Panama »[15].

Ce document se borne plutôt à conférer un pouvoir d'ester en justice au nom du Panama, clairement dans les limites exclusives d'une procédure de prompte mainlevée au titre de l'article 292 de la Convention.

Monsieur le Président, comme je viens de le démontrer, ce pouvoir d'ester en justice ne pouvait pas donner, en même temps, à Monsieur Carreyó le pouvoir de représenter le Panama au niveau diplomatique vis-à-vis de l'Italie, c'est-à-dire le seul niveau sur le plan duquel un désaccord entre les Parties pouvait se produire.

Il faut relever de cette correspondance deux éléments ultérieurs et encore plus étonnant, Monsieur le Président, qui justifient encore davantage l'absence de toute réaction de la part des responsables du Gouvernement italien.

Premièrement, l'intention d'entamer une procédure de prompte mainlevée a été adressée à un Etat qui n'avait pas exécuté la saisie du navire et, par conséquent, n'exerçait aucun pouvoir de détention sur le navire en question de manière manifeste.

Deuxièmement et de surcroît, au moment de cette communication, le 31 août 2004, ce pouvoir, donné quatre ans auparavant, était déjà sans objet depuis longtemps, toujours par rapport à l'Italie au moins. En effet, en dépit des annonces réitérées par Monsieur Carreyó d'un imminent déclenchement d'une procédure de prompte mainlevée, cette procédure n'a jamais été entamée. Entre temps, le 14 mars 2003, la Cour pénale de Savone avait prononcé par arrêt la mainlevée de l'immobilisation du « Norstar »[16] du fait que le navire en question ne se trouvait

[13] Fax sent by Mr Carreyó (footnote 11).
[14] Document of full powers issued by the Republic of Panama in favour of Mr Carreyó with regard to a prompt release procedure before ITLOS, 2 December 2000 (Preliminary Objections, Annex L).
[15] Voir *supra*, note 12.
[16] Jugement du tribunal de Savone, 13 mars 2003 (exceptions préliminaires, annexe B).

pas dans les eaux italiennes, internes ou territoriales. Quatre jours après, le 18 mars 2003, le juge italien a transmis cet arrêt aux autorités espagnoles[17].

Monsieur le Président, c'est donc seulement à l'été 2004 que l'Italie s'est aperçue que, quatre ans auparavant, en décembre 2000, Monsieur Carreyó avait été autorisé par le Gouvernement du Panama à intenter contre l'Italie une procédure de mainlevée devant ce Tribunal[18]. Quatre ans après ! De plus, il paraissait tout à fait évident aux fonctionnaires italiens qu'une telle procédure envers l'Italie n'avait aucun fondement puisque l'Italie n'exerçait aucun pouvoir de contrainte sur le navire !

De plus, il faut mettre en exergue que le Gouvernement panaméen n'a pas pris soin d'informer le Gouvernement italien de l'autorisation en question, si ce n'est près de quatre ans après, alors que ce pouvoir d'ester en justice dans une procédure de prompte mainlevée était totalement sans objet.

Nous avons beaucoup de mal, Monsieur le Président, à concevoir l'existence d'une obligation internationale de diligence d'après laquelle les fonctionnaires italiens auraient dû connaître, pendant cette période de quatre ans, une information qui ne leur avait pas été communiquée et qui, certainement, n'était pas dans le domaine public.

A l'inverse, Monsieur le Président, on pourrait plutôt se demander s'il n'existait pas une obligation, pour le Gouvernement du Panama, d'informer promptement l'Italie de tout pouvoir d'ester en justice dont il avait investi Monsieur Carreyó et qui aurait pu affecter l'Italie. Cela au moins afin d'invoquer de façon valable son prétendu statut officiel le moment venu et, pour l'Italie, de pouvoir contester à bon droit sa non-reconnaissance.

Quoi qu'il en soit, Monsieur le Président, une attitude différente du Panama à ce propos n'aurait pas changé grand-chose alors qu'il s'agissait toujours et seulement d'un pouvoir d'ester en justice dans une procédure de prompte mainlevée qui n'a jamais été entamée.

Monsieur le Président, Madame et Messieurs les juges, s'il est tout à fait évident que, jusqu'à la date du 31 août 2004, Monsieur Carreyó ne pouvait pas représenter la volonté du Gouvernement du Panama dans ses relations diplomatiques avec l'Italie, il est d'autant plus évident que, jusqu'à cette date, toute prétendue attente par le Panama d'une réponse de la part de l'Italie était sans fondement.

Je voudrais maintenant illustrer, Monsieur le Président, comment on parvient aux mêmes conclusions pour les communications envoyées les années suivantes jusqu'à la date de l'introduction de la requête panaméenne le 17 décembre 2015.

Il faut tout d'abord remarquer qu'à la même date, le 31 août 2004, où Monsieur Carreyó avait envoyé le fax que je viens de citer, l'Italie a reçu, pour la première fois, du Gouvernement panaméen, une communication d'un contenu similaire à celui envoyé par Monsieur Carreyó[19]. Il s'agit de la note verbale AJ n° 2227. Elle se trouve dans vos dossiers sous l'onglet n° 4, à la page 3. Les mêmes considérations que je viens de vous présenter concernant le fax de Monsieur Carreyó de la même date et de son annexe sont aussi largement applicables à ce document.

Comme vous pouvez le constater au second alinéa de cette lettre, encore une fois, on fait référence au pouvoir, bien dépassé à l'époque, d'ester en justice dans une procédure de prompte mainlevée. Aux troisième et quatrième alinéas, cette lettre indique qu'elle transmet au Gouvernement italien une lettre de Monsieur Carreyó du 3 août 2004, toujours certifiée et apostillée. C'est une modalité curieuse car l'on pourrait se demander qui représente qui dans cette affaire : le privé le public, ou le public le privé ?

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[17] Notification du jugement du 13 mars 2003 aux autorités espagnoles, 18 mars 2003 (exceptions préliminaires, annexe I).

[18] Télécopie adressée par M. Carreyó, voir *supra*, note 11 ; Procuration, voir *supra*, note 14.

[19] Note verbale A.J. n° 2227 adressée à l'Italie par le Ministère panaméen des affaires étrangères, 31 août 2004 (exceptions préliminaires, annexe M).

Cette perplexité surgit de surcroît par rapport à la condition soulignée par la Commission de droit international d'après laquelle la conduite d'un individu est attribuée à un gouvernement donné seulement lorsqu'il agit, selon les mots de la Commission du droit international, « sous la direction, à l'instigation ou sous le contrôle des organes de gouvernement »[20].

Vous trouvez le texte de la lettre en question sous l'onglet n° 3, page 7, de vos dossiers.

Dans cette lettre, on voit, pour la première et dernière fois dans la correspondance en question, une référence à l'article 283 de la Convention sur lequel je me pencherai tout à l'heure.

Mise à part cette référence formelle à la disposition en question, on ne trouve aucune mention des dispositions de la Convention d'où ressortent les droits matériels dont la prétendue violation par l'Italie a été invoquée dans la requête panaméenne.

Avant d'en revenir aux autres communications soi-disant panaméennes, Monsieur le Président, j'aimerais attirer votre attention sur la formule de clôture de la lettre du 3 août 2004.

> (*Continued in English*)
> The Government of Italy will understand that failing to respond to the demand of the Government of Panama by August 30th 2004 Panama will have no other choice than to submit the dispute to arbitration in accordance with Annex VII of the United Nations Convention on the Law of the Sea.[21]

*(Poursuit en français)* Il est difficile d'évaluer les effets juridiques d'une communication qui a fixé un délai qui avait déjà expiré avant même sa transmission. L'Italie a reçu cette communication le 31 août et, dans cette communication, le délai était fixé au 30 août – deux jours avant que l'Italie reçoive cette communication.

Il se peut que les estimés confrères adversaires trouvent que le Panama était animé par un désir de « frankly and fully exchange views ».[22] Il semble toutefois que ce désir était faible ou que l'échange de vues qu'il avait à l'esprit ne devait pas être nécessairement franc ou complet.

L'approche panaméenne a été plutôt celle de présenter, à maintes reprises et de manière péremptoire, une requête en paiement de dommages et intérêts dont la base juridique, en droit international, n'était aucunement évidente, tout en menaçant en même temps d'entamer une action en justice. Une collection de ces passages pertinents est projetée à l'écran en ce moment.

Monsieur le Président, cette considération a été confirmée par le libellé de la seule communication du Panama avant l'introduction de la requête du 17 décembre 2015. Je me réfère notamment à la note verbale du 7 janvier 2005 du Ministère des affaires étrangères panaméen[23].

Dans cette communication, reproduite dans vos dossiers à l'onglet 4, page 5, on trouve mentionné, avec un langage assez laconique, que Monsieur Carreyó « requested that procedural impulsion be given to the request submitted for consideration to the Government of the Republic of Italy ».

Or, si l'on voulait attribuer au Panama la lettre de Monsieur Carreyó de cinq ans après, celle du 17 avril 2010, vous la trouverez dans vos dossiers à l'onglet n° 3 de la page 13, outre les mêmes problèmes de représentation que je viens de vous expliquer, il faut remarquer l'approche contenue dans le libellé de son ouverture et de sa clôture.

Voici l'ouverture, Monsieur le Président :

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[20] Voir *supra*, note 12.
[21] Letter of 3/6 August 2004 (footnote 11), pp. 1-2.
[22] Written Observations, para. 36.
[23] Note verbale A.J. No. 97 envoyée à l'Italie par le Ministère des affaires étrangères du Panama le 7 janvier 2005 (réponse, annexe M).

> (*Continued in English*)
> The undersigned is honoured to inform that we have obtained the authorization from the Ministry from Foreign Affairs of the Republic of Panama, to start a legal action against the Republic of Italy, at the International Tribunal of the Sea [sic] in Hamburg, in order to obtain compensation for damages caused by the wrongful arrest of the *Norstar* in Palma de Majorca Port (Baleari, Spain).[24]

*(Poursuit en français)* La lettre en question se termine en suivant la même approche de la façon suivante :

> (*Continued in English*)
> The undersigned therefore respectfully requests that the Italian State, within a reasonable time decides [sic] if it will pay the damages caused by the illegal procedure adopted by its competent authorities. Were the above-mentioned not happen, the Republic of Panama will apply to the Hamburg Tribunal.[25]

*(Poursuit en français)* En résumant, dans un laps de 14 ans, de la première lettre du 15 août 2001 jusqu'à la date de sa requête en justice de décembre 2015, Monsieur Carreyó et/ou le Panama ont envoyé des communications, dont celles avant le 31 août 2004, qui provenaient évidemment d'un sujet dont le prétendu caractère de représentant du Panama était inexistant et, de toute façon, inconnu en Italie.

Après cette date, ce caractère prétendument représentatif est resté tout à fait controversé. En premier lieu, par rapport à un pouvoir d'ester en justice dans une procédure de prompte mainlevée qui n'avait aucun fondement juridique dès le début, parce que l'Italie n'exerçait aucune mesure de contrainte sur les navires, et qui avait, de toute façon, perdu formellement son objet depuis le mois de mars 2003 lorsque le juge italien avait décidé la mainlevée du navire.

En deuxième lieu, toutes les communications portant sur le prétendu pouvoir de Monsieur Carreyó d'ester en justice au nom du Panama à partir du 31 août 2004, soit continuent à faire manifestement référence à cette procédure fantôme, soit parlent d'autorisation à ester en justice concernant cette procédure ou même en général.

Mais on reste, de toute façon, dans une perspective fantôme eu égard au fait que si l'on parle d'autorisation à ester en justice, cette autorisation ne peut que se référer encore à une procédure de mainlevée car c'est seulement cette procédure dans la Convention qui peut être entamée, soit par l'Etat du pavillon ou en son nom.

Monsieur le Président, je voudrais revenir très brièvement au document annexé aux observations de Panama sous son annexe 6 intitulé *Demande de Nelson Carreyó* datée du 23 août 2004[26]. Il se trouve sous l'onglet n° 7 de vos dossiers.

A part le fait qu'on ne trouve, dans ce document, aucune référence à quelque déclaration que ce soit d'acceptation de la compétence de ce Tribunal, qui vient d'être annoncé, il faut constater qu'il s'agit d'une requête de transmission de documents faite par Monsieur Carreyó « In his own name and on behalf of Intermarine & Co. ACE, a Norwegian Corporation. »[27]

Il ressort de ce document, aussi bien que des deux communications diplomatiques du Panama, qu'il y a confusion sur le rôle du Gouvernement panaméen dans cette affaire. Notamment, sur la question de savoir si, jusqu'à la date de la requête, il a agi en tant que : a) sujet autorisateur du pouvoir d'entamer une procédure de prompte mainlevée en son nom ;

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[24] Letter of Mr Carreyó to the Italian Minister of Foreign Affairs, 17 April 2010 (Reply, Annex K), p. 1.
[25] *Ibid.*, p. 2.
[26] Observations écrites, annexe 6.
[27] *Ibid.*, p. 1.

b) instrument de transmission à l'Italie de communications privées ; c) Etat agissant pour obtenir la réparation du préjudice causé par un fait internationalement illicite prétendument attribué à l'Italie.

Monsieur le Président, permettez-moi de répéter mon refrain encore une fois : on ne peut pas confondre le pouvoir d'ester justice au nom d'un Etat avec celui de le représenter dans les relations diplomatiques.

Finalement, il faut aussi souligner, une fois de plus, comment, mis à part les aspects portant sur le pouvoir représentatif de Monsieur Carreyó, toutes ces communications annonçaient le déclenchement de procédures judiciaires internationales ayant pour objet des comportements attribuables à un Etat qui n'était manifestement pas l'Italie.

Pour toutes ces raisons, Monsieur le Président, aucune réaction à ces communications ne s'imposait à l'Italie. Même en suivant la logique du *dictum* en *Georgie c. Fédération de Russie* mentionné[28], on ne peut pas considérer l'absence de réponse de l'Italie comme un élément constitutif d'un différend entre les Parties en la présente affaire.

Conformément à l'article 286 de la Convention, il est nécessaire qu'il s'agisse d'un « différend sur l'interprétation ou l'application de la Convention ». Il est vrai que, dans la requête, le Panama a invoqué une pléthore de dispositions de la Convention.

Comme la Cour internationale de Justice l'a rappelé : « Selon une jurisprudence constante, sa compétence doit s'apprécier au moment du dépôt de l'acte introductif d'instance »[29]. Le Panama, avant de déposer sa requête, n'avait pas soumis à l'Italie les réclamations dont ce Tribunal vient d'être investi.

Cela découle, premièrement, des mêmes arguments que je viens d'exposer d'après lesquels les lettres de Monsieur Carreyó ne pouvaient pas être attribuées au Gouvernement panaméen.

Deuxièmement, on se doit de remarquer que, de toute façon, dans ces mêmes lettres, on ne trouve aucune référence aux dispositions de la Convention invoquées par le Panama dans sa requête. Si jamais on trouvait implicitement des références aux droits protégés par la Convention, ces droits n'ont aucun rapport véritable avec les faits de l'espèce.

Il ne suffit pas, Monsieur le Président, que le demandeur se réfère à un certain nombre de dispositions de la Convention au moment de l'introduction de sa requête pour obtenir la compétence *ratione materiae* du Tribunal. Cela irait à l'encontre de la jurisprudence constante sur la condition d'objectivité de la détermination de la compétence du juge international que je viens de mentionner au début de ma plaidoirie[30].

Dans son exposé écrit, l'Italie s'est déjà penchée sur la non-pertinence des droits invoqués par le Panama dans sa requête à l'appui de son exception sur la compétence du Tribunal[31] ; ma collègue, Madame la professeure Ida Caracciolo, y reviendra aussi le moment venu dans le cadre des arguments relatifs à l'irrecevabilité de la demande panamienne.

Monsieur le Président, dans l'*Affaire du navire « Louisa »,* ce Tribunal a affirmé que :

> Pour que le Tribunal puisse déterminer s'il a compétence, il faut qu'il établisse un lien entre les faits allégués par Saint-Vincent-et-les Grenadines et les dispositions de la Convention que Saint-Vincent-et-les Grenadines invoque. En outre, il doit démontrer que (...) les demandes présentées par Saint-Vincent-et-les Grenadines peuvent se fonder sur ces dispositions[32].

[28] Voir *supra*, par. 15.
[29] *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002*, p. 12, par. 26.
[30] Voir *supra*, par. 11 à 15.
[31] Exceptions préliminaires, par. 19 ; Réponse, par. 28-49.
[32] *Navire « Louisa » (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne)*, Judgment, *TIDM Recueil 2013*, p. 36, par. 99.

Aux fins de la présente affaire, je voudrais attirer votre attention sur le fait que, dans les communications soi-disant panaméennes, on ne trouve à maintes reprises qu'une prétention de paiement des dommages-intérêts qui est dépourvue de tout fondement juridique ayant un véritable lien avec la Convention.

Monsieur le Président, je vais immédiatement vous exposer le caractère manifeste de cette circonstance dont l'évidence pourra porter aisément ce Tribunal à la conclusion qu'il ne pourra pas trancher cette affaire sur le fond dans le cadre de cette procédure préliminaire.

En fait, la seule allusion à une règle ou à un principe du droit international matériel que l'on peut relever de la correspondance de Monsieur Carreyó est celle ayant pour objet le principe de la liberté de commerce[33].

Monsieur le Président, aucune des dispositions invoquées par Monsieur Carreyó ou le Panama fait explicitement référence à une telle liberté. Tout de même, on pourrait considérer qu'en invoquant cette liberté, Monsieur Carreyó entendait se référer à la liberté de navigation envisagée à l'article 87 de la Convention.

Même dans ce cas, encore une fois, votre jurisprudence nous vient à l'aide afin de nous indiquer de manière tout à fait manifeste la non-pertinence *ratione loci* du principe de la liberté de navigation dans la présente affaire. Notamment dans l'*Affaire du navire « Louisa »*, ce Tribunal s'est prononcé de façon claire et précise sur la non-application du principe de la liberté de navigation aux situations d'immobilisation d'un navire. Le passage en question est projeté à l'écran en ce moment et se trouve à l'onglet n° 6 de votre dossier. Je cite les parties plus pertinentes, notamment :

> Nul ne conteste que le « Louisa » a fait l'objet d'une mesure d'immobilisation dans un port espagnol. L'article 87 ne peut s'interpréter d'une manière qui accorderait au « Louisa » le droit d'appareiller et de gagner la haute mer alors qu'il a été immobilisé dans le cadre de poursuites judiciaires[34].

Monsieur le Président, il est difficile d'imaginer une affaire à laquelle corresponde aussi bien ce passage que celle devant vous aujourd'hui.

Toutes les considérations que je viens d'exposer portent à conclure qu'il n'y a qu'une seule réclamation dans la requête panaméenne qu'on peut retrouver dans la correspondance soi-disant panaméenne. Il s'agit de la réclamation du paiement des dommage-intérêts pour l'immobilisation du navire « Norstar ».

Or, on trouve dans les ordres juridiques internes, y compris ceux de l'Italie et du Panama[35], un principe général bien établi d'après lequel l'obligation d'indemniser dans le cadre de la réparation dépend de l'existence d'un lien de causalité entre le dommage dont on réclame la réparation et la commission d'un fait illicite en tant que fait générateur de cette obligation[36].

En droit international, ce principe a trouvé une reconnaissance jurisprudentielle dans un des passages les plus connus et amplement cités de l'arrêt de la Cour permanente de justice internationale dans l'*Affaire de l'Usine de Chorzów* : « Le principe essentiel, qui découle de la notion même d'acte illicite (…), est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite »[37].

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[33] Lettre du 7 janvier 2002, voir *supra*, note 11, p. 2 ; lettre des 3 et 6 août 2004, voir *supra*, note 11, p. 2 ; lettre du 17 avril 2010, voir *supra*, note 24, p. 2.
[34] *Navire « Louisa » (Saint-Vincent-et-les Grenadines c. Royaume d'Espagne), arrêt, TIDM Recueil 2013*, p. 35 et 36, par. 109.
[35] Voir Code civil de l'Italie, article 2043 ; Code civil du Panama, article 1644.
[36] Voir Code civil de l'Italie, article 2043 ; Code civil du Panama, article 1644-A.
[37] *Usine de Chorzów (Allemagne c. Pologne), fond, arrêt, C.P.J.I. série A n° 17*, p. 47.

EXPOSÉ DE M. TANZI – 20 septembre 2016, matin

Bien que ce passage soit normalement cité par rapport au contenu de la réparation, il nous intéresse ici dans la mesure où il requiert l'existence d'un acte illicite comme condition génératrice du droit à la réparation.

Ce même principe a été codifié par la Commission de droit international à l'article 31 des articles sur la responsabilité internationale : « L'Etat responsable est tenu de réparer intégralement le préjudice causé par le fait internationalement illicite (…) »[38].

Or, Monsieur le Président, il découle des considérations que je viens de vous exposer sur la non-pertinence des droits invoqués par le Panama par rapport au cas d'espèce, qu'il n'y a aucun lien de causalité entre le dommage dont se plaint le Panama et un fait internationalement illicite du type de ceux invoqués dans sa requête.

Pour toutes ces raisons, Monsieur le Président, l'Italie soutient respectueusement que le Tribunal n'a pas compétence pour connaître de la requête déposée par le Panama le 17 décembre 2015 car, à cette date, il n'existait aucun différend sur les questions qui se trouvent soulevées dans cette demande.

Monsieur le Président, je vais maintenant exposer la deuxième raison pour laquelle l'Italie maintient que le Tribunal de céans ne pourrait valablement connaître de la demande qui lui a été présentée. Il s'agit notamment du fait que le Panama ne s'est pas acquitté du devoir prévu à l'article 283 de la Convention et il ne peut, de ce fait, saisir le Tribunal.

Monsieur le Président, avec votre aval, je ne citerai pas son contenu qui est produit dans mon intervention écrite. Il suffit de mettre en exergue, comme l'article 283, premièrement, que l'obligation en question, celle de procéder aux échanges de vues, surgit après la survenance d'un différend. Par conséquent, cette exception préliminaire est soulevée par l'Italie de façon subordonnée à la condition que ce Tribunal, contrairement aux argumentations italiennes, conclue qu'un différend s'était en effet produit entre le Panama et l'Italie.

Deuxièmement, il ressort de la même disposition que l'obligation en question s'impose en premier lieu au demandeur, qui se doit de prendre l'initiative.

Nous sommes parfaitement conscients qu'il ne peut pas y avoir un échange s'il n'y a pas deux parties entre lesquelles cet échange peut avoir lieu. A ce propos, nous avons dûment considéré la doléance avancée par le Panama dans ses observations d'après lesquelles l'Italie « has used silence to prevent Panama from fulfilling its desire to frankly and fully exchange views. »[39]

Monsieur le Président, nous allons démontrer que le Panama n'a nullement poursuivi un souhait d'avoir avec l'Italie un échange de vues de manière ni authentique ni complète.

En même temps, puisque la condition préalable en question est inextricablement liée à celle portant sur l'inexistence d'un différend, je vais adresser cette doléance panaméenne en me rattachant, de nouveau, au *dictum* de la Cour internationale de Justice dans l'affaire *Géorgie c. Fédération de Russie* déjà mentionnée et d'après lequel « l'existence d'un différend ne peut être déduite de l'absence de réaction d'un Etat (…) où une telle réaction s'imposait »[40].

Monsieur le Président, encore une fois, je vais démontrer qu'une telle réaction ne s'imposait pas pour l'Italie.

Notre première argumentation se rattache à celle, déjà illustrée, sur la non-attribution au Panama des communications provenant de Monsieur Carreyó. De même que celui-ci n'était pas apte à agir pour le compte de l'Etat panaméen afin de produire un désaccord entre les deux Etats, il ne pouvait non plus procéder de lui-même à un échange de vues interétatique avec l'Italie au nom du Panama.

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[38] Projet d'articles, voir *supra*, note 15, p. 97.
[39] Written Observations, para. 36.
[40] Voir *supra*, note 7.

NAVIRE « NORSTAR »

Monsieur le Président, avec votre aval, je me borne sur ce point à vous renvoyer à nos arguments sur l'absence du caractère représentatif que je viens de vous exposer et que vous trouvez aussi dans notre exposé écrit.

Notre deuxième argumentation se rattache, de nouveau, au fait que les communications en question, même si elles étaient attribuées au Panama, ne soulevaient aucun droit parmi ceux qui ont été invoqués dans la requête. Surtout, et manifestement, aucun de ces droits n'était véritablement lié aux faits de l'espèce. Alors que cette argumentation est également liée à ce que nous venons de dire pour démontrer l'inexistence d'un différend, je démontrerai sa relevance par rapport à l'exception portant sur l'article 283.

Comme il l'a été affirmé dans l'*Affaire Mavrommatis* : « Avant qu'un différend fasse l'objet d'un recours en justice, il importe que son objet ait été nettement défini au moyen de pourparlers diplomatiques »[41].

Bien que le libellé de l'article 283 indique que l'objet de l'échange de vues requis doive porter seulement sur les moyens de règlement du différend, tout récemment, le Tribunal arbitral dans l'affaire *Philippines c. Chine* a affirmé que : « Des propositions quant au mode de règlement impliqueront nécessairement une discussion sur le fond. La Convention doit être appliquée avec cette réalité à l'esprit »[42].

En fait, comme l'a souligné le Tribunal dans l'*Affaire des Chagos* : « L'article 283 exige qu'un différend ait surgi avec suffisamment de clarté pour que les Parties aient eu connaissance des questions au sujet desquelles elles étaient en désaccord »[43].

Monsieur le Président, nous ne soutenons nullement qu'il soit nécessaire que les Parties s'engagent dans des négociations sur le fond de leur désaccord. En fait, comme le Tribunal l'a dit dans l'*Affaire de l'« Arctic Sunrise »*, « l'article 283(1) n'exige pas des Parties qu'elles s'engagent dans des négociations concernant l'objet du différend »[44].

Ce que nous affirmons ici, Monsieur le Président, c'est que l'Etat demandeur, avant d'introduire sa demande en justice, doit présenter l'objet de ses réclamations de façon suffisante pour déterminer les contours du différend et sa pertinence avec la Convention.

Monsieur le Président, l'Italie soutient que seulement une fois que cette condition de bon sens, outre que de bonne foi et de bon droit, a été satisfaite, une réaction de la part du défendeur est due.

Même si, dans les communications soi-disant panaméennes, on trouve une référence expresse à l'article 283[45], comme on vient de l'expliquer il y a un instant, l'on ne trouve dans cette correspondance une véritable proposition de consultation qui présentait une indication suffisante du contour du prétendu différend ayant une liaison véritable avec la Convention. Rien, dans cette correspondance, ne pouvait donner à l'Italie le sens qu'il s'agisse d'un véritable différend entre les Etats Parties sur l'interprétation et l'application de la Convention.

Il faut aussi remarquer, Monsieur le Président, comment les communications en question se bornent à réitérer de façon péremptoire et insistent sur une réclamation de dommages-intérêts, conjointement à la menace d'entamer une action en justice. Avec votre permission, Monsieur le Président, je vous renvoie, de nouveau, à la collection de passages pertinents qui sont ici projetés à l'écran.

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[41] *Concessions Mavrommatis*, voir *supra*, note 4, p. 15

[42] *The Republic of Philippines v. The People's Republic of China*, CPA, affaire n° 2013-19, exceptions préliminaires, sentence, p. 115, par. 332.

[43] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, sentence, CPA, affaire n° 2011-03, p. 149, par. 382.

[44] *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, CPA, affaire n° 2014-02, Fond, sentence, p. 34, par. 151.

[45] Lettre des 3 et 6 août, voir *supra*, note 11.

Une lettre de Monsieur Carreyó se trouve à l'onglet 3 de votre dossier alors que les communications du Panama se trouvent à l'onglet 4 de votre dossier.

Une telle attitude se heurte à la logique de l'article 283. Comme il a été bien relevé par le juge Anderson, cette logique n'est pas celle de « d'annoncer l'intention d'introduire une instance »[46].

Finalement, Monsieur le Président, notre troisième argumentation, pour démontrer que le Panama n'a pas rempli la condition en question, porte sur le cadre et l'articulation temporelle de la correspondance de provenance soi-disant panaméenne. Cette argumentation est sans préjudice des considérations sur la prescription extinctive qui seront présentées le moment venu par mon collègue, Maître Paolo Busco.

Le Panama a présenté, dans ses observations, une liste de communications numérotées de 1 à 7 dans un texte d'environ deux pages, du paragraphe 19 à 32. Il s'agit là d'une narration qui pourrait être exposée en sept minutes. Mais, en réalité, il s'agit de sept communications réparties dans un laps de temps de 15 ans. De surcroît, il faut constater, que la dernière de ces communications, celle du 7 janvier 2005, remonte à 10 ans de l'introduction de la demande. Or, si l'on attribuait les communications de Monsieur Carreyó au Panama, sa dernière communication remonterait tout de même au 17 avril 2010, c'est-à-dire cinq ans avant le dépôt de la requête.

Il est évident que ce caractère fragmenté de la correspondance en question, dispersée à travers un laps de temps tellement long, se heurte à un autre aspect de la logique de l'article 283. Il s'agit d'un aspect bien exprimé par Monsieur le professeur Nordquist, qui envisage cette règle en tant que source de : « Une obligation continue applicable à tous les stades du différend »[47].

Si le Panama vraiment pensait qu'au moment de l'introduction de sa requête, il existait un différend avec l'Italie, il nous parait franchement curieux, Monsieur le Président, qu'au cours des 10 années précédentes – ou même cinq – le Panama n'ait pas essayé de procéder à des consultations avec l'Italie de manière convenable par le biais de ses représentants diplomatiques.

Pour toutes ces raisons, Monsieur le Président, l'Italie soutient respectueusement que le Tribunal n'a pas compétence pour statuer sur la requête du Panama du fait que celui-ci ne s'est pas acquitté de son devoir de procéder à un échange de vues avec l'Italie sur le prétendu différend du cas d'espèce.

Monsieur le Président, Madame et Messieurs les juges, j'en viens à la conclusion de mon intervention visant à démontrer que cet éminent Tribunal ne peut pas exercer sa compétence dans le cas d'espèce du fait de l'inexistence d'un différend entre les Parties et que le Panama n'a pas rempli la condition prévue à l'article 283 de la Convention.

Je vous remercie de votre attention. Avec votre autorisation, j'exposerai, après la pause, la dernière partie de ma plaidoirie. Je vous remercie Monsieur le Président.

**THE PRESIDENT:** Thank you, Mr Tanzi.

We have now reached the time when the Tribunal will withdraw for a break of 30 minutes. We will resume at 12 o'clock.

(*Break*)

**THE PRESIDENT:** Mr Tanzi, I invite you to continue your presentation.

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[46] Anderson, David, *"Article 283 of the United Nations Convention on the Law of the Seas"*, in Ndiaye, Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff 2007), p. 858.

[47] Nordquist, Rosenne, Sohn (eds.), *United Nations Convention on the Law of the Sea. A Commentary*, vol. V, (Martinus Nijhoof 1989) p. 29, par. 283.3.

M/V "NORSTAR"

**MR TANZI:** Mr President, thank you for giving me the floor.

Mr President, Members of the Tribunal, my submissions on the lack of jurisdiction *ratione personae* of this Tribunal will be divided into three parts. I wish to emphasize from the outset that each of these three objections is alone sufficient to establish the lack of jurisdiction of this Tribunal.

In the first part, I will contend that the order for seizure of the *M/V Norstar* issued by the Tribunal of Savona on 11 August 1998 does not amount *per se* to an internationally wrongful conduct. In that respect, I will also stress and elaborate on the fact that Panama, in order to ground its claim for damages, is actually targeting conduct that is different from the order for seizure, namely the actual arrest and detention of the *M/V Norstar*. For these reasons alone, the Tribunal lacks jurisdiction *ratione personae*.

In the second part, I will concentrate on the attribution of the arrest and detention of the *M/V Norstar* under international law, and I will demonstrate that such conduct is exclusively attributable to a State other than Italy.

Lastly, in the third part of my presentation I will address the role of Spain in the present dispute. I will demonstrate that the "indispensable party" principle applies to the present case and that, accordingly, this Tribunal may not exercise its jurisdiction over Panama's Application without Spain being a party to these proceedings.

Before I come to my legal arguments, Mr President, allow me briefly to highlight two circumstances that are of essential importance in setting out the factual background to the case before you.

First, on 24 September 1998, the Panamanian-flagged vessel *M/V Norstar* was arrested by Spanish authorities while it was anchored in the Palma de Mallorca Bay. The Palma de Mallorca Bay is part of Spanish internal waters, i.e. within the Spanish exclusive jurisdiction, <u>not</u> the Italian one. This matter of fact is uncontroversial as it was plainly recognized by Panama in its Application.[48] It is also not in dispute that the *M/V Norstar* has been "detained" in Spanish internal waters, without ever entering Italian waters since its arrest.

Second, while Italy has never exercised any enforcement over the *M/V Norstar*, it is also to be recalled that on 13 March 2003 the Tribunal of Savona revoked the seizure of the *M/V Norstar*. Such a decision was communicated to the Spanish authorities on 18 March 2003.[49] In line with this, on 13 November 2006 the Court of Appeal of Genoa answered a request by the Spanish authorities, dated 6 September 2006, concerning instructions with regard to the possibility of demolishing the *M/V Norstar*,[50] stating that it was not entitled to decide on the matter.[51] The relevant documents were attached to Italy's Preliminary Objections and their Reply.

Mr President, Members of the Tribunal, let me now turn to the first part of this presentation, where our main argument is that the order for seizure in question does not amount *per se* to conduct in breach of an international obligation.

Even assuming that the Italian judicial decision in question may have been inconsistent with international law, Italy maintains that such conduct alone is not sufficient to actualize an internationally wrongful act. As stated by the International Court of Justice in its *dictum* in the *Gabčikovo-Nagymaros* case,

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[48] Application, para. 5.

[49] Communication to the Spanish Authorities of the judgment of 13 March 2003, 18 March 2003 (Reply, Annex J).

[50] Response by the Court of Appeal of Genoa to the request of the Spanish Authorities to demolish the M/V Norstar, 13 November 2006 (Preliminary Objections, Annex O).

[51] *Ibid.*

STATEMENT OF MR TANZI – 20 September 2016, a.m.

> [a] wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act … and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act".[52]

Mr President, this is precisely the legal situation which applies to the order for seizure in question.

Now, even considering *in arguendo* that the arrest of the *M/V Norstar* was in breach of an international obligation, the Italian court's order could only be deemed as "preparatory", if at all, with respect to such putative wrongful conduct. Consequently, the order for seizure cannot ground Panama's claim for it involves no internationally wrongful conduct.

Mr President, Panama itself seems to be aware of the fact that the order for seizure alone cannot constitute an internationally wrongful act, insofar as its claim targets only the arrest and detention of the *M/V Norstar*.

It is well to recall that in paragraphs 1 and 3 of its Application, and in paragraphs 7, 9, 47, 48 and 51 of its Observations, Panama claimed that the dispute concerns "the arrest and detention of the *M/V Norstar*". In the clearest terms, Panama claimed to be seeking redress for the arrest and detention rather than the order for seizure. For ease of reference, relevant excerpts of the Applicant's pleadings are reproduced in tab 11 of your folder.

Mr President, in light of the above considerations, it appears that the order for seizure of the *M/V Norstar* was not the actual conduct making up the international wrong alleged in the present proceedings and, no less importantly, it is not even the conduct actually complained of by the claimant.

Mr President, I shall now come to the second part of my presentation. Having just showed that the object of the claim by Panama is the arrest and detention of the *M/V Norstar*, I will now demonstrate that such conduct is not attributable to Italy and that, therefore, Italy is the improper respondent in the present proceedings.

The international rules on the attribution of an internationally wrongful act are based on the *independent responsibility principle*. As put by the International Law Commission in its codification work on the subject, "each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it".[53]

Under the relevant part of article 4, paragraph 1, of the 2001 International Law Commission's Articles on State Responsibility it is stated that:

> *The conduct of any State organ shall be considered an act of that State under international law*, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".[54]

As emphasized by the Commission itself in a passage already quoted in my previous intervention for different purposes

[52] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7, at p. 54, para. 79; emphasis added.
[53] Articles on Responsibility of States for Internationally Wrongful Acts, in Yearbook of the International Law Commission, 2001, Volume II (Part Two), pp. 31 *et seq.*, at p. 64, para. 1 ("ASR").
[54] *Ibid.*, p. 40.

> [T]he general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.[55]

Mr President, in the light of what I have just quoted, it is clear that the conduct of the Spanish authorities in arresting and detaining the *M/V Norstar* cannot be considered as performing acts that may be attributed to Italy under article 4 of the Articles on State Responsibility.

As put by the ILC, the independent responsibility principle is subject to "exceptional cases where one State is responsible for the internationally wrongful acts of another".[56] Such exceptions have been codified in articles 5, 6 and 8 of the Articles on State Responsibility. Mr President, none of such exceptions applies to the instant case.

Article 5, on conduct of persons or entities exercising elements of governmental authority, addresses the conduct of individuals or entities other than State organs.[57] Likewise, article 8, on conduct directed or controlled by a State, governs the attribution to a State of conduct carried out by private persons or entities.[58] Since the Spanish judiciary and enforcement officials are organs of a State, even though not Italy, it is manifest that those two provisions are immaterial to the instant case.

Article 6 on conduct of organs placed at the disposal of a State by another State may seem more germane to the present case, but I will show that rather than grounding the attribution to Italy of the arrest and detention of the *M/V Norstar*, article 6 substantiates precisely the contrary.

Article 6 reads as follows:

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.[59]

For the conduct of the organ of a State to be attributed to another State two conditions apply. As stated by the ILC in its commentary:

> [n]ot only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and *under its exclusive direction and control, rather than on instructions from the sending State*.[60]

Mr President, neither conditions are met in the present case.

In light of the rule in question, it cannot possibly be contended that the Spanish authorities, when carrying out the arrest of the *M/V Norstar*, were acting as organs placed at the disposal of Italy.

The fact that the arrest was carried out by Spain at the request of Italy within the framework of judicial cooperation under the 1959 Strasbourg Convention on Mutual Assistance in Criminal Matters does not change this assessment. Indeed, the rule under

[55] *Ibid.*, p. 38, para. 2.
[56] *Ibid.*, p. 65, para. 8.
[57] *Ibid.*, p. 42, para. 1.
[58] *Ibid.*, p. 47, para. 1.
[59] *Ibid.*, pp. 43-44.
[60] *Ibid.*, p. 44, para. 2; emphasis added.

consideration on the attribution of conduct of organs placed at the disposal of a State by another State, as explicitly pointed out by the International Law Commission "is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise".[61]

International case law illustrates the application of this rule precisely to the point in question. I may recall the *Xhavara* case.[62] There, as put by the ILC, the European Court of Human Rights decided that "the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania."[63]

The *X and Y v. Switzerland* case before the European Commission of Human Rights adds to the authorities in the same direction.[64] In that case, the European Commission had been seised of a claim where the conduct complained of had been performed by Swiss organs on Liechtenstein's territory on the basis of a bilateral treaty on police cooperation between the two countries. The determination of the attribution to either country was key to the assessment of the jurisdiction over the case because Liechtenstein was not a party to the European Convention. Eventually, the Commission found that it should entertain the case attributing the conduct to Switzerland. In order to do so, the Commission found that, while the Swiss authorities were exercising "their function on the basis of the treaty relationship between the two countries",[65] they were "not act[ing] in distinction from their national competence [... but] exclusively in conformity with Swiss law".[66]

Mr President, Members of the Tribunal, it appears from the authorities just referred to that a State organ may not be considered as having been placed at the disposal of another State when it has acted (a) in compliance with a treaty relationship; and (b) under the authority and laws of the State of which it is an organ. Both these circumstances apply to the instant case.

This is clear when one looks at the international framework under which the Italian judge requested the Spanish authorities to enforce the order for seizure that we are discussing today. As already alluded to, such legal framework is provided by the 1959 Strasbourg Convention on Mutual Assistance in Criminal Matters[67], which is binding upon Italy and Spain.

Mr President, I would like to draw your attention to some of its provisions that are of special interest in relation to the present case. You may find them in excerpt at tab 12 of your folder and they will also be displayed on the screen. They are, respectively, articles 2, 3 and 5.

Article 2 clearly provides that a Contracting Party is allowed to refuse to enforce a letter rogatory from another State Party when the request concerns a political or fiscal offence.[68]

Clearly, under the provision in question, Spain was free to enforce or refuse enforcement of the Italian request, as it concerned a fiscal offence.

Under article 5, a Contracting Party may reserve its ability to refuse the enforcement of a letter rogatory on a number of other grounds, which you can see on the screen and find in your folder at tab 12, page 5.[69] Indeed, Spain has availed itself of this opportunity to the fullest extent by making the following declaration, which can also be found on the screen, and at tab 12, page 7 of your folder. It reads as follows:

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[61] ASR (footnote 53), p. 44, para. 2.
[62] *Xhavara and Others v. Italy and Albania*, Application No. 39473/98, 11 January 2001.
[63] ASR (footnote 53), p. 44, footnote 130.
[64] European Commission of Human Rights, *X and Y* v. *Switzerland*, Application Nos. 7289/75 and 7349/76, Decision, 14 July 1977, in *Yearbook of the European Commission of Human Rights*, 1978, p. 372.
[65] *Ibid.*, p. 402.
[66] *Ibid.*, p. 406.
[67] European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959; entry into force: 12 June 1962).
[68] *Ibid.*, article 2(a).
[69] *Ibid.*, article 5.

> Spain reserves the right to make the execution of letters rogatory for search or seizure of property dependent on the following conditions: (a) that the offence motivating the letters rogatory is punishable under Spanish law; (b) that the offence motivating the letters rogatory is an extraditable offence under Spanish law; (c) that execution of the letters rogatory is consistent with Spanish law.[70]

Article 3 of the Convention in point is even more germane to the instant case: "[t]he requested Party shall execute *in the manner provided for* by its law any letters rogatory relating to a criminal matter".[71]

The provisions I have just quoted from the 1959 Strasbourg Convention clearly establish that the Spanish authorities, when arresting and detaining the *M/V Norstar*, were far from acting as organs placed at the disposal of Italy. They were far from acting, as put by the ILC, under "the exclusive direction and control"[72] of Italy and, as put by the European Commission of Human Rights, they were "not act[ing] in distinction from their national competence [… but] exclusively in conformity with [Spanish] law".[73]

On the basis of these considerations, Mr President, and with no inference whatsoever about the legality of the conduct in question attributable to Spain, it plainly appears that the Spanish judiciary, when performing the said conduct, was not an "organ placed at the disposal" of Italy under Article 6 of the Articles on State Responsibility.

Mr President, in light of the quoted authorities and of the considerations just made, it results that the arrest and detention of the *M/V Norstar* cannot in any way be attributed to Italy. Therefore, the Panamanian claim is addressed to the wrong Respondent and this Tribunal should decline its jurisdiction.

Mr President, Members of the Tribunal, each of the two foregoing objections is sufficient on its own to establish the Tribunal's lack of jurisdiction, but I will now, in the last part of my speech, address a third objection. This third objection involves the application of the "indispensable party principle".

The "indispensable party principle" emerges from the ICJ case law as an established principle of general international law. As stated by the Court in the *Monetary Gold* Case,

> [w]here … the vital issue to be settled concerns the international responsibility of a third State, [an international court or tribunal] cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.[74]

As put by Professor (now Judge) James Crawford, the principle in point reflects "the importance of consent as the foundation for the exercise of the Court's jurisdiction".[75]

For an international court or tribunal to pass judgment over the legality of conduct attributable to a State which is not a party to the proceedings in question would flatly contradict this fundamental principle of international law.

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[70] Spain's reservation is contained in the instrument of ratification deposited on 18 August 1982. The text of the reservation is available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030/declarations?p_auth=9PjGzN0s (visited on 19 August 2016).
[71] European Convention (footnote 67), article 3(1).
[72] See above, footnote 60.
[73] See above, footnote 66.
[74] *Case of the Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19, at p. 33.
[75] Crawford, *State Responsibility: The General Part* (CUP 2013), p. 657.

STATEMENT OF MR TANZI – 20 September 2016, a.m.

The ICJ applied and elaborated this principle in a number of cases, the second being the *East Timor* case. One of the passages most relevant to the present case is the one you may find in your folder at tab 14. It reads as follows:

> Australia's behaviour [could not] be assessed without first entering into the question why it [was] that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether ... it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.[76]

Panama has by contrast relied on its Observations on the *Nauru* case in an attempt to demonstrate that the "indispensable party principle" does not apply to this case.

However, it is helpful to set out the following passage from that decision in order to see clearly why the "indispensable party principle" was actually applied in *Nauru*, even though it was applied to the effect that under the factual circumstances of that case, it did not prevent the Court from exercising its jurisdiction. In that case, where Australia had jointly administered Nauru alongside New Zealand and the United Kingdom, the Court stated as follows:

> the interests of New Zealand and the United Kingdom do not constitute *the very subject-matter of the judgment* to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the *Monetary Gold* case. In the latter case, the determination of Albania's responsibility was a *prerequisite* for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom *is not a prerequisite* for the determination of the responsibility of Australia, the only object of Nauru's claim.[77]

By the same reasoning, had the interests of New Zealand and the United Kingdom constituted the very subject matter of the requested judgment, the Court would clearly have applied the same principle to the effect of preventing the exercise of its jurisdiction.

Mr President, Members of the Tribunal, I will now illustrate, by reference to these authorities, how the "indispensable party principle" prevents this Tribunal from exercising its jurisdiction in the present case. To that end, I would like to draw your attention, once again, to its basic factual background.

Although Italy made the order for seizure of the *M/V Norstar*, it is Spain, and Spain alone, that has arrested and detained the *M/V Norstar*. It is this arrest and detention that is the focus of Panama's claim before this Tribunal, and this arrest and detention, having been carried out solely by Spain, does not involve the kind of joint conduct between Italy and Spain as there was in *Nauru* between Australia, New Zealand and the United Kingdom. Spain's conduct is distinct from Italy's, and Panama has no claim without Spain's arrest and detention of the vessel. The latter conduct constitutes the very subject matter of the judgment that Panama asked this Tribunal to render.

Against the backdrop of these facts, it is unquestionable that, to use the ICJ terminology, it is Spain's arrest and detention of the vessel that constitutes the very subject matter of the judgment that Panama asked this Tribunal to render.

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[76] *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 28.

[77] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at p. 261, para. 55.

With those basic facts in mind, I would like to revert to the passage quoted a minute ago from the ICJ in *East Timor* and show its application to the present case. To that end, I will paraphrase the same passage in light of the factual background under consideration by placing Italy in the position of Australia and Spain in that of Indonesia. You may find the language of this paraphrasing in tab 14, page 2, of your folder.

> [Italy]'s behaviour cannot be assessed without first entering into the question why it is that [Spain] could not lawfully [arrest and detain the *M/V Norstar*]; the very subject-matter of the [Tribunal]'s decision would necessarily be a determination whether, having regard to the circumstances [relating to Spain's right to exercise enforcement jurisdiction over the *M/V Norstar*], it could or could not [arrest and detain the ship in accordance with UNCLOS]. The [Tribunal] could not make such a determination in the absence of the consent of [Spain].

Mr President, to put it another way, and in the language of the ICJ in *Nauru*, determining Spain's responsibility for the arrest and detention of the *M/V Norstar* is a "prerequisite" for the determination of Italy's responsibility. Spain, in conclusion, is an "indispensable party", and this precludes the Tribunal from exercising its jurisdiction over this claim.

The principle in question prevents the exercise of jurisdiction because the assessment of the legality of the order for seizure issued by Italy could not be made irrespective of the assessment of the legality of the arrest of the vessel in question by Spain, but the reverse is equally true, namely, this Tribunal's jurisdiction would likewise be prevented, by way of corollary, because the assessment of the legality of the order for seizure by Italy would *a fortiori* imply an assessment of the legality of its enforcement by Spain.

This is corroborated by *East Timor* in a passage already quoted by Italy in its Reply:

> the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act.[78]

Mr President, this reasoning was confirmed in *Germany* v. *Italy*. There, the question was whether Italy was in breach of the international obligation on jurisdictional immunity vis-à-vis Germany by enforcing judicial decisions rendered by the Greek judiciary.

For the purposes of the present case, the Court highlighted that

> [I]t is unnecessary, in order to determine whether the Florence Court of Appeal violated Germany's jurisdictional immunity, to rule on the question of whether the decisions of the Greek courts did themselves violate that immunity – something … which it could not do, since that would be to rule on the rights and obligations of a State, Greece, which does not have the status of party to the present proceedings.[79]

The same principle has been recently confirmed in *Philippines v. China*.[80] Like in *Nauru*, the Tribunal applied the principle in question finding that it would not prevent the Tribunal's exercise of jurisdiction.

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[78] *East Timor* (footnote 76), p. 102, para. 29.

[79] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, Judgment, *I.C.J. Reports 2012*, p. 99, pp. 150-151, para. 127.

[80] *The Republic of Philippines v. The People's Republic of China*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, pp. 71-74, paras. 179-188; *The Republic of Philippines v. The People's Republic of China*, PCA Case No. 2013-19, Award, 12 July 2016, p. 60, para. 157.

STATEMENT OF MR TANZI – 20 September 2016, a.m.

However, it is useful to look at the reasoning followed by the Tribunal which corroborates the principle in point and its application to the instant case preventing the Tribunal's exercise of its jurisdiction:

> The present situation is different from the few cases in which an international court or tribunal has declined to proceed due to the absence of an indispensable third party, namely in Monetary Gold Removed from Rome in 1943 and East Timor before the International Court of Justice and in the *Larsen v. Hawaiian Kingdom* arbitration. In all of those cases, the rights of the third States (respectively Albania, Indonesia, and the United States of America) would not only have been affected by a decision in the case, but would have 'form[ed] the very subject-matter of the decision'. Additionally, in those cases the lawfulness of activities by the third States was in question, whereas here none of the Philippines' claims entail allegations of unlawful conduct by Vietnam or other third States.

Clearly, Mr President, the position of Spain in the present proceedings is different from that of Vietnam in the just quoted case.

Mr President, Members of the Tribunal, this ends my presentation and I thank you for your attention. The next speaker will be Professor Ida Caracciolo, and I would request that you invite her to the podium.

**THE PRESIDENT:** Thank you, Mr Tanzi.

I now invite Ms Caracciolo to make her statement.

M/V "NORSTAR"

STATEMENT OF MS CARACCIOLO
COUNSEL OF ITALY
[ITLOS/PV.16/C25/1/Rev.1, p. 32–38]

**MS CARACCIOLO:** Mr President, Members of the Tribunal, I am honoured to appear today before you, and to do so on behalf of my country, Italy.

My task is to address the issue of the inadmissibility of the claim of the Republic of Panama. In particular I shall assess that the claim by the Republic of Panama pertains predominantly – if not exclusively – to alleged "indirect violations" and that therefore it is inadmissible because the local remedies have not been exhausted.

To that end, my submission will be divided in two parts. The first one will expound the manifest irrelevance and incoherence of the UNCLOS provisions relied upon in Panama's Application with respect to the facts of the present case.

The second part will deal with the written communications and the notes verbales sent respectively by Mr Carreyó and by Panama to Italy. Both the written communications and the notes verbales corroborate the preponderance of the "indirect" character of the injury invoked by Panama.

Let me preliminarily maintain that all my considerations hereafter will be made with all due respect to the function of Mr Carreyó as the Agent of the Republic of Panama.

Finally, by way of introduction, Mr President, Members of the Tribunal, I should stress that all of my arguments, as well as those put forward by my colleagues on the inadmissibility of the Panamanian claim, are advanced on a subsidiary basis and are without prejudice to Italy's contentions concerning the lack of jurisdiction of the Tribunal over Panama's Application.

Mr President, Members of the Tribunal, I come now to the first part of my submission on the manifest irrelevance of the UNCLOS provisions relied upon by the Republic of Panama.

This point is equally relevant in relation to the objection to jurisdiction due to the absence of a dispute between the Parties prior to the filing of the Application. Therefore my arguments on this matter should be considered as complementary to what has been said by Professor Tanzi, as well as in both our written pleadings. That is why Italy finds Panama's Request of 16 August 2016 difficult to understand and totally unfounded, as Professor Tanzi has already underlined.

I shall demonstrate that because all the articles of UNCLOS relied upon by Panama are *prima facie* manifestly irrelevant to the facts of the present case. Consequently there has been no breach of the UN Convention that could be attributed to the Italian Republic. Thus the claim cannot but be predominantly one of an espousal nature, pertaining to alleged indirect violations and seeking redress for the owner of the *M/V Norstar*.

To that end I would like to briefly summarize the facts which Italy considers relevant to determine the irrelevance of the alleged provisions of UNCLOS on which the Panamanian claim is grounded.

Mr President, Members of the Tribunal, at the basis of the instant case there is the seizure of the *M/V Norstar*, a Panamanian-flagged vessel, owned by Inter Marine & Co. AS, a Norwegian company. The latter and the *M/V Norstar* were managed by another company, Borgheim Shipping, also established in Norway. Inter Marine chartered out, through Borgheim Shipping, the vessel to Normaritime Bunker Company, a Maltese company, which was *de facto* managed again by Borgheim Shipping.[1]

The seizure was executed by the competent Spanish authority on 28 September 1998 when the *M/V Norstar* was moored in the Spanish Bay of Palma de Mallorca,[2] following a

[1] International Letters Rogatory of the Tribunal of Savona to the Spanish Authority, 11 August 1998 (Preliminary Objections, Annex D (Confidential Annex), p. 3).
[2] *Ibid.*, p. 1.

request for judicial assistance from the Public Prosecutor at the Tribunal of Savona in accordance with the European Convention on Mutual Assistance in Criminal Matters of 1959.[3]

The rationale of seizing the *M/V Norstar* was to acquire what was deemed to be a *corpus delicti* by the Public Prosecutor of Savona during criminal preliminary investigations on the alleged offences of criminal association aimed at smuggling mineral oils and tax fraud.

The core of the conduct under scrutiny by the Italian prosecutorial authority consisted in the purchase of oil products as ship's stores in non-EU countries, in Italy and in other EU ports under a customs-free regime. These oil products were to be then used to refuel yachts and mega-yachts, included many registered in Italy. These yachts and mega-yachts subsequently introduced the fuel into the Italian territorial sea without making a declaration for customs purposes.[4]

The *M/V Norstar* loaded marine gas oil on four occasions in the ports of Gibraltar, Livorno, Barcelona, and Livorno again. The loading operations at the Italian port of Livorno were carried out on 28 June 1997 and 12 August 1997. In particular Normaritime, through an Italian national, purchased and loaded on *M/V Norstar* at the port of Livorno marine gas oil totalling about 1,844,000 litres, exempt from taxes, as it was declared to be destined to the stores of that motor vessel.[5] This disputed trade was always brokered by an Italian Company, Rossmare International s.a.s, whose managing director was Italian as well.

The preliminary investigations directed by the Public Prosecutor at the Tribunal of Savona started from a tax audit on Rossmare[6] and ended with the criminal prosecution of four Italian nationals and four foreign citizens (three Norwegians and one Maltese). With the judgment of 13 March 2003 the Court of Savona acquitted all the accused.[7] Notably, the same judgment also revoked the seizure the *M/V Norstar*.[8]

Mr President, Members of the Tribunal, in view of the above factual narrative, I shall demonstrate the manifest irrelevance and incoherence of the UNCLOS provisions which, according to Panama's Application, were breached by Italy, namely articles 33, 73, paragraphs 3 and 4, 87, 111, 226 and 300 of the Convention.

Article by article, I shall elaborate the argument already put forth in the Italian written pleadings that all the provisions mentioned are "totally inconsistent, both *ratione loci* and *ratione materiae* with respect to the seizure of the *M/V Norstar* [...]".[9]

To begin with, the claim of the Republic of Panama grounded on article 33 of UNCLOS – which deals with the contiguous zone – is clearly *prima facie* misplaced. As well known, "[t]he contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured".

Therefore because the seizure of the *M/V Norstar* took place in the Spanish internal waters, when the vessel was moored at the Bay of Palma de Mallorca, the reference to article 33 made by Panama in the Application is manifestly irrelevant.

As far as the alleged breach of article 73, paragraphs 3 and 4, is concerned, it is just worth recalling that this provision only refers to the arrest and the detention of vessels by coastal States in the course of ensuring compliance with the laws and regulations concerning the conservation and management of fish stocks in the exclusive economic zone.

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[3] European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959; entry into force: 12 June 1962).
[4] Judgment by the Tribunal of Savona, 13 March 2003 (Preliminary Objections, Annex B (Confidential Annex); International Letters Rogatory, 11 August 1998 (footnote 1)).
[5] International Letters Rogatory, 11 August 1998 (footnote 1), p. 3.
[6] *Ibid.*, p. 2.
[7] Judgment by the Tribunal of Savona, 13 March 2003 (footnote 4).
[8] *Ibid.*
[9] Reply, para. 32.

M/V "NORSTAR"

In the light of the contents of article 73, Italy does not see any relation between this provision and the present case *ratione loci* and *ratione materiae*.

Firstly – and this point is not contested by Panama – the seizure of the Panamanian-flagged vessel was executed in the internal waters of Spain. Then clearly the event triggering the present case occurred outside the exclusive economic zone which notably is "[...] an area beyond and adjacent to the territorial sea".

Secondly – and also this point is not disputed by Panama – the activities of bunkering in which the *M/V Norstar* was involved clearly did not concern fishing vessels but pleasure boats: yachts and mega-yachts.[10]

As in the *M/V "Louisa" Case* – which is akin to the instant case[11] – the seizure of the *M/V Norstar* had no connection either with fishing activities or with laws and regulations on fishing. Indeed the Italian judiciary exercised its criminal jurisdiction with reference to conduct allegedly amounting to offences of criminal association aimed at smuggling mineral oils and tax fraud.

Turning to article 87, it codifies the principle of the free use of the high seas for all States. This provision delineates a non-exhaustive list of freedoms of the high seas, among which the freedom of navigation stands out.

In accordance with article 86 of UNCLOS, the freedoms of the high seas "apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, [...]".

The Panamanian allegation must also be seen in the context that the entire Convention should be interpreted taking into consideration that it provides for different regimes depending on different maritime spaces.[12]

Italy firmly considers that the freedom of navigation as established in UNCLOS cannot be interpreted to include a right to leave a port in order to have access to the high seas in all circumstances. Italy also definitely affirms that the freedom of navigation cannot be interpreted to include any immunity from the detention of a vessel in internal waters because of legal proceedings against it.[13]

Then Italy strongly maintains that article 87 is – even *prima facie* – manifestly irrelevant *ratione loci* with regard to the instant case.

Turning to article 111 of UNCLOS, this provision is also fully unrelated to the facts of the present case.

In fact article 111 codifies a well-established customary rule under which a State has the right to pursue into the high seas and arrest a foreign vessel which has committed an offence within its internal waters, territorial sea and contiguous zone and which must come to an end when the vessel enters the territorial sea of her own State or of a third State.

But no hot pursuit was put in place by the Italian authorities. The facts of this case are clear and not contested by the claimant State. The same facts are also confirmed in Panama's Application wherein it is stated that the arrest of the *M/V Norstar* occurred "when the vessel was anchored at the Palma de Mallorca Bay waiting for orders under the running Charter Party".[14]

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[10] Judgment of the Tribunal of Savona, 13 March 2003 (footnote 4); International Letters Rogatory, 11 August 1998 (footnote 1), p. 3; and Judgment of the Court of Appeal of Genoa, 25 October 2005 (Preliminary Objections, Annex K).

[11] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, at pp. 35-36, para. 104.

[12] *Ibid.*, para. 27.

[13] *M/V "Louisa"* (footnote 11), Dissenting opinion of Judge Wolfrum, p. 77, at pp. 83-84, para. 22.

[14] Application, para. 5, p. 3.

STATEMENT OF MS CARACCIOLO – 20 September 2016, a.m.

Also the claim grounded in article 226 of UNCLOS is again obviously irrelevant *ratione materiae* in the present case.

The article on the "Investigation of Foreign Vessels" is contained in Part XII of the Convention which provides for a legal regime on *The Protection and Preservation of the Marine Environment.* Specifically article 226 copes with investigations of foreign vessels for violation of internal or international rules and standards on the protection of the marine environment.

Thus, this provision is very specific in scope, not only because it is confined to the protection of marine environment but also because its purpose is to set out some conditions to those investigative activities within the competence of port States established in articles 216, 218 and 220.

This Tribunal, in the *M/V "Louisa" Case,* has already interpreted article 226 taking into account its express language, its object and purpose, thus rejecting any broadening of its scope of application.[15]

Then Italy strongly argues that article 226, dealing with marine environmental issues, is not evidently related to the seizure of a vessel in internal waters within criminal proceedings concerning smuggling and tax fraud.

Concluding with article 300 of UNCLOS, it is well established that it cannot be relied upon independently of the other UNCLOS provisions. In other words, an abuse of right may be invoked only in respect of the exercise of the rights, jurisdictions and freedoms recognized in UNCLOS. It is only when such rights, jurisdictions and freedoms are abused that article 300 may be applicable as this Tribunal has already made clear in the *M/V "Louisa" Case*.[16]

Therefore, since all the provisions identified by Panama in the Application are manifestly irrelevant to the present case, its claim based on article 300 of the Convention is altogether unfounded as well.

Mr President, Members of the Tribunal, in view of these considerations, Italy firmly contends that the provisions of UNCLOS invoked by the Republic of Panama in its Application are patently extraneous to the facts of the present case so that the inconsistency of the alleged violations by the Italian Republic of the rights and freedoms of Panama under the Convention are doubtless even *prima facie*.

This confirms Italy's conviction that the dispute between the Parties, far from being a dispute concerning the interpretation or application of UNCLOS, is related mainly and preponderantly to the indirect violations of the rights of the owner of the *M/V Norstar* and to the redress of the alleged injury it suffered as a result of the seizure executed by the Spanish authorities.

Mr President, Members of the Tribunal, I turn now to the second part of my submission which will set forth the prevalent, if not exclusive, espousal nature of the claim by the Republic of Panama, based on alleged indirect violations.

**THE PRESIDENT:** Ms Caracciolo, I would like to apologize for interrupting you. We are coming towards the end of this morning's sitting. How long will it take for you?

**MS CARACCIOLO:** Mr President, my second part will take around 20 to 25 minutes at most.

**THE PRESIDENT:** We will interrupt now and you will continue your presentation when we meet in the afternoon.

We will adjourn the present sitting and resume it at 3 p.m.

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[15] *M/V "Louisa"* (footnote 11), at p. 37, para. 111.
[16] *Ibid.*, para 137.

M/V "NORSTAR"

*(Luncheon adjournment)*

**PUBLIC SITTING HELD ON 20 SEPTEMBER 2016, 3 P.M.**

**Tribunal**

*Present:* *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

**For Panama:** [See sitting of 20 September 2016, 10 a.m.]

**For Italy:** [See sitting of 20 September 2016, 10 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 20 SEPTEMBRE 2016, 15 HEURES**

**Tribunal**

*Présents :* M. GOLITSYN, *Président* ; M. BOUGUETAIA, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

**Pour le Panama :** [Voir l'audience du 20 septembre 2016, 10 h 00]

**Pour l'Italie :** [Voir l'audience du 20 septembre 2016, 10 h 00]

**THE PRESIDENT:** The Tribunal will now continue the hearing of the *M/V "Norstar" Case* and I would like to invite Ms Caracciolo to continue her statement.

M/V "NORSTAR"

**Premier tour : Italie (suite)**

STATEMENT OF MS CARACCIOLO (CONTINUED)
COUNSEL OF ITALY
[ITLOS/PV.16/C25/2/Rev.1, p. 1–8]

**MS CARACCIOLO:** Mr President, Members of the Tribunal, I shall resume my presentation where I left off before the lunch break, namely the second part of my submission, which will set forth the prevalent, if not exclusive, espousal nature of the claim by the Republic of Panama based on alleged indirect violations.

On a preliminary basis, let me underline that, contrary to Panama's allegation in its Request of 16 August 2016, this argument was already raised by Italy in Chapters 1 and 3.II.A of its Preliminary Objections.[1] Italy focused on the general requirements of diplomatic protection strongly contending that Panama "… is preponderantly – if not exclusively – seeking to exercise diplomatic protection for the benefit of … private persons", namely the owner of the *M/V Norstar*.[2]

Mr President, Members of the Tribunal, I shall not reiterate the written pleadings, where Italy extensively analyses the case law of this Tribunal and of the International Court of Justice on this issue, as well as the works of the International Law Commission on the diplomatic protection. Conversely, my intention is to underline that in the light of the test commonly applied by international courts, all the relevant elements in the present case demonstrate that it concerns prevalently, if not exclusively, the alleged violation of the rights of the owner of the *Norstar*.

Besides, determining the indirect nature of injuries invoked is not new for this honourable Tribunal, which in the *M/V "Virginia G" Case* (at paragraph 157 of the Judgment reproduced in tab 20 of your folder) affirms that

> When the claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant.[3]

On this point it is worth mentioning the Commentary to Article 14 of the Draft Articles on Diplomatic Protection adopted in 2006 by the International Law Commission, which is reproduced in tab 21 of your folder. The Commission states that

> In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant ….
>
> The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official, diplomatic official, or State property the claim will normally be direct, *and where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect* (emphasis added).[4]

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[1] Request of the Republic of Panama for a ruling concerning the scope of the subject matter based on the Preliminary Objections filed by Italy, 16 August 2016, para. V.
[2] Preliminary Objections, Chapter 1, para. 5(a), and Chapter 3.II.A, paras. 28 and 29.
[3] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 54, para. 157.
[4] Draft Articles on Diplomatic Protection with commentaries, in *Yearbook of the International Law Commission*, 2006, Volume II, Part Two, p. 24 et seq., at p. 46, paras. 11-12, commentary on article 14.

STATEMENT OF MS CARACCIOLO – 20 September 2016, p.m.

Italy respectfully considers that these explanations exactly outline the situation in the instant case. Not only the subject of the dispute concerns the seizure of a private vessel occurring in the internal waters of Spain but also the monetary relief sought by Panama is preponderantly on behalf of the owner of the *Norstar*.

Most importantly, the grounds for this conclusion can be found in the Application of Panama.[5] Indeed Section 2, entitled "Subject of the Dispute", states that "[t]he Application concerns a claim for damages against the Republic of Italy caused by an illegal arrest of the *M/V Norstar* [...]". Furthermore the incipit of Section 5 on "Damages" is: "[a]s a consequence of the illegal acts of the Italian Republic, the vessel is now a total loss", while it ends by specifying that

> [t]he damages suffered by the vessel's owner *also* included the value of the ship, loss of revenues due to the unfulfilling of the Charter Party in force until detention, registration fees due to the Panamanian Maritime Authority for ships register, legal services, harbour costs, and others.

Mr President, Members of the Tribunal, in the light of the above considerations let me preliminarily contend an assertion contained in Panama's Observations according to which there would be a "clear parallel" between the instant case and the *M/V "SAIGA" Case*.[6] Conversely, Italy maintains that there are sufficient differences between the two cases. The most noticeable one is that in the *M/V "SAIGA" Case* the claimant States filed an application in connection with a specific legal ground, namely article 292 of UNCLOS concerning the prompt release procedure. Since prompt release cases are by nature coloured by urgency, this urgency cannot but influence the tests the Tribunal is called to apply in order to establish whether a claim is direct or indirect.

Mr President, Members of the Tribunal, the prevalence of a private interest underpinning this case is clear from the very beginning of this event.

To this end, it is worth mentioning a letter sent by Inter Marine & Co, the company owning the *Norstar*, to the Italian Embassy in Oslo on 2 February 1999. You may find the document in tab 19 of your folder.[7]

In this letter, the Chairman of the Board of Inter Marine & Co. states that it is:

> important to mention that the UN's Montego Bay Convention of 10/12/1982 clearly and fully makes the Italian State responsible to pay all or any damage *to any company* [...] by Mr Albert Landolfi's [*the Public Prosecutor at the Tribunal of Savona*] actions.
>
> Our company alone are losing about USD 1000.000 each month due to Mr Landolfi's actions. [...] This payment of damage is not subject to any discussions as the Italian Government have signed the Montego Bay Convention.

The communication proceeds to refer to the request for assistance submitted by Inter Marine & Co. to the Government of Norway in the following terms:

> On our side we have now been in contact with the Norwegian Foreign Department in Oslo and the Norwegian Embassy in Rome to assist us in respect of the damage claim. The Panamanian consular in Venezia is preparing the formal protest regarding the seizure of the vessel *Norstar*.

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[5] Application, paras. 2 and 5.

[6] Observations, para. 73.

[7] Letter from Mr Morch to the Italian Embassy in Oslo, 9 February 1999.

Let me incidentally add that this formal protest from Panama has never reached the Italian Ministry of Foreign Affairs.

It is for the sake of the private interests of the *M/V Norstar*'s owner that Mr Carreyó subsequently and Panama later on operated.

Mr President, Members of the Tribunal, in order to further substantiate the preponderantly espousal nature of Panama's claim, I shall address three points:

First, the unofficial nature of the written communications sent by Mr Carreyó to the Italian Republic; second, the content of these communications; third, the content of the notes verbales sent by the Republic of Panama to the Italian Republic.

Mr President, Members of the Tribunal, Italy received in ten years, from 2001 to 2010, six written communications by Mr Carreyó that can hardly be deemed to have an official nature.[8] All these letters are reproduced in tab 3 of your folder. As my colleague Professor Tanzi has already duly elaborated, these communications were far from being in accordance with the practice of interstate and diplomatic relations.

In fact, Mr Carreyó was defending the financial interests of the *M/V Norstar*'s owner, acting in his capacity as a private lawyer specializing in commercial and maritime law.

This conclusion is underscored by two facts. First, the communications addressed to the Italian Minister of Foreign Affairs and the Italian Ambassador in Panama were on Mr Carreyó's personal headed paper.[9]

Secondly, some of his other communications[10] had recourse to a specific means of certification – the so-called apostille under the Hague Convention of 1961 Abolishing the Requirements of Legalization for Foreign Public Documents.[11] As reiterated by Professor Tanzi and extensively indicated in the written pleadings,[12] this certification substitutes the legalization for documents issued in one State and to be utilized in situations or transactions taking place in other States.

Therefore, under any circumstance, the apostille of the Panamanian Minister of Foreign Affairs entails implicit acceptance or consent on the contents of the documents by the legitimizing authority. Indeed the only legal scope of an apostille is to certify the authenticity of the signature and the acting capacity of the signatory.

That the action of Mr Carreyó is inspired by the intention of defending the private interests of the owner of the *M/V Norstar* is also corroborated by the petition of 23 August 2004 to the Ministry of Foreign Affairs of Panama, which is reproduced in tab 7 of your folder.[13] The petition is submitted on behalf of Inter Marine & Co. and in the name of Mr Carreyó to request *inter alia* of the Panamanian Minister of Foreign Affairs that the letters of claim to the Italian Government dated 3-6 August 2004 be sent through diplomatic channels.

In point three of the petition Mr Carreyó recalls that he has special power of attorney to represent Inter Marine before "the Panamanian authorities and the International Tribunal for

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[8] Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs, 15 August 2001 (Preliminary Objections, Annex F); letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs, 7 January 2002 (Preliminary Objections, Annex G); letter sent by Mr Carreyó to the Italian Embassy in Panama, 6 June 2002 (Preliminary Objections, Annex H); letter sent by Mr Carreyó to the Italian Embassy in Panama, 3/6 August 2004 (Reply, Annex G); fax sent by Mr Carreyó to the Italian Embassy in Panama, 31 August 2004 (Reply, Annex H); letter of Mr Carreyó to the Italian Minister of Foreign Affairs, 17 April 2010 (Reply, Annex K).

[9] Letter of 6 June 2002 (footnote 8) and letter of 3/6 August 2004 (footnote 8).

[10] Letter of 15 August 2001 (footnote 8) and letter of 7 January 2002 (footnote 8).

[11] Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents (The Hague, 5 October 1961, entered into force: 24 January 1965).

[12] Preliminary Objections, para. 13, and Reply, paras. 11-20.

[13] Petition by Dr Nelson Carreyó dated 23 August 2004 in which he requests from the Ministry of Foreign Affairs of Panama a declaration accepting the jurisdiction of the International Tribunal for the Law of the Sea and that the letter of complaint be sent through diplomatic channels (Observations, Annex 6).

the Law of the Sea". It is only in point four that Mr Carreyó adds that he represents the Panamanian State before this Tribunal. Moreover, this reference cannot but be to his capacity to represent Panama before ITLOS for the prompt release of the vessel, taking into account the note verbale of Panama AJ 2387 of 2 December 2000.[14]

Mr President, Members of the Tribunal, the formal features of the communications from Mr Carreyó prove that he cannot *de jure* but act for the redress of the economic losses allegedly suffered by the owner of the *M/V Norstar* because of the seizure of the vessel. Mr Carreyo's attempts to elevate these private claims to the status of an international dispute between Panama and Italy must be rejected.

Mr President, Members of the Tribunal, I shall now address the content of the written communications sent by Mr Carreyó to the Italian Republic. In line with the indications that emerged from the illustration given by Professor Tanzi earlier on, the content of the communications confirms that also *de facto* Mr Carreyó was not acting on behalf of the Republic of Panama. Indeed, all these communications consist of isolated requests for the compensation of damages allegedly caused to the *Norstar*'s owner.

The core of these communications is, on the one side, the description of the arrest of the *Norstar* in the Bay of Palma de Mallorca[15] and, on the other, the expressed assertion that the Italian Government is obliged to compensate the damages suffered by the vessel's owner.[16]

Specifically, in the first written communication of 15 August 2001 Mr Carreyó clearly states that he is acting "in order to obtain a damage compensation for damages caused by the arrest of *M/V Norstar* in Palma de Majorca Port (Baleari, Spain), still occurring at the moment".[17] Mr Carreyó also reserves the right to "apply to the Hamburg Tribunal" in the event that Italy has not responded "within the reasonable time" to a request to "release the vessel and pay the damages caused by the illegal procedures".[18]

In the second written communication of 7 January 2002, Mr Carreyó reiterates the request for compensation, stating that "on the expiry of 21 days from the date of this letter, we will institute proceedings before the competent Court of Hamburg without any further notice".[19]

Also the third letter of 3-6 August 2004 proclaims that the request for compensation damages is the main scope of all contacts with the Italian Government. In this letter, Mr Carreyó acknowledges that "[a]s a consequence of the sentence of Savona Tribunal dated 13.03.2003, the vessel has been released".[20]

However, the letter continues "[...] the owners cannot take hold of her before all necessary repair works will enable her to navigate again".[21]

Then Mr Carreyó adds that "[i]f there would be a general consent of the Italian Government to pay damages, the undersigned would be prepared to meet representatives of the Italian Government to explain the amount of damages".[22]

Eventually in the following unequivocal terms, Mr Carreyó concludes

> The undersigned (Carreyó) therefore respectfully requests that the Italian State, within reasonable time, decides whether it wants to pay the damages caused by the illegal

[14] Document of full powers issued by the Republic of Panama in favour of Mr Carreyó with regard to a prompt release procedure before ITLOS, 2 December 2000 (Preliminary Objections, Annex L).
[15] Letter of 15 August 2001 (footnote 8) and Letter of 3/6 June 2004 (footnote 8).
[16] *Ibid.*
[17] Letter of 15 August 2001 (footnote 8).
[18] *Ibid.*
[19] Letter of 7 January 2002 (footnote 8).
[20] Letter of 3/6 August 2004 (footnote 8).
[21] *Ibid.*
[22] *Ibid.*

> procedure, *so that the owners can start all necessary repairs* (*emphasis added*) to restore the vessel to the condition she was prior to the illegal seizing ....[23]

Similarly, in Mr Carryó's last letter, dated 17 April 2010, Italy is requested to decide

> within reasonable time (...) if [it] will pay the damages caused by the illegal procedure adopted by its competent authorities"; otherwise Panama would have reserved the right to "apply to the Hamburg Tribunal.[24]

Then the compensation for any interest of the Panamanian Government injured by any international wrongful act committed by Italy in breach of UNCLOS was far from being the scope of Mr Carreyó's communications.

This assertion is further corroborated by the fact, already indicated by Professor Tanzi, that none of these communications indicates in a precise, unequivocal and appropriate manner the obligations owed by Italy towards Panama under UNCLOS. The sole reference to the law of the sea can be inferred from the mention, in very generic and inaccurate terms, in the first letter of Mr Carreyó of 15 August 2001 and in the written communication of 3-6 August 2004, of the general "principle of Freedom of Commerce outside territorial waters and Contiguous Zone".[25]

This vague allusion cannot evidence any specific, let alone serious intention on Mr Carreyó's part to claim on behalf of Panama that Italy had breached any obligations under UNCLOS. Even if the principle of freedom of commerce were considered to fall within the scope of article 87 of the UN Convention, as previously illustrated, this provision does not manifestly pertain to the conduct complained of in the present case.

Anyhow, still considering that the freedom of navigation includes activities undertaken not only by States but also by individuals or legal entities, as underlined by Judge Wolfrum in his Separate Opinion to the Judgment in the *M/V "SAIGA" (No. 2) Case*, "it is questionable to qualify claims resulting from infringements upon the right of freedom of navigation as interstate disputes"[26] but also admitting that private entities are entitled under UNCLOS to the right of free trade on the high seas, any violation of this right can be ascribed to Italy for the arrest of the *M/V Norstar* since notably it took place in the Spanish internal waters.

In conclusion, Italy argues that the only reason triggering the efforts of Mr Carreyó, which have materialized in the communications just described, was the aim of obtaining economic redress in favour of the owner of the *M/V Norstar* for the damages incurred to the vessel following its detention in the Port of Palma de Mallorca and for lost profits because of the non-use of the *M/V Norstar*.

Mr President, Members of the Tribunal, I turn now to the content of the notes verbales sent to the Republic of Italy by the Ministry of Foreign Affairs of the Republic of Panama, namely note verbale AJ 2227 of 31 August 2004 and note verbale AJ 97 of 7 January 2005, which you will find in tab 4 of your folder.[27]

My colleague, Professor Tanzi, submitted that with such notes verbales Mr Carreyó has not been empowered to legitimately represent the Panamanian Government in diplomatic exchanges with Italy.

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[23] *Ibid.*
[24] Letter of 17 April 2010 (footnote 8).
[25] Letter of 15 August 2001 (footnote 8) and letter of 3/6 August 2004 (footnote 8).
[26] M/V *"SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, *Separate Opinion of Vice-President Wolfrum*, para. 51.
[27] Note verbale A.J. No. 2227 sent by the Ministry of Foreign Affairs of Panama to Italy, 31 August 2004 (Preliminary Objections, Annex M) and note verbale A.J. No. 97 sent by the Ministry of Foreign Affairs of Panama to Italy, 7 January 2005 (Reply, Annex M)

STATEMENT OF MS CARACCIOLO – 20 September 2016, p.m.

For my part, I intend to expound that the two notes verbales support the contention that Panama's Application is preponderantly, if not exclusively, espousal in nature.

Indeed, both notes verbales laconically refer to the communications already sent to the Italian Government by Mr Carreyó, without adding anything new. Most importantly, they do not indicate the subject matter of the litigation between Panama and Italy in any way that links appropriately the facts complained of with an even manifest alleged breach of UNCLOS by Italy.

In particular, the first note verbale of 31 August 2004 (AJ 2227) simply refers to the fact that Mr Carreyó "requested the transmission via diplomatic channels of the claim note addressed to the Italian Ministry of Foreign Affairs, regarding the detention of the Panamanian flagged vessel NORSTAR [...]".[28] Thus its scope is merely to formally accompany the claim from Mr Carreyó made in the interests of the owner of the *M/V Norstar*.

In the second note verbale of 7 January 2005 the Ministry of Foreign Affairs of the Republic of Panama does not oppose equally to Italy any violation of Panama's rights under UNCLOS. It simply mentions the memorial of 3 January 2005 that Mr Carreyó submitted a few days before to Italy in his capacity as legal representative not only of the Panamanian State but also "of the interests of the owners of the motor vessel NORSTAR." On this mere premise, Panama asked Italy "to provide information on the progress of the case at issue".[29]

Italy considers that the vague and generic wording of this note verbale is again emblematic of the indirect nature of Panama's claim. Panama is hardly invoking the responsibility of Italy for the infringement of UNCLOS and agitating an international dispute.

From the above, Italy contends that the two notes verbales, far from notifying Italy of a legal claim stemming from the interpretation or application of UNCLOS, are aimed predominantly, if not exclusively, at supporting the vindication of the private interests of the owner of the *M/V Norstar*.

Mr President, Members of the Tribunal, in conclusion, Italy respectfully considers that Panama's claim would not have been brought but for the damages on behalf of the owner of the *M/V Norstar*. Therefore this claim is espousal in nature and consequently the rule of the exhaustion of local remedies applies.

Mr President, Members of the Tribunal, I have finished my presentation. I would request that you now invite my colleague Professor Francesca Graziani to the podium. Professor Graziani will show how the remedies available under the Italian legal order have not been exhausted by the private entities allegedly affected by the arrest and detention of the *M/V Norstar*.

Mr President, Members of the Tribunal, I thank you for your attention.

**THE PRESIDENT:** Thank you, Ms Caracciolo.

I now invite Ms Graziani to make her statement. You have the floor, madam.

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[28] Note verbale A.J. No. 2227 (footnote 27).

[29] *Ibid.*

NAVIRE « NORSTAR »

EXPOSÉ DE MME GRAZIANI
CONSEIL DE L'ITALIE
[TIDM/PV.16/A25/2/Rev.1, p. 9–20]

**MME GRAZIANI :** Monsieur le Président, Madame et Messieurs les juges du Tribunal, c'est assurément un honneur et un très grand privilège pour moi que de comparaître pour la première fois devant cette éminente juridiction au nom de la République italienne.

Ma collègue, Madame la professeure Caracciolo, vient de vous montrer, d'un côté, que les droits objets du différend ne tombent pas sous le coup de la Convention des Nations Unies sur le droit de la mer et, de l'autre côté, que la réclamation du Panama repose, pour une part prépondérante, sur le préjudice causé au propriétaire du « Norstar ».

Or, étant donné que les éléments pertinents en l'espèce amènent à la conclusion que le Panama a été lésé indirectement, c'est-à-dire par l'intermédiaire d'une personne juridique, la règle de l'épuisement des voies de recours internes trouve son application dans la présente affaire.

Il s'agit notamment de vérifier, sur la base des faits de l'espèce, quels recours judiciaires le propriétaire du « Norstar » aurait pu et dû former auprès des autorités judiciaires italiennes avant qu'une action internationale soit introduite par le Panama devant ce Tribunal.

A cette fin, permettez-moi d'articuler mon intervention en deux parties, dont le moment charnière est représenté par l'arrêt du tribunal de Savone, rendu le 13 mars 2003.

Dans une première partie, je vais me concentrer sur les moyens de recours que le propriétaire du « Norstar » avait à sa disposition avant le jugement du tribunal de Savone pour s'opposer à la mesure de saisie du navire.

La deuxième partie de mon intervention est consacrée aux recours judiciaires que, dès mars 2003, le propriétaire du « Norstar » aurait dû épuiser pour obtenir la réparation des préjudices prétendument subis en raison de l'immobilisation du navire.

Dans mon intervention, je vais me référer aux dispositions du Code de procédure pénale italien et aux lois italiennes pertinentes en la présente affaire et que vous pouvez trouver dans votre dossier à l'onglet n° 23.

Monsieur le Président, comme je viens de le dire, la première partie de mon intervention concerne les voies de recours qui, avant l'arrêt du tribunal de Savone, auraient permis au propriétaire du « Norstar » de contester l'ordonnance de saisie du navire.

Bien que la présente affaire ne porte pas sur la mesure de saisie « en tant que telle » mais uniquement sur la demande en réparation des dommages prétendument subis du fait et en conséquence de l'immobilisation du navire, l'Italie estime nécessaire d'attirer l'attention de ce Tribunal sur le fait que le propriétaire du « Norstar » avait à sa disposition des moyens de recours contre la mesure de saisie mais – et tel est le point important qu'il faut garder à l'esprit – qu'il n'a pas exploité « toutes » les voies de recours que lui étaient offertes pour défendre ses droits.

Il importe de tenir compte de cette « inactivité » volontaire du propriétaire du « Norstar » lorsqu'on abordera en détail, dans la deuxième partie de mon intervention, la question de la demande en réparation des dommages avancée par le Panama.

Cela dit, il faut tout d'abord spécifier que l'ordonnance de saisie du « Norstar », décidée par le ministère public du tribunal de Savone le 11 août 1998, se fonde sur l'article 253 du Code de procédure pénale[1].

Conformément à cet article, la saisie pénale des biens ayant servi, d'une manière directe, à commettre l'infraction contestée est une mesure dont l'objectif prioritaire est celui de l'administration de la preuve dans le cadre d'une procédure pénale.

[1] Code de procédure pénale italien, art. 253.

EXPOSÉ DE MME GRAZIANI – 20 septembre 2016, après-midi

A cet égard, l'article 262 du Code de procédure pénale précise que le bien qui fait l'objet d'une saisie pénale peut être restitué même avant le prononcé de l'arrêt du tribunal en première instance. A ces fins, l'autorité juridictionnelle peut subordonner, le cas échéant, la restitution du bien placé sous main de justice au versement d'une garantie[2].

C'est donc à la lumière des dispositions normatives que je viens de mentionner qu'il faut analyser les faits en cause dans la présente affaire, afin de vérifier si le propriétaire du « Norstar » a fait usage de tous les moyens de recours envisagés pour s'opposer à la mesure d'immobilisation du navire.

Monsieur le Président, Madame, Messieurs les juges, étant donné que, dans la présente affaire, la mesure de saisie du « Norstar » a été exécutée par les autorités judiciaires de l'Espagne, une précision préliminaire s'impose.

Comme le professeur Tanzi l'a dit très clairement ce matin, il faut rappeler que les autorités judiciaires espagnoles ont donné suite à l'ordonnance de saisie du « Norstar », agissant en toute autonomie décisionnelle, sur la base de la Convention européenne d'entraide judiciaire en matière pénale, faite à Strasbourg en 1959[3].

Il me semble essentiel de souligner à présent que, dans la pratique de la coopération en matière pénale, lorsqu'une mesure de saisie a été demandée par voie de commission rogatoire – comme c'est le cas en l'espèce –, l'autorité étrangère, après une évaluation de la recevabilité de la demande de la Partie requérante, adopte sa propre ordonnance de saisie du bien.

Il s'ensuit que le « bien » fait l'objet d'une mesure de saisie, que ce soit sur le territoire de l'Etat requérant ou sur celui de l'Etat requis.

Il en découle également que le propriétaire du « Norstar » visé par la mesure de saisie aurait pu introduire deux recours différents, à savoir un recours devant les autorités judiciaires de l'Italie – qui ont ordonné la saisie – et un recours devant les autorités judiciaires de l'Espagne – qui avaient la compétence sur l'exécution de la mesure de saisie.

Monsieur le Président, avec votre permission, je vais maintenant me concentrer sur les recours que le propriétaire du « Norstar » aurait pu introduire en Italie.

Dans sa requête introductive, la République de Panama a affirmé que le propriétaire du « Norstar » avait présenté une demande de réexamen de l'ordonnance de saisie au ministère public du tribunal de Savone[4].

En janvier 1999, le ministère public a rejeté la demande de mainlevée de l'immobilisation. Cependant, le ministère public a proposé au propriétaire du « Norstar » la restitution du navire contre le versement d'une garantie de deux cent cinquante (250) millions de lires (ce qui représente environ cent quarante-cinq (145) mille dollars des Etats-Unis)[5].

Toujours d'après le Panama, le propriétaire du « Norstar » était dans l'impossibilité de verser un tel montant. Dans sa requête introductive, le Panama soutient, de manière explicite, qu'il s'agissait d'un montant « which the owner of M/V Norstar could not provide as through the long arrest the market for such business had been destroyed with no further income ».[6]

L'Italie prend note des affirmations de la République de Panama. Toutefois, et en même temps, l'Italie tient à souligner que ces affirmations ne peuvent pas être considérées comme exhaustives ou suffisantes pour justifier l'inaction volontaire du propriétaire du « Norstar ».

C'est parce que le propriétaire du navire aurait pu former d'« autres » recours juridictionnels afin soit de s'opposer à la mesure de saisie soit de contester le montant de la garantie exigée.

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[2] *Ibid.*, art. 262.

[3] Convention européenne d'entraide judiciaire en matière pénale (Strasbourg, 20 avril 1959; entrée en vigueur : 12 juin 1962).

[4] Requête, par. 7.

[5] *Ibid.*

[6] *Ibid.*

Dans ce contexte, qu'il me soit permis, Monsieur le Président, de mettre en évidence que le Code de procédure pénale italien consacre de nombreuses dispositions aux voies de recours contre l'ordonnance de saisie.

En particulier, toute personne prétendant avoir un droit sur le bien préalablement saisi peut demander la restitution du bien au ministère public, conformément à l'article 263 du Code de procédure pénale[7]. Il s'agit là, notamment, de la demande de restitution du navire formée par le propriétaire du « Norstar » que le ministère public italien a rejetée.

Néanmoins, il faut dire de façon nette que la décision du ministère public n'était pas définitive.

Au contraire, cette décision aurait pu former l'objet d'un recours auprès du juge responsable de l'enquête préliminaire, selon l'article 263, cinquième alinéa, du Code de procédure pénale précité. Enfin, si le juge responsable de l'enquête préliminaire rejette à son tour la demande de mainlevée de l'immobilisation du bien, on peut se pourvoir en cassation, selon la jurisprudence constante de la Cour de cassation elle-même[8].

Par ailleurs, il est fondamental de mettre en évidence que les voies de recours relatives à l'ordonnance de saisie du ministère public ne sont pas limitées aux moyens que je viens de mentionner.

En effet, en vertu des articles 257 et 324 du Code de procédure pénale, on peut demander un réexamen complet de l'ordonnance de saisie auprès du tribunal du chef-lieu de la province où est établi le bureau de l'autorité judiciaire qui a ordonné ladite mesure[9].

Tout ce qui précède démontre d'une manière claire et non équivoque que le propriétaire du « Norstar » n'a pas exploité toutes les possibilités qui lui étaient offertes pour défendre ses droits auprès des autorités juridictionnelles italiennes.

D'après l'Italie, le propriétaire du « Norstar » aurait pu contester, à différents niveaux, soit le fond de la décision par laquelle le ministère public avait rejeté la demande de mainlevée de l'immobilisation du navire, soit le versement de la garantie prévue par le ministère public. Pour ce qui est du fond de la décision du ministère public, le propriétaire du « Norstar » aurait pu contester la validité, voire la légalité, de la saisie du navire. En revanche, pour ce qui est du versement de la garantie, le propriétaire du « Norstar » aurait pu contester le montant trop élevé de ladite garantie par rapport à la valeur du navire placé sous main de justice et/ou aux ressources économiques du propriétaire du « Norstar ».

Monsieur le Président, Madame et Messieurs les juges, je passe maintenant à l'analyse des voies de recours prévues par la législation italienne que le propriétaire du « Norstar » aurait dû épuiser, après le prononcé de l'arrêt du tribunal de Savone, pour obtenir la réparation des préjudices prétendument subis en raison de la saisie du navire.

S'agissant d'un aspect essentiel de mon intervention, je lui accorderai bien évidemment une attention toute particulière.

Il convient au préalable de rappeler que, le 13 mars 2003, le tribunal de Savone a prononcé l'acquittement de tous les prévenus et, pour ce qui nous intéresse, a décidé la mainlevée de la saisie et la restitution immédiate du « Norstar » à la Société Intermarine SPA, propriétaire du navire[10].

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[7] Code de procédure pénale italien, art. 263.

[8] Voir Cour de cassation, Sections pénales réunies, 31/01/2008, n° 7946 : « [...] La giurisprudenza è infatti schierata da tempo nel senso che l'ordinanza del gip [...] sia impugnabile con ricorso per Cassazione indipendentemente dalla mancata previsione esplicita di questo mezzo di impugnazione nella norma di rinvio [...]». (« [...] La jurisprudence soutient depuis longtemps que contre l'ordonnance du Juge de l'enquête préliminaire [...] on peut se pourvoir en Cassation, bien que la norme du Code de procédure pénale (art. 263, cinquième alinéa) ne mentionne pas un tel moyen de recours [...] »).

[9] Code de procédure pénale italien, art. 257 et 324.

[10] Jugement du tribunal de Savone, 13 mars 2003 (exceptions préliminaires, annexe B).

EXPOSÉ DE MME GRAZIANI – 20 septembre 2016, après-midi

Comme l'on sait, le 18 août 2003, le ministère public du tribunal de Savone a interjeté appel de ce jugement[11]. Toutefois, le 25 octobre 2005, la Cour d'appel de Gênes a confirmé le jugement rendu par la juridiction du premier degré[12].

A ce propos, il m'incombe de préciser ici et maintenant que l'appel interjeté par le ministère public ne portait que sur la partie de l'arrêt du tribunal de Savone relative à l'acquittement des prévenus et donc ne portait pas sur la décision de mainlevée de la saisie.

C'est en tenant compte de cette précision que l'Italie rappelle le paragraphe 8, quatrième alinéa, de la requête introductive, où le Panama, faisant référence à l'arrêt du tribunal de Savone, soutient : « However, the judgment was not full and final. »[13]

Monsieur le Président, permettez-moi de répéter une fois de plus que, contrairement à l'affirmation du Panama, l'appel ne concernait absolument pas la mesure de saisie du « Norstar » car le ministère public italien n'avait pas demandé à la Cour d'appel de Gênes de suspendre l'ordonnance de restitution du navire.

Il s'agit là d'un éclaircissement qui est extrêmement important et que, par conséquent, il faut prendre sérieusement en considération. En effet, comme l'appel n'a pas remis en cause la mesure de saisie du navire, c'est au 13 mars 2003 – date du prononcé de l'arrêt du tribunal de Savone – qu'on doit se placer afin de déterminer les voies de recours internes prévues par l'ordre juridique italien que le propriétaire du « Norstar » aurait dû épuiser.

Cela étant, l'Italie souhaite soulever quatre observations par rapport à l'arrêt du tribunal de Savone de mars 2003.

Monsieur le Président, Madame et Messieurs les juges, ma première observation concerne la portée de l'arrêt du tribunal de Savone dans la présente affaire.

A ce propos, qu'il me soit permis de formuler, à titre liminaire, une remarque critique à l'égard d'une affirmation contenue dans les observations écrites du Panama.

La République de Panama a soutenu que l'Italie aurait manqué de mentionner, dans ses exceptions préliminaires, la motivation de la décision par laquelle le tribunal de Savone a acquitté les prévenus et ordonné la mainlevée du « Norstar »[14].

Or, on tient à rassurer le Panama que si l'Italie n'a pas jugé nécessaire d'approfondir une telle motivation, c'est parce que cette motivation est dénuée de toute pertinence dans la présente affaire.

Comme l'a affirmé la Cour permanente de Justice internationale dans l'*Affaire relative à certains intérêts allemands en Haute-Silésie polonaise* :

> Au regard du droit international et de la Cour qui en est l'organe, les lois nationales sont de simples faits, manifestations de la volonté et de l'activité des Etats, au même titre que les décisions judiciaires ou les mesures administratives[15].

Paraphrasant la Cour permanente de Justice internationale, on pourrait dire que ce Tribunal n'est pas appelé à interpréter la loi italienne ni l'arrêt rendu par un tribunal italien.

La tâche de ce Tribunal est en effet bien différente : il s'agit de se prononcer sur la question de savoir si les organes de l'Etat italien et, parmi eux, les organes de la magistrature, ont agi ou non en conformité avec les obligations que la Convention des Nations Unies sur le droit de la mer leur impose envers le Panama.

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[11] Appel interjeté par le Procureur de la République contre l'arrêt du 13 mars 2003, 18 août 2003 (exceptions préliminaires, annexe J).

[12] Arrêt de la Cour d'appel de Gêne, 25 octobre 2005 (exceptions préliminaires, annexe K).

[13] Application, para. 8.

[14] Observations écrites, par. 47 et 48, annexe 11.

[15] *Certains intérêts allemands en Haute-Silésie polonaise, fond, arrêt n° 7, 1926, C.P.J.I. série A n° 7*, p. 19.

NAVIRE « NORSTAR »

C'est dans cette perspective, et dans cette perspective seulement, qu'on doit analyser à juste titre l'arrêt du tribunal de Savone. Il s'agit là d'une perspective à laquelle l'Italie attache la plus grande attention et que, au contraire, le Panama semble complétement ignorer.

Ce que nous voulons dire – comme l'Italie l'a soutenu maintes fois et comme les professeurs Tanzi et Caracciolo viennent de le dire –, c'est que le tribunal de Savone a agi dans le respect total du droit international. Autrement dit, le jugement rendu par le tribunal de Savone en 2003 fait obstacle à l'affirmation selon laquelle l'Italie aurait violé les dispositions de la Convention des Nations Unies sur le droit de la mer.

Monsieur le Président, Madame et Messieurs les juges, j'en viens à présent à ma seconde observation. L'Italie tient à préciser que, lorsque le tribunal de Savone a statué sur la restitution du navire au propriétaire du « Norstar », la magistrature italienne a épuisé toute compétence en la matière.

A ce sujet, il me semble impératif de préciser que, le 18 mars 2003 – à savoir cinq jours après son arrêt du 13 mars –, le tribunal de Savone a transmis la décision concernant la restitution du « Norstar » aux autorités judiciaires espagnoles, en tant qu'autorités responsables de l'exécution de la mesure de saisie du navire[16].

Plus particulièrement, le tribunal de Savone a prié les autorités espagnoles de mettre en œuvre l'ordonnance de restitution du navire et de transmettre cette ordonnance au gardien du navire. En même temps, le tribunal de Savone a demandé aux autorités judiciaires de l'Espagne de s'assurer que le navire serait effectivement restitué et, à cette fin, de lui transmettre un procès-verbal confirmant cette restitution[17].

Il résulte de ce qui précède qu'une fois la restitution du navire décidée par le tribunal de Savone et cette décision communiquée à l'Espagne, les autorités juridictionnelles italiennes n'étaient plus compétentes en matière de restitution du navire.

Cela tient à ce que, dès mars 2003, l'arrêt du tribunal de Savone constituait un « titre exécutoire » pour la restitution immédiate du « Norstar » à son propriétaire légal.

C'est justement pour cette raison que, le 31 octobre 2006, la Cour d'appel de Gênes a déclaré qu'elle ne pouvait pas statuer sur la demande formulée par l'Autorité portuaire espagnole à propos de la démolition du navire[18].

Monsieur le Président, Madame et Messieurs les juges, ma troisième observation porte sur la demande de dommages-intérêts en réparation du préjudice prétendument subi par le propriétaire du « Norstar » que le Panama a formulée à l'encontre de l'Italie.

Tout d'abord, il convient de rappeler que, depuis mars 2003, le propriétaire du « Norstar » n'a pas réclamé le navire, alors même que le tribunal de Savone avait ordonné sa restitution immédiate.

Dans sa lettre des 3 et 6 août 2004, Monsieur Carreyó a affirmé que le propriétaire du « Norstar » se trouvait dans l'impossibilité matérielle de prendre possession du navire à cause de sa longue période d'immobilisation et des dommages subis en conséquence de cette immobilisation[19].

Il en découlerait que – d'après Monsieur Carreyó – le Gouvernement italien aurait dû réparer ces dommages immédiatement, à savoir dès que la restitution du « Norstar » avait été décidée par le tribunal de Savone. Il en résulterait que – toujours selon Monsieur Carreyó – à défaut d'une telle réparation, la République de Panama avait le droit d'introduire une requête

[16] Notification du jugement du 13 mars 2003 aux autorités espagnoles, 18 mars 2003 (exceptions préliminaires, annexe I).
[17] *Ibid.*
[18] Réponse de la Cour d'appel de Gênes à la demande soumise par les autorités espagnoles en vue de la démolition du navire « Norstar », 13 novembre 2006 (exceptions préliminaires, annexe O).
[19] Lettre adressée par M. Carreyó à l'ambassade italienne à Panama, 3 et 6 août 2004 (réponse, annexe G).

auprès de ce Tribunal et de réclamer réparation du préjudice causé par la saisie du « Norstar », sans épuiser les voies des recours internes prévues à cet effet dans l'ordre juridique italien[20].

Permettez-moi de dire que ce raisonnement est dépourvu de tout fondement.

Comme on le sait, les Etats ne sont pas dispensés des obligations qui leur incombent en matière de dépenses relatives à la garde et à la conservation des biens objets de la mesure de saisie. Incidemment, je souligne à ce propos que l'ordre juridique italien régit les dépenses relatives à la garde et à la conservation des biens placés sous main de justice, tant dans le « Texte unique en matière de frais de justice »[21] que dans le Code de procédure pénale[22].

Toutefois, il n'est pas défendable et il est de surcroit illogique que les décisions des juridictions nationales en matière de restitution des biens placés sous main de justice comportent une obligation immédiate pour un Etat de restituer un bien préalablement objet d'une saisie dans la situation où le bien se trouvait avant l'adoption de la mesure de saisie.

De plus, il semble tout à fait raisonnable de prêter une attention particulière au paragraphe 8, dernier alinéa, de la requête introductive, où le Panama affirme que, étant donné qu'en 2005 la Cour d'appel de Gênes a confirmé l'arrêt du tribunal de Savone de mars 2003 : « Local remedies had been exhausted. »[23]

A ce propos, il importe de remarquer qu'il n'est pas possible de soutenir, d'un point de vue juridique, qu'une fois que les autorités juridictionnelles italiennes avaient décidé la restitution du « Norstar », le Panama avait le droit d'exiger la réparation immédiate des dommages prétendument subis en conséquence de la saisie, sans aucun épuisement, de la part du propriétaire du « Norstar », des recours internes envisagés à cette fin dans l'ordre juridique italien.

En conclusion, l'Italie tient à signaler, encore une fois, que les dommages que le navire « Norstar » aurait subis du fait de la mesure de saisie ne pouvaient pas être imputés « directement » au Gouvernement italien. C'est-à-dire que, d'une part, Monsieur Carreyó, en tant qu'avocat du « Norstar », n'aurait pas pu demander au Ministère des affaires étrangères italien une telle réparation et, d'autre part, la République de Panama n'aurait pas pu introduire une instance contre l'Italie devant de ce Tribunal.

Cela tient au fait, comme je vais l'expliquer sous peu, que le propriétaire du « Norstar » aurait dû épuiser les recours juridictionnels prévus par l'ordre juridique italien pour obtenir réparation des préjudices prétendument subis comme conséquence de la mesure de saisie.

Monsieur le Président, Madame, Messieurs les juges, j'en viens enfin à ma quatrième observation.

Il s'agit à ce point d'analyser les voies de recours internes, prévues dans le système juridique italien, que le propriétaire du « Norstar » aurait dû épuiser avant qu'une quelconque action internationale soit intentée par le Panama pour obtenir la réparation des dommages prétendument subis.

Il convient avant tout d'examiner brièvement les principes du droit international coutumier qui régissent la règle de l'épuisement des recours internes, tels qu'ils sont reconnus par la Commission de droit international dans son projet d'articles sur la protection diplomatique de 2006[24].

Dans ce contexte, je me limiterai à dire que les recours ouverts aux étrangers varient inévitablement d'un Etat à l'autre. Par conséquent, une seule question essentielle demeure à ce

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[20] Observations écrites, par. 45 et suiv. et par. 75 et suiv.

[21] Texte unique en matière de frais de justice (décret présidentiel n° 115/2002), art. 58 et 150, annexe 23, p. 67.

[22] Code de procédure pénale italien, art. 259.

[23] Application, para. 8.

[24] Projet d'articles sur la protection diplomatique et commentaires y relatifs, *Annuaire de la Commission du droit international,* 2006, vol. II (2), p. 24 et suivant.

sujet : celle de savoir si les recours, soient-ils ordinaires ou extraordinaires, offrent une réparation efficace, raisonnable et suffisante.

La Commission de droit international a affirmé ce qui suit concernant la vérification de l'inefficacité ou de la futilité des recours internes :

> Il ne suffit pas que la personne lésée établisse que la probabilité d'obtenir gain de cause est faible ou qu'il serait difficile ou coûteux d'interjeter appel. Il ne s'agit pas de savoir si un résultat favorable est probable ou possible mais si l'ordre juridique interne de l'Etat défendeur est raisonnablement en mesure d'offrir une réparation efficace. (…).[25]

On peut donc affirmer que les exceptions à la règle de l'épuisement des recours internes reposent sur la double appréciation concrète que le juge international est appelé à porter, d'une part, sur l'effet utile des recours et, d'autre part, sur le degré de diligence normale que devait apporter l'individu à la défense de ses droits devant les juridictions internes.

Ce que nous venons de dire suffit pour qu'il soit maintenant possible de trancher la question de l'applicabilité de la règle de l'épuisement des voies de recours internes dans la présente affaire à propos des recours prévus dans l'ordre juridique italien pour obtenir réparation du préjudice prétendument subi du fait de la saisie.

Monsieur le Président, Madame et Messieurs les juges, dans ses exceptions préliminaires, l'Italie a mentionné la possibilité d'introduire un recours sur le fondement de l'article 2043 du Code civil. Il s'agit là d'une norme ayant une portée générale qui vise à protéger un principe fondamental, à savoir le principe selon lequel chacun a droit à réparation pour la violation d'un droit subjectif. « Conformément à l'article 2043, celui qui, par un fait dolosif ou fautif provoque à autrui un dommage injuste, est obligé d'indemniser la victime »[26].

Cette disposition est donc centrée sur la nécessité de réparer tout préjudice injuste, de sorte que c'est précisément le caractère injuste de l'acte qui constitue le critère juridique pour déterminer si un préjudice donné est susceptible de réparation. Le dommage indemnisable comprend la perte subie et le manque de gain, mais également, dans certains cas, le dommage moral, même à caractère non patrimonial. Le droit à indemnisation se prescrit au bout de cinq ans à compter du jour où le fait illicite s'est produit.

Si, comme on vient de le dire, l'article 2043 du Code civil est une norme ayant une portée générale, il convient maintenant de porter notre attention sur d'autres recours qui auraient pu être formés auprès des autorités judiciaires italiennes.

Monsieur le Président, le propriétaire du « Norstar » aurait pu présenter un recours pour faire valoir la responsabilité civile des autorités juridictionnelles italiennes.

Dans le système juridique italien, la responsabilité civile des magistrats, du siège comme du parquet, est régie par la loi n° 117 du 13 avril 1988, connue comme loi Vassalli[27]. Cette loi a été récemment modifiée en 2015 (loi 27 février 2015, n° 18).

En tout cas, même dans sa version précédente, la loi pose le principe que les magistrats – sans faire de distinction entre les juges et les procureurs – doivent répondre de leur comportement professionnel.

Ainsi, aux termes de l'article 2, la loi affirme le principe de l'indemnisation de tout préjudice injustement causé par tout comportement, acte ou décision de justice par suite d'un fait dolosif ou d'une faute lourde d'un magistrat dans l'exercice de ses fonctions. Compte tenu

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[25] *Ibid.*, art. 15, al. a), par. 4, p. 81.

[26] Code civil italien, art. 2043.

[27] Réparation des dommages causés dans l'exercice des fonctions juridictionnelles et responsabilité civile des magistrats (loi n° 117 du 13 avril 1988), annexe 23, p. 25 et suiv. L'article 111 de la Constitution italienne, modifié par la Loi constitutionnelle n° 2 du 23 novembre 1999, énonce les principes dits de « *giusto processo* » (littéralement de « procès équitable »).

de l'exigence de sauvegarder l'indépendance des magistrats, la loi permet d'engager la responsabilité des magistrats dans des cas strictement déterminés.

Lorsque la faute personnelle d'un magistrat est rattachable à l'activité judiciaire, le législateur a opté pour un régime de responsabilité spécifique qui repose sur un mécanisme de substitution de responsabilité directe de l'Etat à celle des magistrats. Plus spécifiquement, la responsabilité de l'indemnisation des préjudices incombe à l'Etat qui, vis-à-vis de la victime, est en toute hypothèse le garant de la réparation des dommages. Au cas où la responsabilité de l'Etat serait établie, celui-ci peut se retourner, dans certaines conditions, contre le magistrat par le biais d'une action récursoire.

Il y a lieu de signaler que la loi prévoit un délai de forclusion pour l'exercice de l'action en responsabilité qui est normalement de trois ans.

Du point de vue de la procédure, celle-ci se déroule au premier degré devant le tribunal compétent qui est déterminé selon les règles du Code de procédure pénale. Le tribunal saisit le juge de cette matière en formation collégiale. Contre la décision d'inadmissibilité, la partie peut se pourvoir en appel et puis en cassation.

Monsieur le Président, Madame et Messieurs les juges, il faut enfin considérer le recours interne que le propriétaire du « Norstar » aurait pu former pour se plaindre de la durée de la procédure de saisie.

Dans sa requête introductive, la République de Panama a en effet affirmé que la décision du tribunal de Savone avait été adoptée « many years after *mv Norstar* was alleged by Italian authorities to have violated Italian laws and about 5 years after following long criminal proceedings against the owner of the vessel and others. »[28]

A ce propos, il importe de souligner que le Parlement italien a adopté, le 24 mars 2001, la loi n° 89, plus connue sous l'appellation de loi Pinto. Cette loi est censée garantir le droit à un procès équitable dans un délai raisonnable[29].

Plus en particulier, la loi Pinto a instauré un recours devant les juridictions italiennes pour dénoncer la durée excessive d'une procédure et obtenir, le cas échéant, une « réparation équitable » couvrant les préjudices patrimoniaux et non patrimoniaux subis.

La requête est dirigée contre l'Etat, en particulier, pour ce qui est des procédures devant l'autorité judiciaire ordinaire, contre le Ministre de la justice. La demande de réparation équitable doit être portée devant la cour d'appel compétente au plus tard dans les six mois de la clôture de la procédure concernée. La cour d'appel décide en chambre de conseil par décret exécutif. Sa décision peut faire l'objet d'un pourvoi en cassation.

La loi prévoit que pour déterminer si la durée d'une procédure a été excessive, il faut vérifier la complexité de l'affaire, ainsi que le comportement des parties, du juge à la procédure et de toute autorité qui a contribué à sa définition, en considérant aussi l'enquête préliminaire. Il est important d'attirer votre attention sur le fait que les critères qu'on vient d'indiquer sont tout à fait similaires aux critères fixés par la Cour européenne des droits de l'homme, compte tenu du fait que le juge italien doit interpréter le droit national en conformité avec la jurisprudence constante de la Cour de Strasbourg.

Il convient de remarquer que la Cour européenne des droits de l'homme, dans sa décision *Brusco c. Italie*, rendue le 6 septembre 2001, a retenu que le mécanisme institué par la loi Pinto devait être considéré comme un recours accessible et que rien ne permettait de douter de son efficacité[30].

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[28] Application, para. 3.

[29] Octroi de réparations équitables en cas de non-respect du délai raisonnable de la procédure et modification de l'article 375 du Code de procédure civile (loi n° 89 du 24 mars 2001), annexe 23, p. 59 et suiv. Cette Loi a été modifiée par la loi n° 134 du 7 août 2012 et par la loi n° 64 du 6 juin 2013.

[30] Cour européenne des droits de l'homme, *Brusco c. Italie*, requête n° 69789/01, décision du 6 septembre 2001, CEDH 2001-IX.

En tout cas, il faut rappeler que si la réparation du dommage est estimée inadéquate et non suffisante par le requérant, celui-ci pourrait saisir la Cour de Strasbourg. Dans sa décision du 27 mars 2003 dans l'affaire *Scordino c. Italie*, la Cour de Strasbourg a affirmé qu'elle pouvait être valablement saisie de telles requêtes, dès lors que l'indemnité accordée ne réparait pas adéquatement la violation alléguée au vu des montants habituellement alloués par la Cour[31].

Monsieur le Président, Madame et Messieurs les juges, j'en viens à ma conclusion.

L'obligation d'épuiser les voies de recours internes est prévue par le droit international afin de donner à l'Etat mis en cause la possibilité de réparer le dommage qu'on lui impute. Ce n'est qu'après avoir donné cette faculté à l'Etat que le différend pourra être porté au plan international.

Or, compte tenu du fait que dans la présente affaire le propriétaire du « Norstar » n'a pas épuisé les voies de recours internes, l'Italie estime que la demande du Panama est irrecevable.

Merci, Madame et Messieurs les juges, de m'avoir écouté patiemment.

Monsieur le Président, je vous serais très reconnaissante de bien vouloir donner la parole à mon collègue, Maître Paolo Busco, pour la suite de la présentation de l'Italie. Merci.

**THE PRESIDENT:** Thank you, Ms Graziani, for your statement.

I now invite Mr Busco to make his statement. The floor is yours, sir.

[31] Cour européenne des droits de l'homme, *Scordino c. Italie*, requête n° 36813/1997, décision du 27 mars 2003, CEDH 2006-V, voir en particulier le par. 94.

STATEMENT OF MR BUSCO
CONSEIL OF ITALY
[ITLOS/PV.16/C25/2/Rev.1, p. 18–28]

**MR BUSCO:** Mr President Golitsyn, Members of the Tribunal, it is an honour to appear before you today and to do so on behalf of my country, Italy. In my presentation this afternoon, I will develop Italy's argument that Panama's claim is inadmissible due to acquiescence and extinctive prescription. I will focus my speech on these two aspects and, in consideration of time constraints, I would ask you to refer to Italy's written pleadings as regards our contention that Panama's Application is inadmissible also due to estoppel.[1]

Before I start, I would like to make two preliminary points.

First, I would like to stress once again what the Agent of Italy, Avvocato Palmieri, and my other colleagues said this morning, namely that Panama's arguments should fail already at the level of objections to jurisdiction. The fact that I am now addressing you on issues that go to the question of the admissibility of Panama's claim is therefore without prejudice to Italy's respectful contention that this Tribunal lacks jurisdiction to entertain the *M/V "Norstar" Case* in its entirety.

Second, I would like to address the question of the scope of the subject matter of Italy's Objections to the admissibility of the claim brought by Panama, which was raised by Panama in its letter to the Tribunal of 16 August 2016. Mr President, Members of the Tribunal, Professor Tanzi has already explained this morning in general terms how the arguments that Italy advanced in its Reply are not new, but rather are connected with the points raised by Italy in its Objections, and by Panama in its Reply.

Allow me to give just a couple of examples in this regard, specific to the subject matter of my presentation.

In its letter of 16 August 2016 Panama says, at paragraph 28,[2] that Italy should not be allowed to refer to the laws of either Italy or Panama on statutes of limitation because, according to Panama, this is a new argument. In reality, this is not a new argument. By referring to the domestic laws of Panama and Italy, Italy is only explaining why Panama's claim is extinct internationally – a position that Italy has maintained from the start. Also, it is wrong to state that Italy never described the conduct of Panama as acquiescent. In its Reply, Italy explains the relationship between acquiescent conduct by a Party and extinctive prescription of a claim. Italy quotes scholarship according to which, in the context of extinctive prescription, "the inquiry shifts towards the extent the party can be considered as having by reason of its conduct validly acquiesced in the lapse of the claim."[3]

Acquiescence is therefore an integral part of the arguments that Italy is making with respect to the prescription of Panama's claim.

Mr President, Members of the Tribunal, with these specifications, and with your permission, I would now like to turn to the question of acquiescence.

Acquiescence is a general principle of law within the meaning of article 38 of the Statute of the International Court of Justice[4]. A State that remains inactive with respect to a claim is precluded from bringing it if, under the circumstances, that State would have been expected to display some form of activity with respect to its claim.

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[1] Preliminary Objections, p. 7; Reply by the Italian Republic, pp. 33-34.
[2] Request of the Republic of Panama for a ruling concerning the scope of the subject matter based on the Preliminary Objections filed by Italy, 16 August 2016.
[3] Silvestre, *The Financial Obligation in International Law* (OUP 2015), p. 605. Italy's Reply, p. 29
[4] Crawford, *Brownlie's Principles of Public International Law* (OUP 2012), p. 699.

Certain conditions are necessary for acquiescence to operate and render a State's claim inadmissible: first, the claimant State must have failed to assert its claim or to pursue it;[5] second, the failure to assert or pursue the claim must have extended over a certain period of time; and, third, it is necessary that the claimant must have failed to assert or pursue its claim in circumstances that would have required action.[6] These circumstances include situations in which the respondent State could legitimately expect that the claim would no longer be asserted.[7]

Mr President, Members of the Tribunal, all the conditions for the operation of acquiescence are present in the *M/V "Norstar" Case*.

First, Panama has not validly asserted its claim. This morning Professor Tanzi explained why the various communications from Mr Carreyó, including his last communication of 17 April 2010, were incapable of validly asserting the claim that Panama is now making before this Tribunal. Professor Tanzi has also explained why the only two official communications sent by Panama by note verbale to Italy did not validly assert Panama's claim. Mr President, Members of the Tribunal, the consequence of this is that Panama is making its claim for the first time before this Tribunal and is doing so more than 18 years from the date when the event complained of by Panama allegedly occurred.

As will emerge in the course of my presentation, it takes much less than 18 years of inactivity to bar a State from bringing a claim due to acquiescence or extinctive prescription.

However, Mr President and Members of the Tribunal, in the event that the Tribunal should disagree with Italy and hold that the claim that Panama is now making has at some point been asserted prior to the December 2015 Application, it is still evident that Panama has failed to pursue its claim over a number of years. I would like to refer to the last communication sent by Panama by note verbale AJ 97, dated 7 January 2005, which you can find at page 5 of tab 4 of your Judges' folder, and to the last communication sent by Mr Carreyó dated 17 April 2010, which you can find at page 13 of tab 3.

The reasons why I have brought these two documents to your attention are as follows:

With respect to note verbale AJ 97, this is the last formal communication sent by Panama to Italy on 7 January 2005. If this Tribunal should disagree with Italy and hold that Panama's claim has been validly asserted by Panama, but should still agree with Italy that the last communication from Mr Carreyó does not validly make Panama's claim, then 7 January 2005 is the date from which Panama's inactivity as regards the pursuit of its claim starts. Under this scenario Panama would have remained silent for ten years and 11 months before bringing its claim before this Tribunal.

As regards the communication of 17 April 2010 from Mr Carreyó, this is the last communication that Italy received with respect to the *M/V Norstar*. This is a matter of fact, which is undisputed between the Parties. Therefore, if the Tribunal should not share Italy's view that this communication does not validly make Panama's claim, it would still be a fact that Panama remained silent for five years and eight months before turning to ITLOS in December 2015.

Mr President, Members of the Tribunal, that acquiescence operates also in situations in which a State fails to pursue a claim that it had originally asserted is a consolidated position in case law. In this regard I would like to refer you to the case of *Wena Hotels* v. *Egypt*. You can find the relevant passage of this case at tab 25, page 7, of your Judges' folder. In that decision the arbitral tribunal confirmed the existence in international law of the principle of repose,

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[5] *Wena Hotels Ltd.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 105
[6] Crawford, Pellet, Olleson (eds.), *The Law of International Responsibility* (OUP 2010), pp. 1035-1049, at p. 1043
[7] *Ibid.*, at p. 1044

according to which a State should not be surprised by the resurrection of a claim that, after being originally asserted, has not been pursued for some time.[8]

As regards the second condition of acquiescence, Italy wishes to stress that Panama's failure to assert or pursue its claim has indeed extended over a certain period of time. Mr President, Members of the Tribunal, we are discussing a claim for damages. Professor Tanzi and Professor Caracciolo have explained this point this morning and Panama frames its claim in these terms when it states in its Application that "the application concerns a claim for damages against the Republic of Italy".[9] The time of the inactivity of Panama in asserting or pursuing its claim must be considered against what is customary in the context of claims for damages, such as the present one. I shall address this point later in the context of extinctive prescription, but I would like to note from now that not asserting or not pursuing a damage claim for, at the very least, five years and eight months would result in the extinction of the claim in the vast majority of the jurisdictions of the world. The time frame of reference to assess Panama's non-assertion or non-pursuance of its claim in this case is not centuries or decades; it is years, and indeed very few years.

Even in cases where territorial claims and claims over sovereignty are made, a short time of passivity is sufficient to bar the claim. Professor Christian Tams, commenting on the *Grisbadarna* case between Norway and Sweden, noted how the International Court of Justice found that Norway had been acquiescent, even if it had failed to assert its claim only for a rather short period of time, and concluded that "there is no reason why the same argument should not be applied to situations involving claims for State responsibility".[10]

Mr President, Members of the Tribunal, if a short time of passivity is sufficient to bar a territorial claim, then, all the more so, it is sufficient to render inadmissible a claim for damages.

As regards the third condition, namely the fact that the claimant must have failed to assert its claim in circumstances that would have required action, I would be grateful if you could turn to tab 3, page 14. Again, I assume, *in arguendo* only, that this communication from Mr Carreyó was capable of asserting Panama's claim *vis-à-vis* Italy. In this communication Mr Carreyó stated that Panama would commence legal proceedings within a reasonable period of time before this Tribunal, had Italy not paid damages.[11] Italy did not respond, did not pay damages and, as we know, five years and eight months passed from this communication before Panama eventually turned to ITLOS.

Mr President, Members of the Tribunal, a situation in which someone says that they would commence proceedings in a reasonable time, and yet they do nothing for five years and eight months, is a situation in which the claimant has failed to assert its claim when action would have been required. The threat of the commencement of legal proceedings within reasonable time, and Italy's failure to acknowledge the request for damages, are precisely circumstances that would have required action on the part of Panama.

Mr President, Members of the Tribunal, I would like to point to a case that you can find at tab 25, page 2, *ICS Inspection* v. *Argentina*.[12] The defendant State argued that the investor's conduct had been acquiescent because "despite the fact that the Claimant notified the respondent of a BIT dispute and threatened international arbitration" in a letter dated 27 November 2006, "the Claimant did nothing further until June 2009", when it eventually

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[8] *Wena Hotels Ltd.* (footnote 65), para. 105

[9] Application, para. 3.

[10] Tams, *Waiver, acquiescence and extinctive prescription*, in Crawford, Pellet and Olleson (eds.), *The Law* (footnote 66), pp. 1035-1049, at p. 1043.

[11] Letter of Mr Carreyó to the Italian Minister of Foreign Affairs, 17 April 2010 (Reply, Annex K).

[12] *ICS Inspection and Control Services Limited (United Kingdom)* v. *The Argentine Republic*, UNCITRAL, PCA Case No. 2010-9, Award on jurisdiction, 10 February 2012, para. 197.

instituted arbitral proceedings. This is the same pattern as in the present case, except that in this case the delay is much greater.

There is therefore State practice that points towards the fact that threatening a certain course of action, giving the time frame for that course of action, and yet doing nothing for several years in the face of non-response by the respondent State, amounts to acquiescence on the part of the claimant.

Mr President, Members of the Tribunal, in concluding on this aspect, Italy's position is that Panama's failure to assert or pursue its claim for a number of years, at the very least – and I stress this – five years and eight months, and the modalities of this failure to assert and pursue the claim determine that the claim before this Tribunal is inadmissible due to acquiescence.

Mr President, with your permission perhaps we may break now and I could continue on extinctive prescription after the break.

**THE PRESIDENT:** Yes. Thank you, Mr Busco.

We have reached the time for a break in our proceedings for 30 minutes. We will break for 30 minutes and resume the hearing at 5 p.m. and then you will continue your statement.

*(Break)*

**THE PRESIDENT:** Mr Busco, I invite you to continue your statement.

**MR BUSCO:** Mr President, Members of the Tribunal, having addressed acquiescence, I will now move on to discuss the question of extinctive prescription, which is of course strictly connected with acquiescence.

Extinction of a right by prescription is also a general principle of law according to the definition of article 38 of the Statute of the International Court of Justice.[13]

I would like to quote from a passage from a Resolution of the *Institut de Droit International* that highlights what the rationale of extinctive prescription is, in international law. According to the *Institut* (tab 26):

> Considerations of order, stability and peace … require that extinctive prescription of obligations between States be listed among the general principles of law recognized by civilized nations, and that International Tribunals be called upon to apply it.[14]

Order, stability and peace. The purpose of extinctive prescription is therefore that of ensuring the certainty of legal relationships in the face of the passage of time.

I focus on the rationale of extinctive prescription because it constitutes the necessary background against which the question of the admissibility of Panama's claim has to be assessed by this Tribunal.

Indeed, Mr President, Members of the Tribunal, it is a fact that the event that gave rise to Panama's alleged right to seek damages from Italy, on the one hand, and these proceedings, by which Panama does so, on the other hand, are 18 years apart. I would like to stress that this is the first time that Panama has brought proceedings against Italy to seek damages allegedly stemming from something that happened 18 years ago. As my colleague Professor Graziani

[13] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 253-254, para. 32; *Grand River Enterprises Six Nations, Ltd., et al* v. *United States*, UNCITRAL, *Decisions on Objection to Jurisdiction, 20 July 2006*, para. 33.

[14] *Résolution concernant la prescription libératoire en droit international public*, in *Annuaire de l'Institut de Droit International*, Vol. 32, 1925, p. 558 et seq., at p. 559, para. I.

has shown you, it was not because it was not possible to file suit earlier, but only because the owner of the *M/V Norstar* has been incredibly neglectful in pursuing its claims.

The question that this Tribunal is therefore called upon to answer is straightforward: is it compatible with the necessity to guarantee certainty of legal relationships to allow Panama's claim to proceed, after 18 years, in the circumstances of this case?

Mr President, Members of the Tribunal, let me show you what these circumstances are that I am referring to and why Italy believes that the Tribunal should answer the question that I just put to you in the negative.

The first circumstance of this case is that Panama's alleged right for damages is extinct as a matter of both Italian law and the law of Panama. This is a fact, regardless of the start date that one chooses to select. Indeed, for the reasons that were explained earlier, at least five years and eight months have passed without the claim having been pursued. If, as Italy claims, Mr Carreyó's last communication was not capable of making Panama's claim, then 10 years and 11 months have elapsed between the last note verbale from Panama and the commencement of these international proceedings. This is of course assuming, for the sake of argument, that those communications, and the others sent by either Panama or Mr Carreyó, were able to assert the claim that Panama is now making before this Tribunal. This is an assumption I am making for the sake of argument.

Mr President, Members of the Tribunal, as Professor Graziani has explained, it generally takes five years for claims for damages to be extinct due to prescription under Italian law. It takes just one year for these claims to be prescribed under the law of Panama.

I would ask you to kindly turn to tab 27, where the relevant provision of the Civil Code of Panama is reported, showing that it takes one year for claims for damages to be extinct due to prescription.

There are judicial decisions according to which a claim that cannot be pursued domestically due to prescription is also automatically barred at the international level. I should again be grateful if you would turn to tab 25, page 5. In *Yuri Bogdanov* v. *Moldova*,[15] an arbitral tribunal held that in the absence of any indication in the international instrument that governed the relationship between two countries, a claim by one Party would be barred if the right at issue were extinct as a matter of the domestic laws of either country. It may be worth going through the text of this decision quickly. This is the decision of the tribunal.

> The Republic of Moldova has made an objection based on statutory limitation, arguing that the charges for the year 2005 are time-barred. The treaty itself does not say anything about limitation as regards claims based on the treaty. It would however appear that the limitation period applying under the laws of either Contracting Party must be applicable, lest claims could be made indefinitely.

Panama's claim is extinct according to the laws not of *either* Italy *or* Panama, but according to the laws of *both* Italy *and* Panama.

Even if the Tribunal should find that there is not any automatism between international time bar and domestic time bar, one thing appears to be clear, Mr President and Members of the Tribunal: the expiry of a domestic statute of limitation does have a bearing on the question of the international prescription of a claim.

In *Alan Craig* v. *Iran* the Iran-US Claims Tribunal held that a domestic statute of limitation may be taken into account by a tribunal in determining the effect of unreasonable

[15] *Yury Bogdanov, citizen of the Russian Federation* v. *Republic of Moldova*, SCC Case No. 114/2009, Award, 30 March 2010, para. 94.

delay in pursuing a claim.[16] Indeed, reference to domestic statutes of limitation is a method routinely employed by international tribunals in deciding on the international prescription of claims. In the *Gentini* case,[17] the arbitral tribunal could not say exactly what the period of prescription was in international law. However, it took notice of the statutes of limitation of a number of countries, according to each of which the claim would have been extinct, and concluded that the claim was extinct also in the case brought before it. You can find this at page 1 of tab 25.

Mr President, Members of the Tribunal, if this same method as in the *Gentini* case is used in the present case, one should consider that Panama's claim would be extinct not just as a matter of the laws of Panama and Italy, but also as a matter of the laws of the vast majority of other jurisdictions. A claim like the one made by Panama in the present case would be extinct by prescription in five years in France,[18] in Belgium,[19] in the Netherlands,[20] in Scotland[21] and, as we have seen, in Italy. It would be extinct in three years in Germany, in Poland and in Finland and in two years in Malta.[22] It would be one year in Spain, Switzerland[23] and Panama. Also, it would be extinct by prescription in three years in Japan,[24] in South Korea and in the Russian Federation[25]. Panama's claim would also be extinct in three years in South Africa.[26] I am just quoting a few examples, but there are of course many more.

The second circumstance of this case that I would like to bring to your attention has to do with the nature of Panama's claim. Mr President, Members of the Tribunal, in its Observations Panama mentions that the various communications sent by Mr Carreyó stopped the clock as far as a time bar was concerned.[27] Italy has already explained why the communications from Mr Carreyó were not able to assert Panama's claim, let alone "stop the clock", as Panama puts it. Italy has also explained that, in any event, the last communication received from Mr Carreyó dates back to 17 April 2010, and the last note verbale from Panama to 7 January 2005.

However, in support of its point, in its observations, Panama quotes the decision by the International Court of Justice in the case of *Certain Phosphate Lands* between Nauru and Australia. In that decision the Court held that, even in the absence of any applicable treaty provision, delay on the part of a claimant may render an application inadmissible.[28] It also noted that international law does not lay down any specific time-limit in that regard, and that it is therefore for a court to determine, in the light of the circumstances of each case, whether the passage of time renders the claim inadmissible.[29]

Panama tries to use this case to prove its argument. In particular, according to Panama, Australia and Nauru kept communicating over the years, with periods of time during which the parties did not communicate in relation to the claim of Nauru. Since the case was not deemed

[16] *Alan Craig* v. *Ministry of Energy of Iran*, Award No. 71-346-3, 2 September 1983, in *Iran-United States Claim Tribunal Reports*, 1983, p. 280 et seq., at p. 287.
[17] *Gentini* case, in *Reports of International Arbitral Awards*, Vol. X, pp. 551 et seq., at p. 561.
[18] French Civil Code, article 2224.
[19] Belgian Civil Code, articles 1382 and 1383.
[20] Source: http://www.twobirds.com/~/media/pdfs/brochures/dispute-resolution/client-know-how/client-briefings -- bird --bird- comparative-table--statute-of-limitation-5.pdf?la=en.
[21] Prescription and Limitation (Scotland) Act 1973, Section 6.
[22] Civil Code of Malta, article 2153.
[23] Source:http://www.twobirds.com/~/media/pdfs/brochures/dispute-resolution/client-know-how/client-briefings --bird--bird-comparative-table--statute-of-limitation-5.pdf?la=en.
[24] Source: http://uk.practicallaw.com/9-502-0319#a640603.
[25] Source: http://uk.practicallaw.com/5-502-0694.
[26] Prescription Act No. 68 1969, Section 11(d).
[27] Observations, para 61.
[28] *Certain Phosphate Lands in Nauru* (footnote 13), pp. 253-254, para. 32.
[29] *Ibid.*

inadmissible by the International Court of Justice, the consequence should be, according to Panama, that this Tribunal should automatically reach the same conclusion in this case.[30]

However, Mr President and Members of the Tribunal, the decision that Panama quotes goes against the very argument that Panama is trying to make. The International Court of Justice stated that, in the absence of a set period of time for time bar to occur, an *ad hoc*, case-by-case analysis is required. Here, the nature of Panama's claim cannot be overlooked.

The cases of *Panama* v. *Italy* and *Nauru* v. *Australia* are so different that it is of no use to Panama to compare them.

Mr President, Members of the Tribunal, Panama is advancing a claim for damages, a pure monetary claim. The application made by Nauru was an application regarding rehabilitation of land and self-determination; also, in the case of *Nauru* v. *Australia* there was no domestic statute of limitation to use as a comparison for the conduct of the Parties, unlike in the present case; also, the relief that Nauru asked of the International Court of Justice was a relief that was only available under international law, whereas the damages that Panama is now asking this Tribunal could have been asked of domestic courts, if only the claim had been pursued in a timely manner.

Indeed, Mr President, Members of the Tribunal, if a comparison has to be made, it has to be made between the present case and cases where damages were sought against a defendant State at the international level. In *Wena* v. *Egypt*, the tribunal explained that claims must be pursued diligently and accepted the principle that they can be barred when they are not so diligently pursued.[31]

In *Wena*, the tribunal found the claim admissible, but only because *Wena* had been diligent throughout the years in pursuing its claim. In giving an example of what this diligence consisted of, the tribunal specifically referred to a letter sent by *Wena*, the investor, to Egypt dated 23 February 1998, with which *Wena* restated its claim with the Prime Minister of Egypt. International proceedings in the *Wena* case were commenced on 10 July 1998.[32] This was only four and a half months after the letter to the Prime Minister of Egypt was sent – not years, just four months.

Mr President, Members of the Tribunal, the third circumstance regards the prejudice that Italy would suffer if the claim by Panama were allowed to proceed. Panama is essentially claiming a certain sum of money, which is bound to increase as interest accrues. Indeed, Panama has already claimed interest against Italy in addition to the alleged economic value of the *M/V Norstar*. Negligence in the pursuit of the claim causes prejudice to Italy as the amount for which Italy is being held liable has been artificially increasing over the years due to Panama's inaction.

Mr President, Members of the Tribunal, in concluding on extinctive prescription, I would like to sum up and stress a couple of points.

The owners of the *M/V Norstar* have had a number of years to pursue their claim domestically, both in Italy and in Panama. At present, the right to claim these alleged damages is extinct as a matter of both Italian law and the law of Panama, and indeed as a matter of the laws of the vast majority of countries. Therefore, Panama is resorting to this Tribunal, to persuade it to remedy the lack of diligence in pursuing the claim related to the *M/V Norstar* in the appropriate avenues and within the appropriate time frame. It is asking this Tribunal to grant the very same remedy that could have been asked of the Italian courts, or of the courts of Panama, over the course of a number of years.

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[30] Observations, para 61
[31] *Wena Hotels Ltd.* (footnote 65), para. 105
[32] *Ibid.*, para. 105, footnote 253.

Panama also seems to treat the *M/V Norstar* as some kind of safe investment, an investment that has been appreciating over the years of Panama's inactivity, and that Panama now thinks is ripe to be cashed out.

However, the machinery of international justice should not be the avenue of last resort for late claimants who have not been diligent in pursuing their claims domestically. The lack of any set period of time for time bar to operate at the international level should not be exploited to seek to obtain internationally what is no longer available at the domestic level. If the uncontested statement that extinctive prescription is a general principle of international law and that international tribunals must apply it is not to remain a mere illusion, one has to draw the line somewhere.

Mr President, Members of the Tribunal, Italy is not asking you to declare generally what the period of time for extinction by prescription of international claims should be. It is simply asking you to declare that this specific case and this specific claim for damages, in the circumstances of this specific case, is extinct due to prescription. If Panama's claim for damages were to be considered admissible, the resulting principle would be that a State could hold off pursuing a claim for damages simply for the purposes of maximizing its advantage while holding a respondent State liable potentially for an indefinite period of time internationally. This goes against the very rationale of prescription of claims, which I discussed earlier – certainty of legal relationships.

Mr President, Members of the Tribunal, this concludes my presentation. It also concludes Italy's pleadings today. The Agent of the Republic of Italy will present Italy's final submissions the day after tomorrow.

Thank you for your attention, Mr President and Members of the Tribunal.

**THE PRESIDENT:** Thank you, Mr Busco.

I understand that Ms Palmieri will present her statement the day after tomorrow.

That concludes our proceedings for today and tomorrow we will have the second round of oral arguments and presentations, which will be made by the delegation of Panama. The sitting is now closed.

*(The sitting closed at 5.30 p.m.)*

**PUBLIC SITTING HELD ON 21 SEPTEMBER 2016, 10 A.M.**

**Tribunal**

*Present:* *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

**For Panama:** [See sitting of 20 September 2016, 10 a.m.]

**For Italy:** [See sitting of 20 September 2016, 10 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 21 SEPTEMBRE 2016, 10 HEURES**

**Tribunal**

*Présents :* M. GOLITSYN, *Président* ; M. BOUGUETAIA, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

**Pour le Panama :** [Voir l'audience du 20 septembre 2016, 10 h 00]

**Pour l'Italie :** [Voir l'audience du 20 septembre 2016, 10 h 00]

**THE PRESIDENT:** Good morning. The Tribunal will today continue the hearing in the *M/V "Norstar" Case*. We will hear the first round of oral arguments presented by Panama.

I now give the floor to Ms Janna Smolkina, Adviser to the delegation of Panama, to begin her statement.

**MR CARREYÓ:** Good morning, Mr President. Ms Smolkina yesterday already introduced our delegation. I do not know whether it is possible to go straight to my oral presentation.

**THE PRESIDENT:** Thank you. Maybe there was a misunderstanding in the information that was conveyed to the Registry. According to the information provided to me by the Registrar, she was supposed to speak for five minutes, after which you would take the floor.

I would like to apologize for this misunderstanding, and I now call on the Agent of Panama, Mr Carreyó, to begin his statement. You have the floor, Sir.

**MR CARREYÓ:** It was my mistake, because it was going to take five minutes for her to introduce the delegation and we thought that that was already covered, so we are very sorry.

**First Round: Panama**

STATEMENT OF MR CARREYÓ
AGENT OF PANAMA
[ITLOS/PV.16/C25/3/Rev.1, p. 1–33]

**MR CARREYÓ:** Good morning, Mr President, distinguished Members of the Tribunal, distinguished members of the Italian delegation and all the people involved with the technical matters as well.

First of all, I thank God for allowing me to be here. It is a very privileged opportunity for me to represent my country and do my best in opposing the objections of Italy.

I would like to start by saying that Panama instituted proceedings against Italy in a dispute concerning the arrest of the *Norstar*. Italy filed Preliminary Objections to the jurisdiction and admissibility of Panama's Application. Panama submitted Observations based on these Objections to which Italy, in turn, replied. The Italian objections as to jurisdiction are based on three main grounds: firstly, Italy contends that this Tribunal has no jurisdiction *ratione materiae* because there is no dispute; secondly, Italy objects to the jurisdiction *ratione personae*, believing that it is not the proper respondent; and, lastly, Italy believes that Panama has not complied with the obligation to exchange views as required by article 283, paragraph 1, of UNCLOS.

Panama has responded to these objections by showing that a dispute does indeed exist, this Tribunal having jurisdiction *ratione materiae*, and it has been demonstrated that Italy, and only Italy, is the proper respondent, this Tribunal also having jurisdiction *ratione personae*. Panama maintains that it has fulfilled the obligation to exchange views while Italy has omitted relevant facts regarding its own compliance with article 238, as well as other significant details explaining how this dispute, the subject matter, falls under the Convention.

As to the admissibility of the claim, Italy has four further objections: firstly, the claimant has to hold Panamanian nationality; secondly, Panama did not exhaust local remedies; thirdly, the claim is time barred and Panama is estopped from pursuing this claim due to the length of time that has passed since the seizure; and, finally, Panama displayed a contradictory attitude by expressing its intention to apply for prompt release and pursue compensatory damages without following through with either.

With regard to the admissibility of the Application, Panama contends that its claim is valid because, according to international law, any country has the right to protect its subjects, either through diplomatic action or by means of judicial proceedings. Panama further contends that its claim is not time barred because its communications with Italy have interrupted and extended any time-limit and thus voided any prescription.

Furthermore, estoppel does not apply because this is a merits defence and Italy has not relied on any pertinent statement of Panama. Panama also has challenged Italy's reference to the rule of exhaustion of local remedies because this only applies when the acts complained of are carried out within the territorial waters of a coastal State. This is not the case in this instance because the alleged offence occurred outside of territorial waters.

First of all, I will refer to certain facts that are not disputed.

Although Panama holds that its dispute with Italy is at the heart of this case, there are certain facts that are undisputed. For example, both Parties have recognized that from 1994 to 1998 the *Norstar*, and some other vessels registered and not registered in Panama, carried out bunkering activity outside the territorial sea of Italy and some other countries of the European Union, and that Italy wrongly considered this activity as criminal. It is also agreed that on 11 August 1998 Italy ordered the seizure of the *Norstar* as *corpus delicti* and, by way of letters rogatory, requested Spain to execute this order while the *Norstar* was moored at Palma de

Mallorca, Spain. Both Parties also agree that Panama has sent, and Italy has received, several written communications requesting Italy to release the *Norstar* and pay compensation for damages. It is also stipulated by both Parties that although Italy ordered the seizure to be lifted, this decision has not been executed, and it is still for the Italian authorities to do so.

Panama would now like to show that a dispute exists.

Panama started communicating with Italy as long ago as 15 August 2001, stating the facts of the case and requesting compensation for the unlawful detention of the *Norstar*. Panama contends that this dispute has arisen because Italy has not even acknowledged, much less tried to resolve, Panama's claim. Panama respectfully requests that the Tribunal recognize its good faith and take the refusal of Italy to work with Panama on this issue as unambiguous evidence that a dispute exists.

On the other hand, rather than respond to Panama's entreaties, Italy has accused Panama of making "no meaningful attempts at negotiated settlement", ironically using the adjective "putative" to belittle what is truly a disagreement between the two States. This accusation itself clearly indicates a significant difference between Italy's interpretations of the law and facts from those of Panama. By refusing to answer Panama's communications, Italy has implicitly taken a very different position from Panama.

In paragraph 87 of the *Land and Maritime Boundary* case, the ICJ stated that a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties, and cited the *Mavrommatis Palestine Concessions* and other cases. However, what is more substantial is that, in paragraph 89, the ICJ, after repeating its definition of a dispute, added that "[the dispute] need not necessarily be stated *expressis verbis*."

Thus, the Court indicated that it is not necessary that the difference be expressed in words. Its existence may be inferred simply from the behaviour of the parties. In other words, a dispute most certainly does exist in this case despite Italy's protestations to the contrary. In paragraph 30 of the *Case Concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination,* commonly known as the *CERD* case, the ICJ affirmed that a dispute can "be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" and that, while it is not necessary that a State must expressly refer to a specific treaty, the judgment explained that "an express specification would remove any doubt about one State's understanding of the subject matter in issue, and put the other on notice."

Therefore, a dispute may be deduced even from a failure of one State to answer when a reply is expected from another, as it has been in this case. If Italy truly believes that no dispute has arisen, it has to explain why it has not adjusted the claim made as a result of the unlawful arrest of the vessel as Panama has always requested.

In the *CERD* case the Court also ruled that in an exchange of views the subject matter of the negotiations must relate to the subject matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question. To this end, Panama has notified Italy that a dispute exists, has delimited the scope of the subject matter, and has placed it in the context of negotiations, in accordance with paragraph 1 of article 283. In paragraph 30 of the *CERD* case the ICJ said that "… [even though] the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter", which in turn will help this Tribunal better to adjudicate this case.

Panama now wishes to address the second objection made on the basis of the lack of jurisdiction *ratione personae*.

The basis for this objection by Italy is that the actual arrest was not executed by Italy, but by Spain, so that Italy considers itself as an "improper respondent". To support this line of reasoning, Italy has relied on the *Monetary Gold* case and the "indispensable third party"

doctrine therein established, whereby the ICJ adjudged that it did not have jurisdiction due to the fact that interests of Albania (the missing third party in that case) were the subject –

**THE PRESIDENT:** Mr Carreyó, I would like to apologize but the interpreters are having difficulty following your presentation. Could you speak a little slower so that your presentation can be interpreted?

**MR CARREYÓ:** Thank you very much, Mr President.

To support this line of reasoning, Italy has relied on the *Monetary Gold* case and the "indispensible third party" doctrine therein established, whereby the ICJ adjudged that it did not have jurisdiction due to the fact that interests of Albania (the missing third party in that case) were the subject matter of the decision and that as a consequence its presence was indispensable.

However, in the present case, Italy's liability can be determined without Spain's involvement. Panama contends that Spain does not have any interest of a legal nature which would be affected by the decision of the Tribunal. The arrest of the *Norstar* was based on an order given by Italy, not by Spain, and thus this case involves only the actions of Italy and not those of a third State.

In the *Military and Paramilitary Activities in and against Nicaragua* case the ICJ stated in paragraph 88 that any other State which considers itself affected by a ruling in a case is at liberty to intervene, to voluntarily institute separate proceedings, or to employ the procedure of intervention within 30 days after the counter-memorial becomes available. However, in the present case Italy's liability can be determined without Spain's involvement.

On the other hand, in paragraph 54 of the *Certain Phosphate Lands in Nauru* case, the ICJ stated that the absence of a request to intervene was no obstacle for the Court to have jurisdiction, "provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for."

Spain has not been mentioned, summoned, cited, or even referred to in this case either as defendant or as a third party, nor has it shown any interest in participating through any of the possible methods accepted by the Convention. The interests of Spain would not be affected by the judgment, much less constitute the "very subject matter of the decision". Thus, this Tribunal can examine the present case and determine Italy's responsibility without examining the conduct of Spain.

I would also like to take issue with the Italian claim that Panama did not meet the obligation to exchange views.

Once a claim requiring the interpretation or application of the Convention has been lodged, article 283 requests that the parties – and I emphasize the plural – proceed expeditiously to exchange views regarding a settlement by negotiation or other peaceful means. As Panama has already pointed out, Italy has used the word "putative" to characterize Panama's claim, suggesting that a legitimate dispute does not exist. Oddly, Italy has juxtaposed this argument with one citing Panama's failure to exchange views (thus implying the existence of a dispute) before resorting to international adjudication.

By failing to answer any of the communications of Panama, Italy has been the party which has impeded this exchange. Yet in paragraph 18 of its Objections Italy reflects conflicting interpretations of article 283, paragraph 1, by saying that "no complaint … bearing on the facts listed in the Application has been raised in any legally appropriate manner by the Government of Panama." Italy has never explained what it meant by "legally appropriate manner". However, this argument ignores several relevant facts, as we will demonstrate.

In paragraphs 4(b), 17(c), 19-20 and 34(c) of its Objections Italy has also stated that "no meaningful attempts at negotiated settlement were made over any … difference between

the two States." By referring to the communications concerning the seizure as failing to comply with article 283, paragraph 1, because they improperly conveyed requests for prompt release and damages, Italy has resisted the basis for Panama's claim on semantic grounds.

Panama has always communicated with Italy with the aim of resolving the matter to the mutual satisfaction of both Parties by determining an appropriate amount of damages due as a result of the unlawful arrest. Nevertheless, in paragraph 31, Italy criticizes Panama's communications for failing to be either "meaningful", "genuine", or "consistent". In spite of the fact that in its Observations Panama requested Italy to explain its use of these terms, Italy has not explained what it means by these terms and how they specifically apply to Panama's actions. Without any specific references explaining how its use of these pejorative remarks is justified, Italy has not only failed to show how Panama has refused to exchange views but has also clearly confirmed its own refusal to participate in this process.

Panama's contention has always been that one of its vessels was wrongfully detained upon an order from Italy. Italy was notified in writing of Panama's claim, which clearly identified the scope and subject matter of the claim, delimited by the facts of the case, thereby fulfilling the requirements of article 283. Thus, the Italian allegation that Panama did not comply with article 283 lacks foundation.

Panama now aims to show that Italy has not stated all the relevant facts about its failure to comply with article 283 of the Convention.

In paragraph 10 of its Objections, Italy referred to the first communication that it received from Panama, dated 15 August 2001. This first letter was used by Italy yesterday, in fact, but it only referred to one particular part of the letter. We would like to show that letter, which you will find at page 19 of the annexes in your folders. If you read that letter, you will see that Panama reflected all the important facts that had occurred concerning the seizure of the *Norstar*. It gave all the information pertaining to the fact that the public prosecutor in Italy considered as guilty the legal representative of the company. It also mentions that the arrest ordinance issued by the Italian authorities for the activity carried out by *Norstar* in 1997 was later performed, after pressure by the Italian authorities by the Spanish authorities. It also said the vessel had been stationary for the last three years and was then not far from being wreckage. It also mentions on the second page that the activity took place in international waters, outside the territorial waters. In the last paragraph Panama said it "respectfully requests that the Italian State, within reasonable time decide if it wants to release the vessel and pay the damages".

That was the first communication from Panama to Italy, 15 August 2001. In that letter, as you have seen, the *Norstar* had been inoperative and allowed to decay for over three years, so that the damages incurred by that time were approximately $6 million and climbing.

The letter went on to say why the detention was improper, and reminded Italy that ITLOS had declared the areas outside of territorial waters and the contiguous zone as open, based on the principle of freedom of commerce. The letter concluded with a request for Italy to release the vessel and pay damages, as we have seen. No response to this letter was ever received and, as of now, any specific objections of Italy regarding its shortcomings remain unclear.

Italy also acknowledged receipt of Panama's second letter, dated 7 January 2002, specifically asking for a reply to the previous letter and repeating Panama's intention to institute proceedings before this Tribunal if a bilateral settlement could not be reached. Italy did not respond to this communication either.

In paragraph 10 of its Objections, Italy also mentioned receiving the third letter from Panama, dated 6 June 2002. Italy considered that this communication only "reiterated" the earlier letter dated 15 August 2001, but the most important aspect of this third communication was that Panama stated that it had "not yet received the relevant acknowledgement of receipt" of its previous two messages, and that it was still waiting for an answer. To this third letter

Panama attached a copy of the original communication dated 15 August 2001 as a reminder. Despite the importance Panama placed on its request, no reply was ever received.

In fact, it was not until it filed its Preliminary Objections on 10 March 2016 that Italy first admitted, and Panama was also informed for the first time, that it had received these first three communications. Even so, Italy still neglected to mention the existence of a fourth communication, sent on 3 and 6 August 2004, which was written in Spanish, English, French and Italian. Needless to say, Italy did not reply to this communication either.

If Italy had had any doubts about the intentions of Panama concerning its compliance with article 283, these should have been completely dispelled with this fourth communication, which clearly declared: "This is a letter from the Panamanian Government to the Italian Government in accordance with article 283 of the United Nations Convention on the Law of the Sea."

Due to a total lack of response by Italy as of this time, Panama used this fourth communication to restate its desire to reach a settlement with the Italian Government "through the procedures given for the International Law of the Sea Tribunal". The letter went on to say that if Italy wished to have the dispute decided by ITLOS in accordance with article 287 of UNCLOS, Panama would be ready to proceed accordingly.

On 31 August 2004 Panama sent its fifth communication, the note verbale number 2227. Once again, Italy, in its Preliminary Objections, referred to this message as one that only "reiterated the mandate". However, with this note verbale Panama did more than that, requesting its Ministry of Foreign Affairs to use diplomatic channels to ensure that the communication dated 3/6 August 2004 had been received. Since Italy has now admitted receiving the message conveyed by this fourth letter, which clearly invoked article 283, Panama now wonders why Italy had not previously acknowledged its existence.

On 7 January 2005, pursuant to the contents of note verbale 2227 of 31 August 2004, Panama dispatched note verbale 97, its sixth communication. Italy mentions this communication in its Objections. However, Panama has drawn the attention of the Tribunal to Italy's inaccurate translation of this message. This is highly significant, because this important piece of evidence has a direct bearing on jurisdiction and the admissibility of the Application, issues raised by Italy.

As stated in paragraph 30 of its Observations, Panama takes strong exception to the Italian translation because it distorts the actual meaning of the original and is therefore misleading. For that reason, Panama has requested as evidence that the Tribunal review the translation provided by Italy and compare it to the original communication. We will come back to this issue later on.

By the same token, Panama is also concerned by the failure of Italy to disclose that on 25 January 2005, its Embassy notified Panama that it had transmitted note verbale 97 to the appropriate authorities and that, as soon as the Embassy received an answer, it would inform Panama accordingly. Italy never did so but, because no objection has been raised, Italy has tacitly accepted the validity of this piece of evidence, which was not filed by Italy but by Panama.

In paragraph 16 of its Objections Italy has also admitted receiving an eighth communication, this time a letter dated 17 April 2010, although it did not refer to its contents. In this letter Panama repeated the facts of the case and again asked Italy to decide whether it would pay damages or whether Panama should apply to the Tribunal. The primary purpose of this letter was to determine if Italy had received Panama's previous messages, but Italy remained silent.

The clear objective of all these communications was to obtain feedback from Italy about the Panamanian position on the subject matter and, consequently, the feasibility of a negotiation or settlement. There have been eight attempts made by Panama to understand the position of

Italy concerning this case, all of them unsuccessful. Given its silence, it is unclear how Italy intended to comply with article 283. By completely ignoring all of Panama's communications on this subject over the years, Italy has essentially blocked any productive exchange of views.

The *travaux préparatoires* of UNCLOS show that exchanges of views are called for to prevent a State from unexpected proceedings instituted by another. As these communications demonstrate, Panama's Application to the Tribunal should have come as no surprise to Italy. Furthermore, the repeated efforts of Panama to engage Italy in negotiations show that Panama has not submitted this case precipitously.

Similarly, in paragraph 60 of its decision in the *Southern Bluefin Tuna Cases,* the Tribunal said: "A State Party is not obliged to pursue procedures under Part XV, Section 1, when it concludes that the possibilities of settlement have been exhausted."

Italy's refusal to engage Panama's attempts to settle justifies Panama's conclusion that the chances of reaching a resolution through bilateral communication have likewise been exhausted.

Panama has maintained a genuine intention to peacefully negotiate even as late as 28 January 2016 when, during consultations held by the Parties in the presence of the President and the Registrar, Panama indicated that it was still willing to reach a settlement, and also more recently, when the Italian Ambassador, Mr Marcello Apicella, and the Chargé d'Affaires, Mr Roberto Puddu, both from the Italian Embassy in Panama, approached the Director of the Legal Department of the Ministry of Foreign Affairs requesting that the possibility of negotiations be explored.

Panama accepted and on 4 August 2016 sent a letter addressed to the Italian Agent, Ms Gabriella Palmieri, requesting ITLOS to suspend the proceedings. In spite of the fact that the Italian diplomatic representative promised, once again, that it would convey the Panamanian position to its Government's officials, Panama has not received any response regarding the possibility of negotiations to which its own authorities had referred. This can now be interpreted as an official rejection of all the Panamanian initiatives to exchange views. Although Panama did not file this document as evidence, it would be interesting to know whether the distinguished Agent of Italy received this latest communication from Panama and whether it has any answer to it.

On page 31 of the Judgment in the *Factory at Chorzow (Germany* v. *Poland)* case, the Permanent Court of International Justice stated that a principle generally accepted in the jurisprudence of international arbitration is that "one Party cannot avail himself of the fact that the other has not fulfilled some obligation, if the former Party has prevented the latter from fulfilling the obligation in question".

The way Italy has used silence to prevent Panama from fulfilling its desire to frankly and fully exchange views coincides with the doctrine above, because Italy is now suggesting that Panama has not complied with its duty to exchange views, even when it was the Party responsible for impeding this compliance.

Panama has to conclude that the Italian silence represents bad faith, because there is no excuse for not returning communications within a reasonable time, save to avoid the matter being brought up and discussed. Given Italy's unforthcoming approach, the possibility of reaching a mutually satisfactory resolution has become remote.

In sum, the Italian contention that Panama failed to exchange views in "any meaningful or legally appropriate manner" related to article 283 is not true. Italy's silence should not be used to deny or evade its own obligations under article 283, paragraph 1, nor should its suggestion that it has been Panama who has not complied with this provision of UNCLOS.

That Italy had prevented Panama from even knowing whether it had received its formal communications concerning its claim reflects an uncooperative attitude with regard to negotiations. In any case, Italy's lack of responsiveness does not negate the fact that Panama

has made a sincere effort to consult with Italy, thereby fulfilling its own requirements under article 283. To resolve this conflict, Panama's only recourse has been to submit its claim to this Tribunal.

Panama would next like to address the question of the interpretation and application of the Convention.

In paragraph 9 of the Application, Panama identified the subject matter. Although it accepts that articles 73 and 226 are not applicable, Panama calls attention to article 297, which limits its applicability to disputes about the interpretation or application of the Convention, this provision being cited in the very first letter Panama addressed to Italy on 15 August 2001.

Panama will now express its arguments as to the objection to the admissibility of its Application.

Italy objects to the claim being admitted, firstly, because it is preponderantly of a diplomatic protection character, and the requirement of the nationality of the alleged victims has not been met. Secondly, Italy deems Panama's application inadmissible because Panama is time-barred, and estopped due to the lapse of 18 years since the seizure. Lastly, because the requirement of exhaustion of local remedies has not been met.

We will now address each of these arguments, starting with the question of nationality and diplomatic protection.

In paragraphs 28-29 of its Objections, Italy argued that the *Norstar* was not "owned, fitted out, or rented, by a natural or legal person of Panamanian nationality …" suggesting that the claim is one of diplomatic protection and thus should be considered void. Panama submits that it is entitled to protect its vessels by diplomatic action *or* by international judicial proceedings, as paragraph 21 of the *Mavrommatis Palestine Concessions* case and paragraph 2 of the *Nottebohm* case both affirm.

Italy contends that Panama could only validly bring the claim if the wrongful act had affected its own nationals. However, with this contention, Italy has only been referring to the nationalities of the *Norstar*'s owner, charterer, captain, and crew, that is to say to persons, but not that of the *Norstar*, which holds Panamanian registration.

As set out in the Convention, Panama has the right and duty to protect its vessels and use peaceful means to assure that other States respect its rights. If Italy had taken into account the Panamanian nationality of the *Norstar* (the essence of what this claim is about), it would have not objected to the admissibility of the Application.

Additionally, Italy has ignored the ruling of the Tribunal in the *M/V "SAIGA"* case, upholding the rights of a ship and its flag State to seek reparation for damage caused by other States and to institute proceedings through ITLOS by saying that the ship, everything on it, and every person involved or interested in its operations are treated as entities linked to the flag State. According to paragraph 106 of this decision, the actual nationalities of these persons are not relevant.

In the *Certain Phosphate Lands in Nauru* case, the ICJ rejected the objection of Australia that Nauru had not made its claim until 20 years after having become independent. The ICJ stated that "international law does not lay down any specific time-limit" and that it was for the Court to determine, in the light of the circumstances of each case (those are the important words), whether the passage of time renders an application inadmissible.

Although there were long periods of time during which the two parties did not communicate about the claim, in paragraph 32 of its decision the Court ruled that, "given the nature of relations between Australia and Nauru as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time."

On page 561 of its decision in the *Gentini* case, the arbitral tribunal held that "[t]he presentation of a claim to competent authority within proper time will interrupt the running of prescription".

STATEMENT OF MR CARREYÓ – 21 September 2016, a.m.

Additionally, Panama also refers to page 595 in the *Giacopini* case where the court held that since the Government of Venezuela knew of the existence of the claim from an Italian citizen, it "had ample opportunity to prepare its defense" and referring to the *Gentini* case it stated that "[t]he principle of prescription finds its foundation in the … avoidance of possible injustice to the defendant" and that "[f]ull notice having been given to the defendant, no danger of injustice exists, and the rule of prescription failed.

Both cases are cited by the author Tams and allowed him to conclude that lapse of time as such is not a sufficient reason to conclude that there is an extinction of claims unless it "placed the respondent at a disadvantage."

That is on page 48 of his cited work.

In the present case, in paragraph 32 of its Objections, Italy has asserted that Panama's claim should be rejected on the basis of time-bar because 18 years have elapsed since the seizure and because the agent merely expressed an intention to apply for prompt release without taking any action, thereby ultimately waiving the right to do so. However, since 15 August 2001, by referring to the arrest as connected to article 297 of the Convention, as well as to the principle of freedom of commerce, Panama effectively suspended any prescription period or time-bar lapse running, or any other delay that could affect its claim.

We have shown that Panama has not ceased communicating with Italy. The fact is that Italy now admits that, as early as 2001, Panama sought redress and the prompt release of the *Norstar*, as can be proved by annexes G, H, L, M and N of the Italian Objections, and Annexes 1 to 5 of the Panamanian Observations. You have that information in the folder we have just delivered.

This evidence is incongruent with Italy's time-bar objection or with any other delay issues that Italy has raised. Panama's consistent effort to communicate openly with Italy through formal written requests clearly refutes Italy's time-bar argument. We now know that Italy took due notice of the claim and has had ample opportunity to seek evidence and prepare its defence.

The time-bar objection is also negated by the local judicial proceedings in Italy because, as early as 13 November 2006, the Court of Appeal of Genoa answered a request from Spain to demolish the *Norstar*. The answer of this court was that, after having noted that the judgment to release the vessel had to be enforced, the court responded there was no decision to be taken, given that the destiny of the vessel, after having been given back to the party entitled, does not fall within the competence of this court and in any case, given that the first instance judgment was confirmed – and this is the important part – any issue on the enforcement of the said judgment would be the competence of the Court of Savona. Italy's conduct in this case contradicts its own judicial order and therefore is an unsurmountable obstacle to the validity of its time-bar objection.

The Court of Appeal of Genoa thus assumed that the vessel had been, or at least, would be, returned to its owner and that the case was closed. However, although it was decided that any issue on the enforcement of the said judgment would be the competence of the Court of Savona, to date that court has not issued a decision on this matter and therefore it is still pending. Meanwhile, the relevant authorities of Italy have made no effort to keep Panama apprised of these developments, much less to facilitate the return of the ship or to pay damages.

In other words, the fact that the *Norstar*, the object of these proceedings, has not been returned to its owner despite the order issued by an Italian court, signifies that Italy's compliance with the judgment of its own authorities is still unrealized, this fact influencing any issue of delay.

To argue now that this claim is time-barred denies all of Panama's efforts to obtain redress. Contrary to the principle of *nullus commodum capere de sua injuria propria*, with this

objection Italy intends to reap advantage from its own failure to make timely reparations to Panama.

Italy asserts that Panama is estopped from bringing this case, but its reasoning in this regard is also faulty, firstly because this is a merit argument. Wagner says that

> International estoppel requires the good faith reliance upon the representation or statement of one party by the other party either to the detriment of the relying party or to the advantage of the party making the representation ... However, if the complaining party never relied on the statement and consequently did not change its position, the change in policy cannot be said to lack good faith.

In practice, if one party made a statement that another party relied on, in effect a promise, that it failed to keep, it is unable to benefit at the expense of the second party, i.e. it is estopped.

Italy appears to be saying that it relied on Panama to file a petition for prompt release and was harmed when Panama did not ultimately do so. Italy also seems to believe that Panama indicated that it would not bring this case before this Tribunal, and that the fact that Panama has now done so is also causing it harm.

First of all, Panama was not obligated to bring a petition to the Tribunal for prompt release, and has never promised Italy that it would do so. Panama has also never promised not to bring a claim for the wrongful arrest order and consequential damages before this Tribunal. Therefore, Italy, as the complaining party in its Objections, has not relied on, nor reacted to, any such statement. In light of this, the objection of Italy regarding estoppel is also unfounded and should be rejected.

Panama raised the possibility of a petition for prompt release because Italy had not yet issued a final judgment and, therefore, Panama did not consider local remedies to have been exhausted. The *Norstar* was arrested in 1998 and the Court of Appeal of Genoa did not confirm the judgment of the Court of Savona until 2005, seven years later. Panama also declined to bring a prompt release petition because circumstances did not allow the posting of the necessary bond. Although prompt release proceedings were not initiated, Panama is not estopped on the basis of its decision not to make use of such an accessory or incidental proceedings since they are rights and, as such, are not mandatory, estoppel being a merits defence.

In paragraphs 29, 5(b), 27(a), 28 and 35(a) of its Objections, Italy alluded to the rule concerning the exhaustion of local remedies in a rather subtle manner, juxtaposing it with the issue of diplomatic protection. In paragraph 28 of its Objections, Italy stated that the requirements for the exercise of diplomatic protection apply, "whereby the victims of an internationally wrongful act should be nationals of the Applicant and should have exhausted local remedies in the Respondent State." We will now show why the exhaustion of local remedies objection is not applicable in this case.

The very first reason why the exhaustion of local remedies rule does not apply is because the actions of Italy against the *Norstar* violated the internationally lawful use of the sea related to the freedom of navigation, as set out in the provisions cited in the Application.

The *M/V "SAIGA" Case* held that the rights which Saint Vincent and the Grenadines had claimed had been violated by Guinea were all rights that belonged to Saint Vincent and the Grenadines under the Convention.

The parallels between the *M/V "SAIGA"* and the present case are clear because the *Norstar* was also arrested for acts performed in international, rather than in territorial waters and, for that reason, the rights invoked have been violated by Italy's wrongful and unlawful arrest of the *Norstar*.

STATEMENT OF MR CARREYÓ – 21 September 2016, a.m.

In the *M/V "SAIGA"* ruling, the Tribunal also affirmed that "the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens".

However, the Tribunal went on to add that none of the violations of rights claimed by Saint Vincent and the Grenadines could be described as breaches of obligations concerning the treatment to be accorded to aliens but that they were all direct violations of the rights of Saint Vincent, and that damage to the persons involved in the operation of the *Saiga* arose from those violations. Accordingly, this Tribunal concluded that the claims with respect to such damage were not subject to the rule that local remedies must first be exhausted.

Italy has created just such a situation with regard to the *Norstar*. The rights claimed by Panama are not based on obligations concerning the treatment of aliens, but are, instead, based on the treatment of a Panamanian vessel (just as the rights of the *Saiga*'s Saint Vincent nationality were violated); thus, the rule of exhaustion of local remedies is not applicable in this case either.

Whether the local remedies rule applies also depends on the *locus* where the alleged activity of the *Norstar* was taking place. In paragraph 4 of the Application, it is not disputed that the *Norstar* was "in international waters beyond the Territorial Sea of Italy" that is to say, outside of Italian jurisdiction.

Indeed, the facts of the case show that the *Norstar* was outside Italian territorial waters at the time of the alleged infraction, and that, therefore, Italy was not entitled to apply its customs rules to the *Norstar*'s operation because of the lack of a jurisdictional connection between them.

Panama would like to summarize the first part of its oral arguments as follows:

Italy's refusal to respond to any of the formal communications it received from Panama constitutes a dispute. The facts allow this Tribunal to have jurisdiction *ratione personae* and to continue proceedings with Italy only as defendant, the presence of Spain not being indispensable for its adjudication.

Panama has assiduously attempted to settle this case through bilateral means. On the other hand, Italy has advanced a contradictory interpretation of article 283, paragraph 1, of the Convention, contending that there is no dispute, while simultaneously declaring that Panama is obligated to exchange views. This paradoxical approach has inhibited the very exchange Italy has professed to want. Moreover, the allegation of Italy that the Panamanian attempts at dialogue have not been "appropriate", "genuine" or "meaningful" lacks specificity, substance, and a legal foundation, thereby undermining the principle of due process of law.

Italy's failure to file all communications received has been amplified by its omission of highly relevant facts about both its conduct and the case. It is extremely significant to note (as Italy has neglected to do) that the *Norstar* release was ordered because its activities were carried out beyond Italian territorial waters. Such omissions have affected not only the interpretation of the case, but also have impeded the Panamanian right to seek a resolution in an expeditious manner. This Tribunal has authority to deal with this matter because the dispute concerns the interpretation and application of several provisions of the Convention.

Italy's objections based on diplomatic protection do not correspond with reality. Panama asserts that it is using the international judicial proceedings to seek a resolution, the Application being admissible.

Although many jurisdictions have established fixed rules regarding the implementation of prescription, this is not the case with international public law. Specifically, there is no article in UNCLOS that prescribes a particular time restriction regarding the bringing of cases. In the absence of a clearly stated definition of legal deadlines, as the time bar requires, this objection should be rejected.

Even if the Tribunal were to consider such objections to be applicable, Panama has interrupted any limitation period by pressing its claim between 2001 and 2010, eliminating its bearing on the outcome.

Estoppel depends on whether the complaining party relied on any statement of the party making the representation. Italy has not shown any evidence by which it relied on a statement from Panama having consequences against it. Estoppel does not apply simply because a claimant decides against filing a prompt release request in order to let the process of local remedies take its course, nor does it apply in the assurance that Panama would seek justice through the Tribunal.

Finally, just as it was not in the case of the *Saiga,* the need to exhaust local remedies is not applicable in this case. Due to the lack of a jurisdictional connection between Italy, as the arresting State, and the Panamanian vessel *Norstar*, whose arrest was based upon activities that the vessel carried out in international waters beyond the territorial sea of Italy, there is no need for Panama to have exhausted local remedies before bringing this case.

The detention of the *Norstar* has not been properly annulled since, in order to do so, the *Norstar* would have to be restored to the same condition it was in at the time of seizure, with updated trading and class certificates and a formal notification in that respect. The decision whether to restore the *Norstar* to its original state and deliver it back, or to pay compensatory damages, still rests with Italy. If, after all this time, Italy has not made a decision regarding the vessel's fate, how long will Panama have to wait in order to obtain compensation?

Mr President, I have finished the first part of my presentation. I have divided my presentation into two parts. The first part is dedicated to the Objections originally filed by Italy. I will now turn to the second part of my presentation, dealing with Italy's Reply.

**THE PRESIDENT:** Please proceed.

**MR CARREYÓ:** As I said, Panama has dedicated the first hour of oral arguments to addressing the Italian Preliminary Objections. We will now address the Objections raised in the Reply.

An introductory point that Panama would like to raise relates to the statement made by Italy in paragraph 5 of its Reply, which reads as follows: "Any failure in the present Reply to address specific allegations by Panama should not, of course, be construed or deemed as implicit admission of such allegations."

We respectfully suggest that the Tribunal bears this in mind. Because Italy has not replied to several of the Panamanian Observations, Panama is forced to surmise that the suspicions contained within are indeed well founded. How else should we regard the specific allegations that Italy has failed to address? Panama is hoping that Italy will eventually clarify this when this issue is addressed tomorrow by Dr Olrik von der Wense.

The first Italian objection that Panama will deal with concerns the non-compliance of Italy with article 283, paragraph 1, that is to say, the duty to exchange views. In this regard, Italy has claimed that there is no dispute, so it is not required to respect this provision, the Italian interpretation of article 283, paragraph 1, being contradictory when it contends that there is no dispute and at the same time declares that Panama was unilaterally obligated to exchange views, paradoxically inhibiting the very exchange that Italy has alleged it wants.

Panama will show that this Tribunal has jurisdiction because Italy's refusal to respond to any of the formal communications that it has received from Panama has prolonged the existence of this dispute. Panama will also show that the Tribunal has jurisdiction *ratione personae*, the presence of Spain not being indispensable.

Panama will demonstrate that Italy did not disclose all the communications received from Panama and omitted highly relevant facts about both its conduct and the case itself, such

as the letter in which Panama specifically referred to article 283, the recognition of the full powers of the Agent, and the note verbale 97, which Italy misinterpreted, as well as that in which the Italian Embassy in Panama stated that as soon as Italy had an answer to the previous letters it would reply.

It will also be proved that Italy has not considered that the *Norstar*'s release was ordered by the Italian judiciary itself because its activities were carried out beyond Italian territorial waters, that is to say on the high seas, and thus were not unlawful acts. Such omissions have affected Italy's interpretation of the case and a resolution in an expeditious manner. The arrest of the *Norstar* was the direct result of the order issued by an Italian judicial authority without regard for the applicability of the principle of independent responsibility.

Panama has always intended to communicate whereas Italy has used silence as its only means of defence. Panama's claim remains admissible because it was notified to Italy as early as 2001. This case entails a continuing representation of the unmet obligation of Italy to return the *Norstar*, which is still under the jurisdictional control and authority of the Italian public servants in the judiciary, thereby invalidating any delay or objection either in terms of estoppel, time bar or acquiescence.

The clear case law of the Tribunal represented by the *M/V "Saiga"* and *M/V "Virginia G"* cases shows that there is no need to exhaust local remedies due to the lack of a jurisdictional connection between Italy and Panama, because the arrest was based only upon activities of the vessel carried out in the high seas outside of the territorial waters of Italy.

Consequently, Panama maintains that all of the Italian objections should be dismissed because Italy has used silence, concealment and misrepresentation as a means of avoiding compliance with the Convention.

Panama would like to state the fact that it has always been an interested party seeking a mutually agreeable solution to this case in accordance with UNCLOS, whereas Italy has always intentionally procrastinated in the resolution of this dispute, using silence as means of evading justice.

Yesterday, my dear colleague Ms Caracciolo said that in the ten years from 2001 to 2010 Italy received six written communications. We think that the arithmetic is incorrect, because Panama has sent eight communications to Italy on eight different occasions, the contents of which we will analyse within the context of the first new issue that Italy has raised in its Reply, namely the lack of representative powers of the Agent of Panama. In this framework, we will analyse the eight communications that are listed here, along with their locations within the files, as follows.

Mr President, distinguished Members of the Tribunal, nine documents are shown in the slide. The communications in red (numbers 4 and 8) were not mentioned in Italy's original Objections, namely the letters of 3 and 6 August 2004 and the note verbale from the Italian Embassy to Panama, stating that they would convey all the communications and note verbale 97 to the Italian authorities, on which they would come back to us when they had a response.

The documents can be found in your Judges' folders as follows: the first letter at Annex 14; the second letter at Annex 15; the third letter at Annex16; the fourth letter at Annex 17 – the letter that was written in four different languages and sent to Italy, which Italy did not file in its Preliminary Objections but has not objected to as evidence and has even used as evidence; the note verbale 2227 at Annex 18; the fax attaching the first Power of Attorney at Annex 19; the note verbale 97 of 7 January 2005 at Annex 20; the note verbale 0332 from the Italian Embassy at Annex 21; and the final communication from Panama on 17 April 2010 at Annex 22.

You can also see from the slide the places where you can find the objections, the annexes and the replies, because all those documents have been repeated several times.

The first letter conveyed the complaint that the detention of the *Norstar* was improper, noting that this Tribunal had declared the contiguous zone as outside of territorial waters and thus open based on the principle of freedom of commerce. This letter also mentioned that Panama was considering bringing the case to this Tribunal.

The second letter (Annex 15) specifically asked for a reaction to the previous letter conveying to Italy the intention to institute proceedings within a specified time.

The third letter (Annex 16) also enclosed a copy of the first letter. Panama would like to stress that the most important aspects of this third communication were that it stated that Panama was expecting an answer and that it had "not yet received the relevant acknowledgement of receipt" of its previous two messages. However, Italy did not respond either to this letter or the previous two.

In its Preliminary Objections –

**THE PRESIDENT:** Mr Carreyó, unfortunately, the Registry has not been able to copy all the documents and make them available to the Judges before the sitting.

**MR CARREYÓ:** We handed them in.

**THE PRESIDENT:** Yes. I suggest that we now adjourn for 30 minutes to allow these attachments to be circulated, and we will then continue at 11.45 a.m., when all the Judges will have the annexes in front of them and it will be easier for them to follow your presentation.

**MR CARREYÓ:** We will be much obliged. Thank you.

**THE PRESIDENT:** We will therefore adjourn for 30 minutes and resume the sitting at 11.45 a.m.

(*Break*)

**THE PRESIDENT:** We now resume the morning sitting.

Mr Carreyó, please continue your statement.

**MR CARREYÓ:** We were reviewing the letters I previously mentioned. The letters are within the annexes. The first is in annex 14 at page 19; annex 15, page 21, is the second one; annex 16, page 23, is the third one; the fourth one is annex 17, page 34.

I have already said that the fourth letter Panama had, as you can see in annex 17, in the very first paragraph says: "This is a letter from the Panamanian Government to the Italian Government in accordance with article 283 of the United Nations Convention on the Law of the Sea."

It also says that Panama was trying to reach a settlement with the Italian Government through the procedures of the international law of the sea.

On 31 August 2004 – that is the next document, which is on page 27, annex 18 – Panama sent a fifth and a sixth communication, the former being the note verbale 2227 and the latter being a facsimile, page 19, attaching a power of attorney. It was a facsimile of the document which officially endowed the Panamanian agent with the power of attorney to represent Panama regarding this matter, characterized by Italy itself in its Preliminary Objections as "a document of full powers". It is important to note how Italy referred to this sixth piece of evidence in paragraph 13 of its Objections, when it accepted the mandate with the following statement, in which I have stressed the pertinent parts:

STATEMENT OF MR CARREYÓ – 21 September 2016, a.m.

> Mr Carreyó forwarded … a document of full powers ... Such a document_merely authorized Mr Carreyó to represent Panama … On the same date … the Ministry of Foreign Affairs … sent to Italy Note Verbale AJ No. 2227 which_reiterated the mandate of Mr Carreyó.

That was the Italian statement in paragraph 13 of its Objections. According to the Italian translation of note verbale 2227, Italy was informed by means of the note dated 2 December 2000: "Lawyer NELSON CARREYO acts as representative of the Republic of Panama … before the Court of International Tribunal for the Law of the Sea." It is not a very well written letter. At that time my English was not as bad as it is now.

Also, in its second paragraph, the accompanying power of attorney read as follows: "Lawyer NELSON CARREYO will represent before the International Tribunal for the Law of the Sea the interests of the Motor Vessel *Norstar* flying Panamanian flag ...".

In paragraph 14, Italy stipulated that on 7 January 2005, Panama sent a seventh communication, note verbale 97. However, Italy summarized the content of this note verbale as only "urging Italy to lift the seizure". This note verbale did more than that. With this note verbale, Panama requested its Ministry of Foreign Affairs to use diplomatic channels to verify that Italy had received the four letters of August 2004, while offering to work with Italy to come to an agreement in accordance with the procedures of the Tribunal.

At this point, Panama wishes to remind this Tribunal that, during the written stage, Panama expressed a serious concern in paragraph 30 of its Observations, namely that the translation of note verbale 97 provided to the Tribunal by Italy was inaccurate. This translation distorted the meaning of the original and is therefore misleading. Panama requested that the Tribunal review the translation provided by Italy and compare it to the original, and Italy did not object to this.

Nevertheless, in spite of the very clear concern that Panama expressed, Italy, with full intention, repeated this misrepresentation in its Reply. This is particularly important because a significant part of Italy's defence is the supposed lack of representative powers vested in the representative Agent of Panama and, by obscuring the truth in this way, Italy has perpetrated a falsehood.

In paragraph 25 of its Reply, Italy erroneously described what the Ministry of Foreign Affairs of Panama said in note verbale 97. The Italian translation says that "lawyer Nelson Carreyó … requests that the case of the Government of the Italian Republic be submitted to the attention of the Judiciary" and asked Italy "to provide information on the progress of the case at issue".

However, if we compare the Italian translation to what Panama truly wrote, we will see that Panama did not mention the "Judiciary" as the Italian translation says; it simply wanted to determine the status of its notes verbales and obtain feedback.

For the sake of clarity, we will show on the screen the English translation filed by Italy and the English translation that Panama deems correct.

If we make a comparative analysis, in paragraph 25 of its Reply, Italy has unequivocally stated "in even clearer terms" that the wording used by Panama, that is to say, that the case be submitted to the attention of the Judiciary, "cannot refer to anything different from the criminal proceedings before the Italian judiciary concerning the offences committed through the *M/V Norstar*" and that, as such, Panama was requesting Italy to provide information on the progress of the proceedings before the Italian domestic courts.

However, Panama does not accept such a statement, because the clear wording was to determine the result of its attempts to communicate with Italy. Clearly, therefore, Italy has put words in Panama's mouth, particularly when note verbale 97 expressly stated that, first of all, it was sent considering the contents of note verbale 2227, which in turn made a neat reference

to the authority vested in the Agent by means of the note dated 2 December 2000 empowering him as representative of Panama, and even informing Italy that he had requested to send Italy the claim by diplomatic means.

If we read note verbale 97, as correctly translated, we will see that what Panama asked for was, taking into account the content of the previous note verbale 2227, to provide the status of its petition through its letters and note verbale 2227.

This may have been an inadvertent error but, had Italy respected the powers vested in the Panamanian Agent, as mentioned, it would likely not have made such a mistake. In any case, by misrepresenting Panama's intentions, Italy not only avoided taking any action at the time this message was received, but has continued to refuse to take the Agent at his word. As was previously noted, Italy had already received official notice that the Panamanian Agent was duly authorized to engage in negotiations on Panama's behalf. By altering the meaning of his inquiry in this communication, Italy is still seeking to cast aspersions on the Panamanian Agent which are manifestly unjustified.

Based on its misrepresentation of this note verbale, Italy has argued in paragraphs 12 and 25 of its Reply, as we also heard yesterday, that the communications sent by Panama had no relevance because they

> could not be deemed as coming from a state representative entitled to invoke Italy´s responsibility ..., as Panama's communications never appropriately vested Mr Carreyó of representative powers encompassing the substantive scope of the Application in the instant case.

I would respectfully ask how can Italy now state that the Agent of Panama did not have representative power after previously acknowledging that he did?

Moreover, in paragraph 10 of its Preliminary Objections, Italy indicated that in the very first letter from Panama the named Agent stated "he was acting on behalf of the Panamanian Government", and also recognized that the Agent forwarded to the Italian Embassy in Panama the sixth communication, dated 31 August 2004, which it identified in paragraph 13 of the Preliminary Objections, as "a document of full powers sent by the Panamanian Government to ITLOS on 2 December 2000".

Italy did not question the representative powers of the Agent in its Preliminary Objections, nor did Italy raise any objection when receiving any of the communications. It is difficult to understand how, 12 years later, Italy can now question the legitimacy of Panama's official representative, having previously acknowledged it back in 2004.

Italy now suggests, in paragraph 12 of its Reply, that the power of attorney was granted to a "private lawyer who was acting in the interest of the owner of the *Norstar*" rather than of Panama. On what basis does Italy reach this conclusion, when the evidence submitted to this Tribunal says otherwise?

If Italy had had a real intention to negotiate in good faith (as was its duty according to article 283), it would have communicated any concerns it had about the power of attorney at the time it received the initial messages. This would have demonstrated a positive, honest and firm intention to comply with article 283, and we would not need to be discussing this issue now. However, Italy did not do that.

How long did Italy believe that the actual Agent "was not vested with powers to negotiate with Italy"? 15 years? Was this "knowledge" difficult to verify? Is it good faith that one of the parties to a dispute keeps silent about something which that very party considers necessary under article 283? Or is it more in line with article 283 that both parties play an active role in looking for avenues of real communication? Who has hindered the exchange of

views? How long did Italy question the qualifications of the Panamanian Agent? Why did Italy not raise this issue in its Preliminary Objections, but only in its Reply?

If an Agent is empowered for incidental proceedings, such as a prompt release procedure, he should also be considered qualified to exchange views. Was it necessary that the power of attorney contain a more express authorization for the Agent to exchange views and to apply for compensation? I have not seen any such a requirement or provision related to the law of the sea. Italy no longer has any reason to deny the attempts that Panama made to communicate before 2004, and certainly has no justification for failing to respond after that date.

We may then conclude that the objection concerning the lack of sufficient power or authority vested in the Agent from the time the first letter was sent to Italy does not hold and should be rejected.

Those are not all the Italian misrepresentations. In paragraph 35 of its Reply, Italy again made the following out-of-context citation: "the business of supplying oil offshore to mega yachts constituted a criminal act …".

Further, in Italy's misrepresentation and out-of-context citation in paragraph 8 of the Statement of Facts in the Italian Objections, Italy referred to "offences of criminal association aimed at smuggling … and tax fraud … committed by the *Norstar*", and classified the *Norstar* as a "*corpus delicti*, i.e. the means through which the crime was perpetrated".

However, Italy did not refer to the previous portion of the Savona court's ruling in which it was stated that the seizure of the *Norstar* was based on erroneous information regarding violations which the Italian Republic authorities knew, or should have known were false.

In this context, it is important to notice that Italy has acknowledged the absence of a rationale for believing that an offence had been committed within its territorial waters, stating that "[t]here are no logical reasons for believing that an offence does exist" and then added that "[i]t has been committed without any connection to the national territory".

This represents a very important contradiction and by continuing to refer to the *Norstar* as a *corpus delicti,* Italy is excluding evidence and promoting an inaccuracy.

Furthermore, the Savona Court judgement also stated that the activity performed by the *Norstar*, i.e. purchase of fuel intended to be stored on board by leisure boats outside the territorial sea line, was not "any offence" and at the end of paragraph 6 that "the fact does not exist, the seizure of motor vessel *Norstar* shall be revoked and the vessel returned".

We kindly request you to check all the citations in annexes 23 and 35. In annex 23 at page 26 you will see: "There are no logical reasons for believing that an offence does exist but it has been committed without any connection to the national territory."

On page 37: "The purchase of fuel intended to be stored on board by leisure boats outside the territorial sea line … shall not be subject to the payment of import duties."

However, neither in its Statement of Facts, in its Objections, nor in any part of its Reply, did Italy refer to or cite this reasoning of its own judiciary, suggesting that these facts are of no relevance. Italy also failed to concede that its judiciary's decision to release the *Norstar* was based on the fact that none of the offences with which it was charged were sustained because in order to criminally prosecute the *Norstar* it was necessary to prove the *locus* where the activity complained of occurred and that if this were outside the territorial waters no offence would have been committed. As it turned out, this was indeed the case.

Panama, then, has legitimate reasons to request the Tribunal to consider the merits of this case in light of these omissions.

In paragraph 161 of the *CERD* case, the Court said that the absence of an express reference to the treaty in question does not bar the invocation of the compromissory clause to establish jurisdiction and that these negotiations must relate to the subject matter of the treaty.

In other words, the subject matter of the negotiations must relate to the subject matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question.

The normal sequence of events is that negotiations are based on the stated or prescribed subject matter which, in turn, must refer to the responsibilities of State signatories to the Convention which have become substantive obligations.

If we examine paragraph 3 of the Application, we will see that Panama identified the subject matter accordingly as

> a dispute concerning, *inter alia*, the contravention by the Italian Republic of the provisions of the Convention in regard to the freedoms of navigation and/or in regard to other international lawful uses of the sea specified in Article 58 of the Convention … for damages … caused by an illegal arrest of the *Norstar*.

We may also note that in paragraph 9, Panama claims its legal basis to be the

> Respondent's violations of articles 33, 73 (3) and (4), 87, 111, 226 and 300 *and others* of the Convention. The right of peaceful navigation of the Republic of Panama through the *M/V Norstar* was violated by Italian Republic agents hindering the movements and activities of foreign vessels in the High Seas without regard for the norms of the Convention, i.e. those relating to the General Principle of Free Navigation.

In paragraph 19 of its Objections, Italy has asserted in response that there has been "a manifest irrelevance of the UNCLOS provisions invoked by Panama" and in paragraph 28-49 Italy again described the provisions invoked by Panama as irrelevant. Although this is not the moment to discuss the merits of this case, we do not have any other choice other than to explain briefly why we contest the Italian assertion.

First of all, Panama takes this opportunity to concede that article 73 (Reply, paragraphs 34, 35, and 36) and article 226 (paragraphs 42, 43 and 44) do not apply to this case, since these provisions fall under Part XII, which is devoted to the protection and preservation of the marine environment.

Panama maintains, however, that articles 33, 58, 87, 111 and 300 among others are applicable to this case, nonetheless. Italy violated article 33, which applies to its contiguous zone, because none of the activities of the *Norstar* which led to its arrest fell within the Italian territorial sea as this provision requires. It was also the Italian order of arrest that impeded the free navigation of the *Norstar* in violation of article 87 which protects the freedom of navigation, and article 58, which specifically refers to activities within the exclusive economic zone.

As the *Norstar* was arrested following the orders of Italy, Italy should be held accountable for any violation of the UNCLOS provisions. I would like to pose another question: would the *Norstar* have been arrested by Spain if Italy had not issued the arrest order and sent the rogatory letter to Spain to execute such an order?

In paragraphs 38-40 of its Reply, Italy cited the *M/V "Louisa" Case* where this Tribunal said that "[a]rticle 87 cannot be interpreted in such a way as to grant the *M/V Louisa* a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it".

However, Italy did not cite the previous part of the same paragraph which the Tribunal had written as follows:

> The Tribunal notes that article 87 of the Convention deals with the freedom of the high seas, in particular the freedom of navigation, which applies to the high seas and, under

article 58 of the Convention, to the exclusive economic zone. It is not disputed that the *M/V Louisa* was detained when it was docked in a Spanish port.

The reasons for the arrest of the *Norstar* were different from the reasons for the arrest of the *Louisa*. While the *Norstar* was arrested due to its activities on the high seas, the *Louisa* was arrested for its activities within Spanish territorial waters.

The Tribunal stated in paragraph 104 of its ruling that "[t]he detention was made in the context of criminal proceedings … in Spanish territory". You can check that in annex 25, page 39.

In no way does this commentary have any bearing whatsoever on the present case. The activities carried out by the *Norstar* were held to be in accordance with the law by the Italian judiciary itself. Italy determined that the activities which the *Norstar* engaged in were not illegal, but lawful, so the order for its arrest breached UNCLOS article 87 and constituted a serious violation of the freedom of navigation.

Italy contends that the Panamanian claim is unfounded *ratione loci* under article 111 of UNCLOS because this provision deals with the right of hot pursuit and the facts underlying Panama's claim show that the seizure took place when the *Norstar* was in Spanish waters. In order to better appraise the validity of the Italian contention we would invite the Tribunal to examine the Italian order of seizure in annex C of the Objections. (We have not provided that piece of evidence, but you will surely look at it when you decide.)

Article 111 was invoked because it was Italy which first used it as the basis for issuing the arrest order. An examination of the arrest order confirms that Italy determined that the *Norstar* had to be "acquired as *corpus delicti*" and as an "object through which the investigated crime was committed", in spite of the fact that *Norstar* "positioned itself beyond the Italian territorial seas".

It was in this context that Italy cited article 111, noting that the seizure should "be performed also in international seas and hence beyond the territorial sea", and due to "actual contacts between the vessel that is to be arrested and the State coast (so called 'constructive or presumptive presence' pursuant to articles 6 of the Criminal Code and 111 of the Montego Bay Convention)".

As we can see, it was Italy that used article 111 of UNCLOS in the first place to justify its unlawful order of seizure. Therefore the Italian contention that this provision has no link to the facts laid down in the Application is false.

Article 300, good faith and abuse of rights, also deals with the rights of the *Norstar* which were violated by the Italian order of arrest. However, since our main purpose here is discuss the Preliminary Objections, the Observations, and the Reply, we will not go into detail about this article here.

Finally, in terms of the subject matter of the dispute, the Court stated in the *CERD* case that the dispute must be defined "with respect to the interpretation or application of [the] Convention".

While it is not necessary that a State expressly refer to a specific treaty in its exchanges, it must refer to the subject matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject matter.

The express specification would remove any doubt about one State's understanding of the subject matter in issue and put the other properly on notice, as Panama has done.

We will now consider the Italian Objection as to jurisdiction *ratione personae.* Mr President, would this be a good time to break?

**THE PRESIDENT:** If I understand you correctly, you suggest that we take a break for lunch at this stage, and then you will continue after lunch?

**MR CARREYÓ:** I can finish in ten minutes, at half past twelve, and we are going to start with a new subject.

**THE PRESIDENT:** No, actually we are continuing until one o'clock. We will take a break at one o'clock for lunch.

**MR CARREYÓ:** I am going to deal now with the Italian Objection to jurisdiction *ratione personae*.

That Spain has not intervened in this case reinforces Panama's point that the legal interests of Spain would not be affected by the judgment of this Tribunal, much less "constitute the very subject matter of the decision", and that this Tribunal has jurisdiction to examine the present case and determine Italy's responsibility without examining the conduct of Spain.

In paragraph 64 of its Reply, Italy stated that the seizure itself did not amount to an international wrongful act *per se*, contending that its order for seizure together with a request for its enforcement addressed to Spain was not a breach of the Convention. This further strengthens Panama's assertion that Italy is the sole respondent.

However, along these lines, Italy went on to introduce a new objection as to whether it was the proper respondent by distinguishing between conduct that completes a wrongful act from conduct that precedes it, arguing that the latter does not qualify as wrongful. In other words, this Italian hypothesis is based on the assumption that the actual arrest was internationally unlawful, but that its own order was not.

In paragraph 67, Italy again stated that "the order for seizure of the Italian judiciary could only be deemed as conduct 'preparatory' to an internationally wrongful act" and would not qualify as wrongful act.

In paragraph 68 of its Reply, Italy expands this reasoning by stating that "the actual conduct complained of by Panama is not *the order* of seizure but the *material arrest* and detention, which cannot be attributable to Italy" and later repeats this argument, stating that "it was not the Italian authorities that held the vessel" and that "the order for seizure was not enforced by Italy nor was it enforced in Italy".

In short, Italy has based its Objection to jurisdiction *ratione personae* on the fact that, since it did not carry out the actual arrest, it is an "improper respondent". Italy has based this assertion on the *Monetary Gold* case and the "indispensable third party" doctrine. However, any references to these precedents are misleading because the arrest was the direct consequence of an order given by Italy, not by Spain. Italy is basically arguing that a wrong was committed and that Spain should be the State to blame. Panama accepts the first conclusion, but not the second.

Contrary to what Italy has affirmed, Panama contends that the conduct complained of was the order for the seizure, the physical detention being the natural consequence of the wrongful conduct of Italy's order: sequestration, arrest, detention, seizure. The order of arrest was an internationally wrongful act because it was issued in contravention of several provisions of UNCLOS. If Italy had respected such provisions it would not have ordered the arrest of the *Norstar*, and its responsibility would not have accrued. Even its own judiciary has held that the order of arrest was unlawful without differentiating between conduct that completes a wrongful act from conduct that precedes it.

In paragraph 77 of its Reply, Italy relies on the ILC Commentary to article 6 of the ASR by saying that "for an organ of State A to be considered to have been put at the disposal of

State B the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State".

Panama will now deal with Italy's interpretation of article 6.

In paragraph 78, Italy further relies on article 6 of the ASR and article 2 of the Additional Protocol to the 1959 Strasbourg Convention on Mutual Assistance in Criminal Matters to support this conclusion, stating that the Spanish authorities were not put at the disposal of Italy since "[a]rticle 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise".

In addition, in paragraph 78 Italy contends that the present case falls within the legal reasoning of the ILC because "the Spanish authorities could not be held to have been put at the disposal of Italy" under article 6 of the ASR when enforcing the order for seizure by the Italian authorities.

Moreover, in paragraph 79 Italy maintains that the ILC has sustained article 6 by referring to the decision in the *Xhavara* case issued by the European Court of Human Rights which assessed the responsibility of Italy for the sinking of a ship in the course of an investigation upon a request from Albania, concluding that since the conduct of Italy was not attributable to Albania, "likewise the conduct of Spain was not attributable to Italy."

Panama challenges this proposition, however, by noting that in the *Xhavara* case the damage caused to the ship was caused when the Italian vessel collided with the Albanian ship, directly causing the damage to the claimants.

Italy is still responsible for issuing such an order and, according to article 1 of the ASR, every internationally wrongful act of a State entails responsibility. The order of arrest was held to be unlawful by the Italian judiciary itself, which concluded that there were no breaches of Italian criminal law committed by the *Norstar* and consequently that the arrest was an illegal act. It is then not difficult to conclude that by ordering the arrest Italy contravened the provisions of the ASR.

Panama also challenges Italy's contention by noting that it relies on just one part of article 6 of the ASR entitled "Conduct of organs placed at the disposal of a State by another State". Paragraph 2 of this section states that when performing functions on behalf of another State

> "[n]ot only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State".

Thus, Italy claims that the beneficiary State has to work in coordination with the sending State.

However, the context of this statement changes when the previous paragraph of that decision is also considered.

The commentary should be read completely to be fully understood. A complete reading of this commentary shows that the words "placed at the disposal of" in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving State (Italy) and not of the sending State (Spain). Therefore, the notion of an organ being "placed at the disposal of " the receiving State (Italy) is a specialized one, implying that the organ is acting with the consent of, under the authority of, and for the purposes of the receiving State (Italy).

Italy intends to evade its responsibility by suggesting that Spain acted independently rather than under the exclusive direction and control of Italy as the receiving State. On the

contrary, by accepting the Italian request for the execution of its arrest order, it is evident that the Spanish authorities were indeed put at the disposal of Italy.

That the Spanish authorities were put at the disposal of Italy is evidenced in the documents that Italy filed with its Preliminary Objections as annex E, the Statement of Detention of the *Norstar*, in which the Spanish authorities said that the *Norstar* "will remain at the disposal of the Office of the Public Prosecutor attached to the Court of Savona". This was also confirmed more recently when the Spanish authorities asked permission of the Italian Court of Appeal to demolish the *Norstar*.

These two pieces of evidence are sufficient to show that Spain did not act independently but rather under the exclusive direction and control of Italy as the receiving or beneficiary party.

Additionally, the European Court of Human Rights found in the *Xhavara* case that article 6 of the ASR "is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise". The Court then stated: "[t]he Court notes at the outset that the sinking of the *Kater I Rades* was directly caused by the *Sibilla* Italian warship. Therefore, any complaint on this point must be regarded as being directed exclusively against Italy."

The same reasoning applies to the present case. The *Norstar* was arrested upon an order issued by Italy, the wrong being caused directly by Italy, and therefore any complaint must be regarded as being directed exclusively against Italy.

If, for example, in the present case, Spain had used excessive force and had damaged the *Norstar* when putting its organ at the disposal of Italy, Panama would have considered Spain as the respondent for the wrongful act of the sending State. In the present case Panama considers that no wrong has been committed by the sending State (Spain).

Panama agrees with Italy's proposition that the independent responsibility principle states that "each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it which is in breach of an international obligation of that State".

Panama also agrees that "this principle is particularly germane to the circumstances of the present case" because the arrest of the vessel was ordered by the respondent State since, as in most cases of collaborative conduct, any State's culpability for any wrongful act will be determined according to the principle of independent responsibility.

Panama adds that if, according to the international law of the sea, the order of arrest issued by Italy is considered unlawful because it breached the obligation to respect the right and freedom of navigation of foreign vessels in the high seas, there should be no doubt that this act, according to article 1 of the ASR, entails the international responsibility of Italy. Panama again considers that this is not the stage at which to discuss the responsibility issues that arise from this case, because they pertain to the merits.

Panama will now address the objection to the admissibility of the Application.

Italy's contentions in this respect are: first, that the claim is one of a diplomatic protection character and that the exhaustion of local remedies requirement has not been met; secondly, that Panama is time-barred and estopped from bringing this case due to the 18 years that have elapsed since the seizure of the vessel; and, thirdly, that Panama has acquiesced, which is a new issue introduced in the Reply.

The Italian reasoning for its first objection is that the *Norstar* was not owned by a natural or legal person with Panamanian nationality. Italy concludes that this means that the claim is one of diplomatic protection. However, as we have already demonstrated, it is important that when States bring cases either "by resorting to diplomatic action or to international judicial proceedings", in reality they are asserting their own rights. On page 16 of the *Panevezys-Saldutiskis Railway* case, the Permanent Court of International Justice held that the rule of international law is that in taking up the case of one of its nationals, either by

resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its *own* rights.

In the second paragraph of page 41 in annex 27 you can see the quotation:

> [i]n the opinion of the Court, the rule of international law on which the first Lithuanian objection is based is that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right.

We have already demonstrated that Italy only referred to the nationalities of the *Norstar*'s owner, charterer, captain, and crew, neglecting to refer to the nationality of the *Norstar* itself. Had Italy taken into account the nationality of the *Norstar*, it would have had to accept that Panama is entitled and even obligated by international law to bring this case to protect vessels holding Panamanian nationality and use all peaceful means to assure that the other members of the international community respect its rights. This claim is based on the deprivation of property – in this case a vessel registered in Panama.

With this in mind, the precedents set in the *Mavrommatis Palestine Concessions* and *Nottebohm* cases are significant. On page 12 of the *Mavrommatis* decision the ICJ ruled that although the case began between a private person and a State (Great Britain), when the Greek Government entered the case in support of one of its citizens the dispute became a bilateral one between two States and therefore was subject to international law. The Court held that it is an elementary principle of international law that a State is entitled to protect its subjects against acts committed by another State.

Thus, by taking up the case of one of its subjects, either by resorting to diplomatic action or international judicial proceedings on his behalf, a State is actually asserting its own rights.

We would now like to approach the issue of diplomatic action or international judicial proceedings. You will have noticed that I have always emphasized the word "or", which separates both statements – diplomatic action *or* international judicial proceedings.

In this sense, it is important to remember that in the *M/V "SAIGA" Case* the Tribunal held that "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State" and that, therefore, their specific nationalities were irrelevant.

In the *Mavrommatis Palestine Concessions* case the Court concluded that "[o]nce a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant" (annex 28, page 42).

On page 24 of the Judgment in the *Nottebohm* case the ICJ restated the principle above as follows:

> Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State and continued: As the Permanent Court of International Justice has said and repeated, "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.

In addition, according to paragraph 10 of the United Nations ILC Preliminary Report on Diplomatic Protection prepared by Special Rapporteur Mr Mohamed Bennouna, diplomatic protection is the use of diplomatic action or *other means* of peaceful settlement as a procedure to attribute responsibility to a host State for the injury to foreign natural or legal persons.

Italy frames this case as one of diplomatic protection, adding that therefore it is one of an espousal or indirect nature, as opposed to one of adversarial jurisdictional proceedings. Italy

also suggests that this Tribunal applies case law different from its own, and even contrary to its jurisprudence. It is then important to remember, as the international case law has maintained, that there is a difference between diplomatic action and judicial proceedings.

Panama has contended that it "has the right to protect its national subjects by diplomatic action or through the institution of international judicial proceedings".

The ILC commentary to article 2 of the Rules on Diplomatic Protection defines a State's right to exercise diplomatic protection, saying that

> although a State has the right to exercise diplomatic protection on behalf of a national, it is under no duty or obligation to do so and that the internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation.

Therefore, although Panama has had the right to exercise diplomatic protection in this case, it has not done so. Panama has only been supporting its claim with the rules governing international judicial proceedings. Italy has not shown any evidence that Panama has used diplomatic action to protect the rights of the motor vessel *Norstar*. Since Panama has not done so, none of Italy's objections regarding diplomatic protection is inapplicable

**THE PRESIDENT** (*Off microphone*)

**MR CARREYÓ:** I am trying really hard. I am not a diplomat, I am not a public servant, I am a simple private lawyer dedicated to international law of the sea studies, who practices privately and has been hired by the Panamanian Government to defend its case here. If I were a diplomat, probably I would accept Italy's views concerning diplomatic protection provisions.

In paragraph 119 of its Reply, Italy relies on article 15 of the ILC Draft Articles on Diplomatic Protection, which refer to cases where there is no need to exhaust local remedies. However, Italy neglects the reference the author Tams (page 1062) has made with respect to the previous article 14, which codifies the customary rule on exhaustion of local remedies by saying that

> The exhaustion of local remedies rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim. This position is codified in paragraph 3.

Panama also challenges the Italian invocation of article 18 of the Articles of Diplomatic Protection because this provision deals exclusively with the protection of ship´s crews and not with the protection of ships themselves. Article 18 states: "The right of the State of nationality" – and I stress the following part – "of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members …."

Article 18, used by Italy in paragraph 97 of its Reply, is thus inapplicable to this case, not only because the instant case is not one of diplomatic protection but also because article 8 deals only with the protection of ships' crews.

On the other hand, article 1 of the same document states 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. I want to stress the word "person". Reference is made to natural or legal persons. According to

the ILC, the use of diplomatic protection requires an injury to occur to "natural or legal persons".

The cases cited by Italy in which the rules for diplomatic protection have been applied, such as the ICJ *Interhandel* and *ELSI* cases, have not been cases involving vessels but legal persons or corporations. All chapters of the ILC Draft Articles on Diplomatic Protection refer to "natural persons" (Chapter II), "legal persons" (Chapter III), and even in the case of article 14 on the exhaustion of local remedies, "nationals or other persons".

In paragraph 98, Italy said that the object and purpose of the applicants' claims in the *Interhandel* and *ELSI* cases (Switzerland and the United States respectively) was "to secure the interests of their nationals and not to vindicate their own rights".

Panama does not contest this. What Panama challenges is that Italy has tried to equate the facts of the *Interhandel* and *ELSI* cases to those of the *M/V "SAIGA"* and the *M/V "Virginia G"* cases by saying, contradictorily, that ITLOS "has repeatedly relied on the same line of reasoning" in the *M/V "SAIGA" Case*.

This is misleading because the cases of *Interhandel* and *ELSI* did not involve freedom of navigation and, as was stated by the Chamber in the *ELSI* case, it was not possible "to find a dispute over alleged violation of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of Raytheon and Machlett".

In the present case, the dispute is over the alleged violation of the Convention, resulting in direct injury to Panama, which is distinct and independent of the dispute over any violation with respect to any person related to the *M/V Norstar*. The breaches claimed by Panama are not those concerning the treatment of aliens, such as persons and corporations, but of Panama itself.

Panama avers that it has only used judicial proceedings, and that its communications are not to be taken as diplomatic actions, but only as evidence of compliance with paragraph 1 of article 283 as a true and good-faith intention to engage in negotiations before resorting to judicial proceedings.

Whereas all references of the ILC Draft Articles on Diplomatic Protection allude to *persons*, Italy has not presented any evidence nor clearly indicated who it considers to be the "national subject", or other person, whom Panama is supposed to be espousing. The only reference by Italy to the claimant has been made in paragraph 7 of its Objections, where several corporations related to the *Norstar* were mentioned.

In paragraphs 96-97 of its Reply Italy expressly accepted the Tribunal's ruling in the *M/V "SAIGA" Case* that "the ship, everything on it and every person involved or interested in its operations are treated as an entity linked to the flag State".

However, in paragraph 98, Italy went on to say that the claims put forward by the flag State (Panama) were indirect and, when lodged to seek redress for the individuals involved in the operation of the ship, the local remedies rule would apply on the same grounds as in a diplomatic protection case.

Again, Italy did not define who the "individuals involved in the operation of the ship" were, nor to whom it was referring for the purposes of its contention that the claim was of an espousal or indirect violation nature. Instead, in paragraph 121, Italy said that it was the companies involved in the use of the *Norstar* which should have brought civil proceedings for compensation of damages under the Italian Civil Code, thereby suggesting that Panama is not entitled to bring this case to the Tribunal. Panama challenges this attempt to abridge its rights of national sovereignty.

**THE PRESIDENT:** I apologise for interrupting you but I think that we are coming to the end of this morning's sitting, so we will now break for lunch for two hours and we will resume the first round of argument of Panama at 3 p.m. and you will have the floor. *Bon appetit.*

*(The sitting closed at 12.55 p.m.)*

21 September 2016, p.m.

**PUBLIC SITTING HELD ON 21 SEPTEMBER 2016, 3 P.M.**

**Tribunal**

*Present:* *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

**For Panama:** [See sitting of 20 September 2016, 10 a.m.]

**For Italy:** [See sitting of 20 September 2016, 10 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 21 SEPTEMBRE 2016, 15 HEURES**

**Tribunal**

*Présents :* M. GOLITSYN, *Président* ; M. BOUGUETAIA, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

**Pour le Panama :** [Voir l'audience du 20 septembre 2016, 10 h 00]

**Pour l'Italie :** [Voir l'audience du 20 septembre 2016, 10 h 00]

**THE PRESIDENT:** The Tribunal will continue the hearing in the *M/V "Norstar" Case*.
I now give the floor to the Agent of Panama, Mr Carreyó, to continue his statement.

**First Round: Panama (continued)**

STATEMENT OF MR CARREYÓ (CONTINUED)
AGENT OF PANAMA
[ITLOS/PV.16/C25/4/Rev.1, p. 1–21]

**MR CARREYÓ:** Distinguished Members of the Tribunal, Mr President, good afternoon. I will try to take myself back to where I was. We were discussing the diplomatic protection issues brought forward by Italy and the cases that it relied on, such as the cases of *Interhandel* and *ELSI.* Our position was that those cases did not involve vessels owned by one of the Parties, but legal persons or corporations.

We also said that Italy had stated in paragraph 98 that the object and purpose of the applicants' claims in the *Interhandel* and *ELSI* cases was "to secure the interests of their nationals and not to vindicate their own rights".

Panama did not contest this. We also said that what Panama challenged was that Italy has tried to equate the facts of the *Interhandel* and *ELSI* cases to those of the *M/V "SAIGA"* and the *M/V "Virginia G"* cases, which we will analyze in a moment, and that it was contradictory to say that ITLOS "has repeatedly relied on the same line of reasoning" in the *M/V "SAIGA" Case*.

We purport to convince this Tribunal that this is misleading because the cases of *Interhandel* and *ELSI* did not involve freedom of navigation and, as was stated by the Chamber in the *ELSI* case, it was not possible "to find a dispute over alleged violation of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of Raytheon and Machlett".

In the present case the dispute is over alleged violation of the Convention, resulting in direct injury to Panama, which is distinct and independent of the dispute over any violation in respect to any person related to the *M/V Norstar*. The breaches claimed by Panama are not those concerning the treatment of aliens, such as persons and corporations, but of the rights of Panama itself.

Panama avers that it has only used judicial proceedings, and that its communications are not to be taken as diplomatic actions, but only as evidence of compliance with paragraph 1 of article 283, as a true and good-faith intention to engage in negotiations before resorting to judicial proceedings.

Whereas all references of the ILC Draft Articles on Diplomatic Protection allude to *persons*, Italy has not presented any evidence, or clearly indicated who it considers to be the "national subject", or other person, whom Panama is supposed to be espousing. The only reference by Italy to the claimant has been made in paragraph 7 of its Objections, where several corporations related to the *Norstar* were mentioned.

In paragraphs 96-97 of its Reply Italy expressly accepted the Tribunal's ruling in the *M/V "SAIGA" Case* that "the ship, everything on it and every person involved or interested in its operations are treated as an entity linked to the flag State".

However, in paragraph 98 Italy went on to say that the claims put forward by the flag State (Panama) were indirect and, when lodged to seek redress for the individuals involved in the operation of the ship, the local remedies rule would apply on the same grounds as in a diplomatic protection case.

Again, Italy did not define who the individuals involved in the operation of the ship were, nor to whom it was referring for the purposes of its contention that the claim was of an espousal or indirect violation nature. Instead, in paragraph 121, Italy said that it was the companies involved in the use of the *Norstar* which should have brought civil proceedings for compensation of damages under the Italian Civil Code, thereby suggesting that Panama is not

entitled to bring this case to the Tribunal. As we have previously stated, Panama challenges this proposition because it finds it is an attempt to abridge its rights of national sovereignty.

Due to its relevance concerning the issue of exhaustion of local remedies, Panama will now proceed to the analysis of the *M/V "SAIGA" Case*, with certain detail.

Italy has tried to use the *M/V "SAIGA" Case* to support its contention of framing the instant case as one of an espousal nature by citing paragraph 98 of that Judgment where this Tribunal held that none of the violations of rights claimed by Saint Vincent and the Grenadines could be described as breaches of obligations concerning the treatment to be accorded to aliens.

On the contrary, this Tribunal held that those breaches were all direct violations of the rights of Saint Vincent and the Grenadines, and the injuries of the people involved in the operation of the ship arose from those violations, and their claims were not subject to the exhaustion of local remedies.

Therefore, the *M/V "SAIGA" Case* does not support the Italian position. As Panama explained in detail in its Observations, the *M/V "SAIGA" Case* supports the contention that all the rights claimed in its Application can be described as breaches of obligations concerning the treatment accorded to aliens but as breaches and rights directly concerning only the State of Panama itself.

In spite of the similarities between the *M/V "SAIGA"* and the *M/V "Norstar"* cases, Italy´s contention in paragraph 103 of its Reply that they are of a "different factual background" is misleading and promotes a line of reasoning contrary to reality. In fact, when instituting proceedings, Panama itself has specifically relied on paragraph 98 of the *M/V "SAIGA"* decision, because this Tribunal has already held in that case that the exhaustion of local remedies rule does not apply in the absence of a "jurisdictional connection" between the arresting state, in that case, Guinea, and the "natural or juridical persons" represented by the flag State bringing the action, Saint Vincent and the Grenadines, simply because the arrest was made outside its territorial waters.

If you turn to annex 29 of your folder, you will find that the rights that Saint Vincent claimed, according to paragraph 97 of the *M/V "SAIGA"* Judgment, were:

(i) freedom of navigation and other internationally lawful uses of the seas;
(ii) not to be subjected to the customs and contraband laws of Guinea;
(iii) not to be subjected to unlawful hot pursuit;
(iv) to obtain prompt compliance with the judgment of the Tribunal of 4 December 1997;
(v) not to be cited before the criminal courts of Guinea.

In the *M/V "SAIGA" Case*, the Tribunal affirmed that, according to article 22 of the Draft Articles on State Responsibility, the rule of exhaustion of local remedies is applicable when the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens …."

It was to this that Panama specifically referred when it cited the same paragraph that Italy had, adding that the Tribunal declared that none of the actions claimed by Saint Vincent and the Grenadines could be described as breaches of obligations concerning the treatment to be accorded to aliens by Guinea but rather were direct violations its rights. Any damage to the persons involved in the operation of the ship arose from those violations and therefore the Tribunal ruled that local remedies did not have to be exhausted.

The same has become true in this particular case of the *Norstar*.

Panama has strongly relied on this Tribunal case law doctrine. Before instituting proceedings, Panama identified instances in which this Tribunal has not required the exhaustion of local remedies. In spite of this case law, Italy insists on pursuing the need for Panama to exhaust local remedies, first by framing the claim of Panama as a claim of diplomatic protection

and then, along the same lines, by describing Panama's claim as one of indirect violation and of a predominantly espousal nature.

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

It is therefore misleading for Italy to claim, as it has in paragraphs 101-103 of its Reply, that ITLOS "repeatedly relied on the same line of reasoning" in the *M/V "SAIGA" Case* when referring to the ICJ *Interhandel* and *ELSI* cases, because it is clear that the *M/V "SAIGA" Case* was fundamentally different from both of those.

Panama will now analyze the *M/V "Virginia G" Case*.

The misleading supposition of Italy that, compared to the *M/V "SAIGA" Case*, there is a "different factual background to the present case" was repeated when Italy remarked that the case of the *Saiga* "seems all the more corroborated by the *Virginia G* case" in paragraph 104 of its Reply.

Italy holds that in order to establish whether a given claim is "direct" or "indirect", ITLOS case law shows a consistent application of the "preponderance test". Italy relied on paragraph 157 of the *M/V "Virginia G" Case* to support its view. But when we read this paragraph, we will notice that Italy only cited its first part which says: "[w]hen the claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant".

The Tribunal continued, however, by saying that it was of the view that

> the principal rights that Panama alleges have been violated by Guinea-Bissau include the right of Panama to enjoy freedom of navigation and other internationally lawful uses of the seas in the exclusive economic zone of the coastal State and its right that the laws and regulations of the coastal State are enforced in conformity with article 73 of the Convention. Those rights are rights that belong to Panama under the Convention, and the alleged violations of them thus amount to direct injury to Panama. Given the nature of the principal rights that Panama alleges have been violated by the wrongful acts of Guinea-Bissau, the Tribunal finds that the claim of Panama as a whole is brought on the basis of an injury to itself.

On the basis of paragraph 157 of the Tribunal's finding in the *M/V "Virginia G" Case*, Panama challenges Italy's argument because the Tribunal concluded that the rights Panama has under the Convention had been violated by Guinea-Bissau and that these violations were injurious to Panama. In other words, the Tribunal found that the claim as a whole was justified on the basis of this injury inflicted.

To support its Objection to Panama's invocation of case law related to international judicial proceedings, Italy has suggested that the facts of the present case are fundamentally different from those in the *M/V "Virginia G" Case*.

However, this is not a valid conclusion. Instead, Panama argues that the circumstances of the *M/V "Virginia G" Case* are largely similar to the instant one because Panama is once again defending its basic rights concerning the freedom of navigation within the economic zone and on the high seas. That the Tribunal confirmed that Guinea-Bissau had indeed infringed the freedom that Panama claimed in the *M/V "Virginia G" Case* only strengthens, rather than weakens, Panama's position before this Tribunal. The Tribunal found that the preponderance test in that case fell on the side of an injury to a State, thereby precluding the need to exhaust local remedies. Panama contends that this is also the case here.

STATEMENT OF MR CARREYÓ – 21 September 2016, p.m.

Yesterday Italy was very interested in telling us about its municipal law; it mentioned the Vassalli law, the Pinto law; but it completely forgot that the rule of local remedies in this Tribunal has already clarified it in two different cases that are germane to the instant case, as we have demonstrated.

I will now introduce the issue of *locus* with regard to the exhaustion of local remedies.

Whether the local remedies rule applies also depends on the *locus* where the vessel carried out its activities. In paragraph 7 of its Objections, Italy merely confirms in its Statement of Facts, that the *M/V Norstar* was "off the coast" of Italy. It says: "From 1994 to 1998 *M/V Norstar*, a Panamanian flagged vessel, carried out bunkering activity off the coasts of France, Italy and Spain."

In its submissions to the Tribunal, however, Italy has never explained what "off the coast" means. Nevertheless, this very ambiguous reference can be clarified by evidence revealed in the Italian Criminal Court, showing that the *Norstar* was, in fact, on the high seas and therefore outside the territorial waters of Italy. The Court of Savona referred several times to the *locus* of the *Norstar*, saying that it was operating either on the high seas, within the economic zone or within the contiguous zone, but certainly outside the territorial sea of Italy. This was the principal reason that Italy ordered the release of the *Norstar*. According to the Italian judiciary, the locus was outside the territorial jurisdiction of Italy. The Court of Appeal of Genoa came to the same conclusion when it held that: "no offence is committed by anyone who provides bunkering on the high seas, … when the gasoil has been sold or trans-shipped on the high seas ... once the vessel has left the port, or once it has gone beyond the limit of territorial waters".

In view of these statements, the question remains: why has Italy still failed to specify what it means by "off the coast" in its arguments in this case? We already know that the purpose of its vagueness is to hide the fact that it was outside its territorial jurisdiction.

Italy was not entitled to apply its customs rules to the operations of the *Norstar* because there was neither a jurisdictional connection between Italy and the *Norstar* nor one with the juridical and natural persons that Italy identified as shipowner, charterer, captain, and crew.

Italy has also raised the issues of time-bar and estoppel. We will start with time-bar.

As has been accepted by Italy, Panama began contact on 15 August 2001. Beginning with this first communication, Panama has asserted that the arrest of the *Norstar* was contrary to article 297 of the Convention and to the principle of freedom of commerce. As we have already stated, and as Italy has recognized, this very first claim "stopped the clock" as far as a time-bar is concerned.

We have referred to the *Gentini* case, where the tribunal stated that "the presentation of a claim to competent authority within proper time will interrupt the running of prescription". It means that if a claim is made, there is no reason to argue validly that delay is affecting the claim.

In the *Certain Phosphate Lands in Nauru* case, the ICJ rejected an objection by Australia that Nauru had made a claim against it 20 years after having become independent and stated that "international law does not lay down any specific time-limit". How many years is Italy considering that Panama has been delaying – 18, 15, 5? We do not know.

Panama has not ceased pursuing this case. The fact that Italy concedes that as early as 2001 Panama sought redress and the prompt release of the *Norstar* clearly indicates that Italy took notice of the claim at that time, as has been shown over and over in this hearing, and as you will find out, within all the evidence that is presented even by both Parties as annexes to their pleadings.

We will now deal with the objection concerning estoppel.

We have already cited Wagner and other authors.

We would like now to ask some questions. Did Italy rely on the statement that it argues Panama made? At page 35, paragraph 173, of its Reply, Italy stated that it did rely on it. However, to say that it relied on it is not enough to estop Panama from bringing this case. Italy still needed to prove that it suffered any harm – or, as Wagner says, some detriment. What damage has Italy suffered with the Panamanian representation that Italy is presumably relying on?

In claiming estoppel, Italy founds its objection on Panama's expressed intention to apply for a prompt release that it ultimately never carried out. However, in order for estoppel to arise, there had to be a change in the Panamanian representation. But what was the position that Italy changed due to the communications it received from Panama?

Panama has not changed its position in terms of its claim because it has always stated that Italy should account for the wrongful arrest. The fact that it did not file for prompt release in no way changes its claim.

Panama was very diligent in pursuing its claim, but Italy has never explained why it did not answer, apart from saying that it was because of lack of powers vested in the Agent, as previously discussed.

Yesterday Mr Busco said that it was wrong to state that Italy never described the conduct of Panama as acquiescence, trying to include it as extinctive prescription, stating that "acquiescence is therefore an integral part of the arguments that Italy is making with respect to the prescription". If they are the same, then there was no point to present them separately as Italy did. In fact, although they are intimately related, both institutions have differences.

I will not dwell on these theoretical or academic issues to differentiate between acquiescence, prescription, time-bar or estoppel.

Relying on article 38 of the Statute of the ICJ, Italy contends that Panama has failed to assert its claim for an excessive period of time and that, under the doctrine of acquiescence, such inaction forfeits the right to claim. Specifically, Italy states that Panama remained completely silent, not communicating with Italy for five years and seven months, before commencing proceedings and bringing a claim against Italy *ex abrupto*.

Citing the *Grisbadarna* case and the author Tams, Italy has also determined that this period is considerably longer than what Panamanian law allows regarding the prescription of claims for damages. Italy further suggests, in paragraph 131 of its Reply, that Panama's failure to institute proceedings for five years and seven months has led it to expect that the claim would no longer be asserted. In order to validate this objection we would have to forget all the Panamanian times, all the written communications by means of which Panama claimed Italy.

The defence of acquiescence and the issue of delay have been the subject of comments by the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC. Paragraph (b) of article 45 deals with this issue by stating that the responsibility of a State may not be invoked if "the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim".

Commentary 6 to this article repeats this, emphasizing the conduct of a State, including a test of unreasonability, as the determining criteria for the lapse of the claim.

However, the ILC concludes that "[m]ere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim".

In its commentary No. 7 the ILC also cites the *Certain Phosphate Lands in Nauru* case in which the ICJ concluded that if a claim has not been resolved, no objection of acquiescence should be admitted, especially if the injured State has taken, as Panama has shown it has, every reasonable step to keep its claim alive.

In the same commentary the ILC also referred to the *LaGrand* case, saying that "the Court held the German application admissible even though Germany had taken legal action

some years after the breach had become known to it" after giving weight to factors relating to the delay due to any "additional difficulties" that may have affected the respondent due to the lapse of time, and that the only example of such difficulty was "the collection and presentation of evidence" without reference to interest.

In relation to this particular aspect I would like to emphasize the question: what is the purpose of these institutions? The purpose is to avoid the claim being filed without expectations from the other party, to allow the potential defendant to collect evidence and seek any means by which to defend its case. Has Italy been affected by this fact? Has Italy been affected by Panama during all these years if the entire criminal law files in the courts of Savona and Genoa are easily available for Italy to access? It is Panama that has experienced difficulties in obtaining evidence for this case, and it still has many steps to surmount to know exactly what happened in the Italian criminal courts.

Italy also has cited paragraph 197 of the *ICS Inspection and Control Services Limited* case to support its reasoning regarding acquiescence, but only paraphrases the arguments of the defendant in that case.

It is much more revealing also to include the arguments of the claimant, who said in paragraph 213 that acquiescence in international law is "a tacit agreement or an implied consent to act, to ascribe a legal consequence to certain factual circumstances" and that "it must therefore be restrictively interpreted to ensure that acquiescence corresponds accurately with the implied intention".

Panama is certain that no acquiescence could have been inferred from its conduct in this case because it has never expressed an intention to cease its pursuit of justice for the *Norstar*.

On the other hand, Panama wonders why it should have been necessary for it to continually assert its claim when Italy, despite having received eight communications from Panama, had not even bothered to acknowledge them.

In any event, it is clear that Italy has been notified of the claim and that it has never been dropped. The plea of delay was rejected by the ILC, stating that the respondent State could not establish the existence of any prejudice because "it has always had notice of the claim and was in a position to collect and preserve evidence relating to it".

The presentation of the claim to Italy has at least put it on notice of the existence of the claim. In the *Ambatielos* case the tribunal dismissed the laches claim by the United Kingdom on the grounds that it did not suffer any harm in the preparation of its defence. This relates closely to the notice argument adopted in the *Giacopini* case, holding that the claim of laches must be defeated because the defending State was put on notice years earlier and had an "ample opportunity to prepare its defence". Has Italy not had an ample opportunity to prepare its defence in this case?

There are other similar instances in which international law courts have held that a claim that has been well documented since its inception by both the claimant and respondent States will defeat a defence of laches. This is a citation from King, page 90: "If the defendant has, or might have had, a clear record of the facts, or if the facts are admitted, prescription will not lie."

Borchard, page 831: "Where public records support the existence of the claim, the reason for the principle ceases."

You can also see the *Tagliaferro* case in 1903. All these cases show that the main issue in cases involving delay – allow me to be repetitive – is to collect evidence and prepare the defence of the case.

In paragraph 9 of article 45, the ILC continued by saying that

> contrary to what may be suggested by the expression "delay", international courts have not engaged simply in measuring the lapse and applying clear-cut time limits, that no generally accepted time limit, expressed in terms of years, has been laid down

and concluded that "none of the attempts to establish precise limits for international claims had achieved acceptance".

Probably the most relevant passage of the ILC commentaries to the present case is in paragraph 10, where the ILC stated that "[o]nce a claim has been notified to the respondent State, delay in its prosecution will not usually be regarded as rendering it inadmissible".

This statement was supported by the ruling in the *Certain Phosphate Lands in Nauru* case, in which the ICJ looked at the conduct of the parties as the "determining criterion" rather than "mere lapse of time".

In the *ICS Inspection and Control Limited* case, the Permanent Court of Arbitration found that "any form of protest, action, or activity aimed at protecting rights or negating the status quo will preclude acquiescence".

Panama has continued to protect its rights by both actively asserting them throughout the communications it sent and by assiduously avoiding the indication that any lapse would lead the respondent to believe that Panama had acquiesced due to the circumstances as a whole, particularly in light of the breaches of the Convention by Italy.

On the other hand, the respondent has not provided any evidence as to why the lapse of time would have made it believe that the claimant was not going to institute proceedings, nor has it demonstrated why it believed that the claimant would ever abandon its claim.

Panama concurs with Italy that in the *Wena* case the arbitral tribunal invoked the principle of repose, according to which "a respondent who reasonably believes that a dispute has been abandoned or laid to rest long ago should not be surprised by its subsequent resurrection".

I do not know how this quotation helps Italy's case, because it says only that they should not be surprised by the resurrection of the case. However, while Italy suggests that this was only because "Wena had continued to be aggressive in prosecuting its claims", implying, therefore, that Panama has not, there is no clear-cut time limit for the purposes of invoking responsibility; the decisive factor being whether the respondent could have reasonably expected that the claim would no longer be pursued, thus making the delay unreasonable.

It is important to note that although Italy has relied on chapter 72 of Tams on "Waiver, Acquiescence and Extinctive Prescription" (pages 1043 and 1044), it has not provided copies of such citation as far as I know; I might be mistaken. Once researched then, we can conclude that the reason for not providing such citation, if that was the case, is that on page 1044 the author states that "[i] is clear that only under specific circumstances can inaction amount to acquiescence. In order to entail legal effects, a State must have failed to assert claims in circumstances that would have required action."

Panama did not need to act more than it did in terms of pursuing its claim against Italy. The examples given by Tams refer to situations where the claimant "has failed to energetically pursue other, related claims" and where "the respondent State could legitimately expect that the claim would no longer be asserted", or "where it was prejudiced by the long period of passivity". None of these examples is applicable to the present case.

Tams again confirms that "it can hardly be overstated that much turns upon the specific facts of the given case." This author concludes his commentary by saying that "a State bringing forward a claim based on estoppel would have to more carefully establish that it had been prejudiced by the other State's change of attitude" which Italy has not been able to evidence in this case.

STATEMENT OF MR CARREYÓ – 21 September 2016, p.m.

The final argument that Panama would like to bring before this honourable Tribunal is that Italy still holds jurisdiction and has control over the *Norstar*.

Yesterday Italy said that once the decision had been made to return the vessel and communicated from Savona to Spain, the Italian judicial authorities had no further jurisdiction regarding the return of the *Norstar*. This is because as of March 2003 the Savona Court's ruling was an enforcement order for the immediate return of the *Norstar* to the legal owner. With all respect to my colleague Ms Graziani, this is incorrect. In her own statement Ms Graziani had previously acknowledged that on 18 March 2003, five days after issuing the 13 March ruling, the Savona Court transmitted the decision regarding the return of the *Norstar* to the judicial authorities in Spain, but she did not say that the public prosecutor appealed the first-instance decision of the Savona Court, which made impossible the compliance of the Savona Court's ruling on the return of the vessel.

It is then important to note that upon receiving a petition from the Spanish authorities to demolish the *Norstar* on 31 October 2006 the Court of Appeal of Genoa stated that there was a decision still pending as to the destiny of the vessel and that it lacked jurisdiction to decide on this matter. In fact, this was the same quotation made by Italy. However this Italian Court said something else. It said that "having noted that this judgment obviously has to be enforced and there is no decision to be taken given that the destiny of the vessel, after having been given back to the party, entirely does not fall within the competence of this Court" – that is the Court of Genoa – "and in any case, given that the first instance judgment was confirmed, any issue on the enforcement of the said judgment would be the competence of the Court of Savona".

Italy has recognized that enforcement of the judgment ordering the release of the vessel would come from the Court of Savona. However, to date that Court has not issued a decision on this matter, so it is still pending. In fact, Italy has not even informed Panama of its intention to either return the ship or to pay damages. Notwithstanding this, Italy still considers this claim is affected by delay in terms of acquiescence, time-bar and estoppel.

In any event, the *Norstar* (the object of these proceedings) has not yet been returned. In fact, Italy has made not a single effort to facilitate this or to provide redress for the damages caused by its order of arrest. This signifies that Italy's compliance with the judgment by its own authorities is still unrealized. For Italy to argue that the Panamanian claim is affected by delay with reference to any of the three institutions – acquiescence, prescription and estoppel – denies all of the efforts Panama has made to communicate in order to obtain redress. Italy intends to reap advantage from its own failure to make timely reparations to Panama as a consequence of its unlawful arrest of the *Norstar*, thereby contravening the principle in law of *nullus commodum capere de sua injuria propria,* namely, that no one can be allowed to take advantage of his own wrong.

Yesterday we heard that Italy's arguments were developed upon the fact that the Agent had never been vested with representative powers. However, we know now that the only reason to bring forward this objection was because there was no answer to the question of why Italy has not responded to any of the communications of Panama. If you think about it, in the Preliminary Objections of Italy as put forward originally, there was no reference to this issue; the reference to this issue came after our Observations, which made clear that Italy had not responded.

Italy also mentioned yesterday Panama's invocation of rights that are manifestly irrelevant to the instant case. Italy clearly raised this point in its Preliminary Objections. Panama acknowledged this when it recorded in its Observations at paragraph 50 that Italy asserts that there is a manifest irrelevance of the UNCLOS provisions invoked by Panama. How can I better explain the relationship of the provisions invoked by Panama to the facts that

Panama depicted alongside all the communications that we filed as evidence and that Italy has recognized that it received?

From the very first letter, Panama stated all the facts of the case. Italy has sometimes referred to the fact that Panama did not refer exactly to the wording of the Convention – that is probably true – or that Panama only referred to freedom of commerce, but is it not true that freedom of commerce is part of freedom of navigation? What was the activity that the *Norstar* was performing when it was arrested by Italy? It was performing a trade activity. That is the main purpose of a ship, to make money to obtain some rewards for its work. Italy completely eliminated the possibility for the *Norstar* to continue as an asset, and that is against the freedom of commerce that is performed by the freedom of navigation of ships.

Italy also said yesterday that no allegedly wrongful act in the present case is attributable to Italy, and Italy addressed this point with the same language that has just been referred to and that Panama has likewise acknowledged. We are fully convinced, Italy said, that all the arguments serve to show clearly that in the case before us today we find ourselves precisely in a situation in which such a response is not required, so Italy still considers it does not have to answer our communications.

I would even put forward an ethical issue here. When somebody asks someone a question, the person who asks the question expects an answer. As a matter of courtesy, we should be expecting Italy to have answered, at least that they had received the communications. Panama did not know that Italy had received the communications until the time that Italy filed its Preliminary Objections. All these years Panama did not know if Italy had received the communications.

Another issue that Italy raised yesterday is that Panama had not communicated to the Italian Government in a diplomatic and proper way. I would like to know why I had to communicate with Italy in a diplomatic way. I am not a diplomat. I have stated this over and over. I do not have to communicate in diplomatic language or with a note verbale. Perhaps presuming that Italy would raise this issue, I went to the Ministry of Foreign Affairs of Panama and requested that the communications I had been sending to Italy be then sent through diplomatic channels. That is why you will find in the files two notes verbales, 2227 and 97. Even using those channels, Italy did not respond.

Italy has also said that the communications did not in any way refer to rights deriving from the provisions of the Convention which Panama invoked in its Application. I have made clear that all the facts that were explained in our letters clearly indicated that it was the affectation of the rights of Panama in terms of freedom of commerce and freedom of navigation. It is not difficult to deduce. Is it true that we have to explain precisely in a letter purporting only to obtain feedback from the other party as if we had to write in a claim or in an application? We do not; there is no provision that requires that.

There is something else that Italy referred to yesterday. It said that an authorization to litigate is something entirely different, that these are two separate roles which Mr Carreyó confused over the years, starting in 2001; that clearly Panama made the same confusion when it authorized the current litigation. However, it also made this confusion at an earlier stage. The confusion, Italy continued, is very clearly visible in the communication of 31 August 2004, because I sent a fax. There was a confusion in the fax attaching the power of attorney. Mr President, Italy says this language is not at all in line with the text of the document accompanying it. I am sure you will have a look at those documents. The document accompanying it is simply a letter from the Panamanian Ministry of Foreign Affairs, sent to the Registrar of this Tribunal four years previously. It is simply a letter from the Ministry of Foreign Affairs to the Registrar of this Tribunal.

As you see, Mr President, Italy says this document most certainly does not authorize Mr Carreyó to intervene in the name of the Panamanian Government in the case of the

*M/V Norstar* as such, as the fax which Mr Carreyó sent to Italy says. Coming back to the words of the ILC, the document does not show that Mr Carreyó in any way acted, says Italy, "under the direction, instigation or control of Panama". The document simply restricts itself to authorizing him to litigate on behalf of Panama. What else do I need if I am being authorized to litigate on behalf of my country? It only adds that it was for the prompt release procedures. I ask myself, when a lawyer obtains a power of attorney to lift the arrest of a vessel, is it not also authorized to communicate with another party in any terms? Does he have to obtain a new power of attorney in order to comply with the article 283 requirements to exchange views?

Italy says, Mr President, as I have just shown, that this authorization to litigate could not also give Mr Carreyó the authorization to represent Panama in diplomatic dealings with Italy. I was not interested in dealing with Italy as a diplomat, that is to say, the only level at which any dispute could arise between the two Parties.

Of course, after the presentation of the Reply I understood that Italy wanted to frame this case as a diplomatic protection case at the start.

The Panamanian Government says that Italy did not trouble to inform the Italian Government of the authorization in question until almost four years later. In any case, by that time the power to litigate through a prompt-release procedure had become entirely moot. There is confusion, says Italy, regarding the role of the Panamanian Government in this case, notably as to the question if up until the date of the Application it acted.

There are three possibilities raised by Italy: (a) as a subject with the authority to initiate prompt-release proceedings in its name – tick – it is true; (b) as an instrument for transmitting to Italy a private communication – tick, true; and (c) as a State acting in order to obtain reparation of the damage caused through an international wrongful act, allegedly ascribed to Italy – true as well – all of them. Why should there be any doubt about it?

Mr President, allow me to repeat my refrain once again: we cannot confuse the power to litigate on behalf of a State with that of representing it in its diplomatic relations. I am not confused; I am very clear that I have been acting, since the very beginning of this case, as having the power to litigate. Before litigating, the Convention requires me to try to communicate with the other Party to see whether we can do several things – not only one. Article 283 is not only concerned with exchange of views for nothing. If we review some cases, and what has been happening in this case, Italy in its Preliminary Objections, at paragraph 26, suggests that Panama did not comply with its own obligation to exchange views, because Panama mentioned immediately in the first communications recourse to ITLOS as a means to settle the dispute. The *travaux préparatoires* of UNCLOS do not only demonstrate that the obligation to exchange views was included to avoid surprises, but also in order to define as quickly as possible the procedure for settling the dispute. The intention of the States Parties for article 283 during the draft negotiations can be deduced from various statements made by the participants themselves. The following account of discussions has been given by a participant, Mr Adede from Kenya:

> One of the fundamental features of the comprehensive system for the settlement of disputes combining flexible choices of non-compulsory and compulsory procedures was the right of the parties to agree on the appropriate procedure for a particular dispute. There was accordingly the need to create an obligation for an exchange of views between the parties on the selection of the appropriate mode of settlement … The emphasis was also placed on an expeditious manner in exchanging views so as to avoid turning the procedure into a mechanism of delaying the process of actual settlement.

Italy has used silence to delay the process of settlement.

Another participant, Mr Ranjeva, of the Malagasy Republic, has stated the following:

> Those who drafted the informal basic text intended to prompt parties to enter into negotiations in order to define, by common agreement, and as quickly as possible, the procedure for settling the dispute. As far as the participants were concerned, exchanging views was designed to make it easier to decide on the means of settlement acceptable to both parties, rather than to resolve the dispute. It is not a question only of settling the case, but selecting the means for settling it.

The two participants, Shabtai Rosenne, Israel, and Louis Sohn, the United States, include in the *Virginia Commentary*:

> This mandatory exchange of views is not restricted to negotiations but also includes all the peaceful means, thus re-emphasising the provision in article 280 that Parties are free to agree at any time on the settlement of the dispute by any peaceful means of their choice.

Panama had, consequently, every right to mention recourse to the Tribunal at the beginning of the communications. As a choice of dispute settlement procedure, the fact that Panama did not do so does not mean that it did not comply with its own obligation to exchange views. The statements made by the participants – the intention of the States Parties to enter into negotiations – are reflected in the Convention itself. If you read the Convention within the context, article 283 in section 1 of Part XV contains seven articles, the first five of which are interlinked. In particular, article 283 follows article 279, recapitulating the general obligation to settle disputes by peaceful means; and there is a close link between article 280 concerning the choice of means of dispute settlement and article 283, providing for the obligation to exchange views.

The subject-matter of this exchange is precisely the choice of a peaceful means of settlement, as has been said by the author David Anderson. Another link can be seen between article 282 governing the situation where the parties to a dispute have agreed upon a procedure that entails a binding decision, and article 283 which is concerned with identification of the appropriate means of settlement of disputes.

For this reason and others, Panama finds that it has indeed complied with its own obligation to exchange views and Panama finds that it has made enough efforts.

In the *Cameroon* v. *Nigeria* case the ICJ stated that there exists no rule to the effect that "the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred" to the Tribunal. Panama's own obligation to exchange views was to a certain extent dependent upon a response from Italy. Italy never responded with regard to recourse to ITLOS as a choice of procedure, not even answering Panama when it said "we could use arbitration". If you read all the documents that Panama sent to Italy, we mentioned arbitration as a choice of procedure and a way to resolve the dispute.

In the *Right of Passage* case (*Portugal* v. *India*), the Court held that the prior diplomatic negotiation requirement had been complied with to the extent permitted by the circumstances of the case. Panama contends that if one party, like Italy, remains silent, it is a circumstance to be taken into consideration, since that did not permit a bilateral exchange views on the choice of a dispute settlement procedure.

Now, we also have to consider what was done by Italy, not by Panama only. Italy failed to comply with its own obligation to exchange views. Remember that when we were beginning our presentation we made reference to article 283 and we said "the Parties" – plural. Italy omitted to respond to any communication sent by Panama and that alone is an omission and is an act contrary to the general principle of good faith recognized in public international law.

STATEMENT OF MR CARREYÓ – 21 September 2016, p.m.

The duty to act in good faith is also enshrined in UNCLOS. Panama respectfully asks the court to take this into consideration, and also because Judge [Chandrasekhara] Rao noted in his Separate Opinion in the *Land Reclamation* case that the obligation under article 283 must be discharged in good faith, and it is the duty of the Tribunal to examine whether this is being done.

Italy is the one that has failed to comply with this obligation to exchange views.

We will also argue, on the basis of recognized principles and case law, that Italy is not acting in good faith when using its own failure to comply with the obligation to exchange views as a means to object to the Tribunal's jurisdiction.

Page 31 of the Judgment by the ICJ on the *Factory at Chorzów*, in the case between Germany and Poland, stated:

> It is … a principle generally accepted in the jurisprudence of international arbitration … that one Party cannot avail himself of the fact that the other has not fulfilled some obligation … if the former Party has … prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.

This case is the classic application of an existing principle, the maxim *nemo ex propria turpitudine commodum capere potest*. This maxim is a concrete decision of the principle of good faith or *bona fides*. *Nul ne peut profiter de sa propre faute*.

Another application of the maxim in question is to be found in the jurisdiction of the *Danzig* case. In that case the Court recalled that Poland could not be heard when invoking the competence of its municipal tribunals if this incompetence resulted from Poland's own failure diligently to transform the provisions of an international treaty into internal law. The point is that a State cannot plead an objection that would be tantamount to pleading the non-execution of one of its own international obligations.

The Court expressed itself in the following terms:

> The Court would have to observe that at any rate Poland could not avail herself of an objection which, according to the construction placed upon the *Beamtenabkommen* by the Court would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international agreement.

I do not know if I have pronounced that word correctly; forgive me if I have not done it properly.

There is another parallel, since Italy is pleading an objection to the jurisdiction of the Tribunal, which is the same as pleading the non-compliance with its own international obligation to exchange views.

We will now summarize our case, Mr President.

Fuel purchased outside the territorial sea is not a crime. Therefore, this Tribunal has jurisdiction to entertain this case because the wrongful arrest order of the *Norstar* is disputed and because Italy's refusal to respond to any of the formal communications it received from Panama has prolonged the existence of this dispute

Furthermore, the facts of this case allow the Tribunal to have jurisdiction *ratione personae* and to continue proceedings with Italy, the presence of Spain not being indispensable for its adjudication. While Panama has conscientiously attempted to settle this dispute through bilateral means, Italy has advanced a contradictory interpretation of article 283, contending that there is no dispute while simultaneously declaring that Panama was unilaterally "obligated to exchange views". This paradoxical approach has inhibited the very exchange that Italy has professed to want.

The allegation that the Panamanian attempts at dialogue have not been "appropriate, genuine or meaningful" lacks specificity, substance, evidence and a legal foundation. Italy's failure to file all the communications received from Panama has been amplified by its omission of highly relevant facts about both its conduct and the case itself. It is extremely significant to note, as Italy has neglected to do, that the *Norstar*'s release was ordered because its activities were carried out beyond the Italian territorial waters and thus were not criminal acts. Such omissions have not only affected Italy's interpretation of the case but have also impeded the Panamanian right to seek a resolution in an expeditious manner.

Italy, however, has described Panama's efforts to negotiate as "an absence of meaningful attempts", despite the fact that the communication has been entirely one-sided on the part of Panama.

As a result, Panama now wonders how a negotiated settlement could be considered feasible when Italy has added belittling comments, such as this one, to its previous refusal even to acknowledge receipt of any of the Panamanian communications, much less expend any energy on reaching a settlement.

In fact, Panama first learned that Italy had received its messages only when Italy appended them to its Objections. Thus, it is ludicrously hypocritical for Italy to accuse Panama of failing to make "meaningful attempts" at negotiation.

Italy has also referred to its juridical relationship with Panama as merely a putative "difference", but it is clear from Italy's Objections that its interpretation of the law and facts in this case differs greatly from that of Panama. By rejecting all Panama's formal requests to engage, Italy has essentially confirmed the existence of a serious disagreement.

On top of this, Italy now proposes to put an end to the proceedings without even advancing its view regarding the Panamanian claim. In other words, Italy intends to take advantage of its own inaction by requesting that the Tribunal dismiss this case without regard to its merits.

Although many jurisdictions have established fixed rules regarding prescription, this is not the case with international law. There is no provision in UNCLOS regarding prescription, the doctrine of laches or any of the delay institutions claimed by Italy to be applicable in this case.

In the absence of a clearly stated period, all those objections do not hold, particularly when the behaviour of Panama has always been to demonstrate its good faith intention to communicate its claim, whereas its counterpart has used silence as its only means of defence until filing its Preliminary Objections.

Panama asserts that its claim *remains* admissible because, by notifying Italy of its intentions as early as 2001, Panama extended any time limitation period in effect, thus eliminating any question of a time-bar, estoppel, prescription or acquiescence and because this case represents the unmet obligation of Italy to release the *Norstar*, which is still under the jurisdictional control of the Italian authorities.

Estoppel is not invoked merely because a claimant decides against filing a prompt release request in order to let the process take its course, but rather depends on whether the complaining Party (Italy) relied on the statement of the Party making the representation (Panama), which in this case it did not.

Finally, the need to exhaust local remedies is not applicable in this case, as it was not in the *M/V "SAIGA"* and the *M/V "Virginia G"* cases, due to the lack of a jurisdictional connection between Italy as the arresting State and Panama, where the *Norstar* is registered, because the arrest was based only upon activities of the vessel carried out in the high seas outside of the territorial waters of Italy.

Panama has shown that it has always been an interested party seeking a mutually agreeable solution to this case according to the United Nations Convention on the Law of the

Sea, whereas Italy has always intentionally procrastinated in the resolution of this dispute, using silence as a means of evading justice.

The decision whether to restore the *Norstar* to its original state at the time of its seizure, with updated class and trading certificates delivered to its owner, or to pay compensatory damages, still rests with Italy.

If, after all this time, the Italian courts having jurisdiction over the *Norstar* have not acted regarding the *Norstar*'s devolution nor made any arrangement with the Spanish authorities to this end, there is no validity in any of the objections raised by Italy concerning the passage of time, such as acquiescence, time-bar, prescription and estoppel. Finally, it seems that Italy intentionally omitted to respond in order to allow time to pass and then defend itself by saying that it was the claimant's fault not to institute proceedings on time.

Thank you, Mr President.

**THE PRESIDENT:** I would like to thank the Agent of Panama for his statement.

That brings us to the end of the first round of Panama's oral arguments. We will continue the hearing tomorrow at 10 a.m. to hear the second round of oral arguments of Italy in the morning, followed by Panama in the afternoon.

**MR CARREYÓ:** May I have the floor?

**THE PRESIDENT:** Yes, please.

**MR CARREYÓ:** Mr President, I understood that you had allowed a further half hour to refer to the petition of Panama.

**THE PRESIDENT:** I asked the Registry to check with you whether you had any additional statement today and I have not been informed of any, but if you have an additional statement, we will adjourn for 30 minutes and resume at 5 o'clock, when you will have 30 minutes in which to respond.

**MR CARREYÓ:** I do not want to impose on the Tribunal. I know that it will have been very tiring for you listening to me for such a long time, but I understood that we could sustain our request to deal with the scope of the subject-matter of the new issues raised by Italy at any time that we wanted, and we decided to do it at the end of our verbal statement.

**MR PRESIDENT:** As I said, I asked the Registry to check with your delegation during the lunch break what time you would be using this afternoon, but probably there was some kind of misunderstanding. Yes, you do have time, and we will then adjourn for a break of 30 minutes and resume at 5 o'clock, when your delegation will have 30 minutes in which to provide an additional statement.

**MR CARREYÓ:** Thank you, sir.

**THE PRESIDENT:** We will adjourn for 30 minutes and resume at 5 o'clock.

(*Break*)

**THE PRESIDENT:** We resume our oral hearing.

I will give the floor to Mr Carreyó to continue his statement and exercise the right to the additional 30 minutes allocated to each delegation. You have the floor.

**MR CARREYÓ:** Thank you, Mr President. I apologize for the misunderstanding in our communications.

As you know, Panama filed a request for a ruling concerning the scope of the subject matter based on the Preliminary Objections filed by Italy. This is a very important issue for Panama because we feel we have not had the opportunity Italy has had to approach several issues not included in its original Preliminary Objections.

There are six issues Panama has identified in this area.

The first concerns the lack of representative powers. Italy has answered this particular issue by saying that this is part of the objection that a dispute does not exist. I do not see how you can extend one objection to include another. As we have already said, the only reason for Italy to include this new objection is because there is no answer to the fact that Italy did not respond to the Panamanian communications, but it is not fair that Panama does not have the opportunity to reply to the objection by Italy except by way of these oral proceedings.

Article 97 of the Convention is very clear about the time-limit within which parties are allowed to present their preliminary objections and that time-limit had already passed when Italy filed this Reply. It is very easy to compare the Preliminary Objections of Italy originally against the Reply in terms of extension. Italy has said that Panama had ample opportunity to respond to these objections and it has the further ability to respond to them during this hearing, and even cited a case where it says that a jurisdictional objection raised at the merits stage of the proceedings could be considered – but this is not the case. They are of course trying to apply this case *a fortiori* but it is nothing to do with what I am claiming as a Party which has not had the opportunity to make written submissions; it is not a question of oral hearings. I am very happy to have this opportunity to reply to Italy's new objections, but this has only been orally, not in writing, and I feel there is a difference between putting something into writing and only having the opportunity to refer to it orally. I have not found a single reference in Italy's original Preliminary Objections to the lack of representative powers of Panama. There is none, and it is very hard to accept that Italy would have reason in saying it is part of the objection that a dispute does not exist.

The second new objection is that Italy says in the Reply that the rights invoked by Panama are manifestly irrelevant. I concede that there is a line and a half in the Preliminary Objections that states "apart from the manifest irrelevance of the UNCLOS provisions invoked by the Applicant to sustain its claim".

That is the only reference to the irrelevance of the provisions invoked by Panama in the Application. Less than two lines. If you read, there are 21 new paragraphs concerning this alleged irrelevance of the provisions that Panama invoked. Has Panama had the opportunity to reply in writing to these new objections? No.

The third new issue is the order. The difference in the new hypothesis between a State's conduct that completes a wrongful act and the conduct that precedes such conduct, the preparatory conduct to an international wrongful act. I do not know whether this is a part of the tradition. This may be the first time this will be discussed in this Tribunal because this is the first time, as far as I know, that a Preliminary Objection has been presented. I understand that the provisions give the opportunity to the respondent to file the objections and then to the applicant to observe, but then another opportunity to the respondent to reply, without the opportunity for the applicant to submit anything in writing. This is an imbalance that I would appreciate if you would consider.

The fourth is that no internationally wrongful act is attributable to Italy. Italy says that it addressed this point with the same language I have just quoted and Panama has likewise acknowledged, but it does not give any other explanation. I have seen no reference in the original Preliminary Objections, which are covered in the Reply, with regard to the attribution

of an international wrongful act and the independent responsibility principle, bringing up all the issues of the ILC and the Strasbourg Convention on Mutual Assistance in Criminal Matters and the *Xhavara* case, the fact that Italy did not actually carry out the arrest. This question of attribution; the attributability was not raised in its Preliminary Objections either.

The fifth, the espousal nature of the claim – of course it is related to diplomatic protection but it was not elaborated in the Preliminary Objections how far we can say that something is related to something. Everything is related to the law in fact but I have not seen in the Preliminary Objections any reference to the espousal nature of the claim, nor any reference to the *Interhandel* or *ELSI* cases cited by Italy. We did not say that we explicitly recognized the espousal character of its claim in our Observations. Of course we did not say that, because there was no reference to espousal nature of the claim in the Preliminary Objections.

The last one, Mr President, is acquiescence. I have already referred to the fact that Italy seemed to rely on them being synonymous; Italy considers acquiescence and timely prescription are synonyms or at least that one covers the other. I am not sure that these institutions are not different, otherwise Italy would not have considered them separately in its Reply.

May I conclude, Mr President, in just 13 minutes, that we have not had the opportunity to respond; to respond, yes, but not in writing. I do not know whether this could be an issue in future for this Tribunal that a respondent which files preliminary objections then takes advantage of the fact that the Applicant will not have an opportunity in writing to oppose a whole gamut of new issues that could be introduced in the Reply.

With that, I conclude my oral arguments today. Thank you for your patience, for your attention, for your kindness and for the opportunity to speak before such an important, high and honourable Tribunal. Thank you, Mr President.

**THE PRESIDENT:** I thank the Agent of Panama for his statement.

That brings us finally to the end of the first round of arguments of Panama. We will continue the hearing tomorrow at 10 a.m. to hear the second round of oral arguments of Italy in the morning, followed in the afternoon by oral arguments of Panama.

The sitting is now closed.

*(The sitting closed at 5.15 p.m.)*

M/V "NORSTAR"

**PUBLIC SITTING HELD ON 22 SEPTEMBER 2016, 10 A.M.**

**Tribunal**

*Present:* *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

**For Panama:** [See sitting of 20 September 2016, 10 a.m.]

**For Italy:** [See sitting of 20 September 2016, 10 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 22 SEPTEMBRE 2016, 10 HEURES**

**Tribunal**

*Présents :* M. GOLITSYN, *Président* ; M. BOUGUETAIA, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

**Pour le Panama :** [Voir l'audience du 20 septembre 2016, 10 h 00]

**Pour l'Italie :** [Voir l'audience du 20 septembre 2016, 10 h 00]

**THE PRESIDENT:** Good morning. The Tribunal will continue today the hearing in the *M/V "Norstar" Case*. This morning we will hear the second round of oral arguments presented by Italy.

I now give the floor to the Agent of Italy, Ms Palmieri, to begin her statement.

**Deuxième tour : Italie**

EXPOSÉ DE MME PALMIERI
AGENT DE L'ITALIE
[TIDM/PV.16/A25/5/Rev.1, p. 1–2]

**MME PALMIERI :** Merci, Monsieur le Président.

Monsieur le Président, Madame et Messieurs les juges, c'est un honneur et un privilège pour moi que de m'adresser encore une fois en tant qu'agent de la République italienne dans la journée conclusive de cette audience.

Monsieur le Président, Madame et Messieurs les juges, avec votre permission, je vais présenter notre plaidoirie.

Notre conclusion, en quelque mesure, pourrait vous surprendre, cela parce que vous écouterez peut-être des arguments que l'Italie a développés, soit dans la phase écrite, soit dans la phase orale.

Ce n'est pas notre intention de répéter ce qu'on a déjà soutenu et que, à vrai dire, l'Italie croyait avoir expliqué de manière suffisante et en toute bonne foi et certainement sans aucune intention de profiter des situations d'autrui.

Toutefois, après avoir entendu la plaidoirie de l'agent du Panama, Monsieur Carreyó, il nous incombe de revenir sur les exceptions préliminaires afin d'éclaircir la position italienne dans la présente affaire.

Monsieur le Président, Madame et Messieurs les juges, tout d'abord, je tiens à souligner que c'est uniquement dans le cadre de la Convention des Nations Unies sur le droit de la mer, et à la lumière de la jurisprudence de ce haut Tribunal, qu'on doit aborder la présente affaire.

A ce propos, l'Italie entend réitérer que les dispositions de la Convention des Nations Unies sur le droit de la mer invoquées par le Panama sont dépourvues de toute pertinence dans la présente affaire. Comme on l'a déjà dit, il s'agit d'un point qu'il faut prendre sérieusement en considération afin de trancher, soit la question de la compétence juridictionnelle de l'éminent Tribunal, soit celle de la recevabilité de la requête.

Monsieur le Président, Madame et Messieurs les juges, l'Italie a écouté avec attention les considérations faites hier par l'agent du Panama. Aujourd'hui, Monsieur le professeur Attila Tanzi développera les raisons de l'Italie dans la présente affaire, considérations que je vais brièvement résumer.

Premièrement, je vais souligner que le Panama n'a pas réussi à démontrer la compétence juridictionnelle du Tribunal.

A ce sujet, Monsieur le professeur Attila Tanzi soutiendra, tout d'abord, que toutes les exceptions préliminaires soulevées par l'Italie sont bien et absolument recevables.

Ensuite, il démontrera que la République du Panama n'a pas réussi à contester les thèses italiennes sur la nature privée de l'affaire, ni par rapport aux modalités de présentation de la requête, ni quant à son contenu.

Sur ces deux aspects, l'Italie mettra bien en évidence le manque de bien-fondé des argumentations panaméennes. Cela découle du chevauchement de la protection des intérêts publics avec celle des intérêts particuliers.

Monsieur le Président, Madame et Messieurs les juges, pour ce qui est de l'irrecevabilité de la requête de la République du Panama, l'Italie entend souligner à nouveau que sa réclamation repose, pour une part prépondérante – sinon exclusive – sur le préjudice causé au propriétaire du navire « Norstar ». Il s'ensuit que, comme l'Italie l'a soutenu à plusieurs reprises, la règle sur l'épuisement des voies de recours internes trouve son application dans la présente affaire.

Enfin, Monsieur le professeur Attila Tanzi abordera les questions de l'acquiescement, de la prescription extinctive et de la forclusion ou de l'estoppel.

Pour ce qui est de la prescription, je vais seulement rappeler l'article 293, paragraphe 1, de la Convention susnommée qui stipule en effet que : « Une cour ou un tribunal ayant compétence en vertu de la présente section applique les dispositions de la Convention et les autres règles du droit international qui ne sont pas incompatibles avec celle-ci. »

Il va aussi apparaître clairement comment l'acquiescement doit – pour la sécurité du droit et des droits – être toujours retenu en tant qu'élément fondamental dans nos débats.

Je vous remercie beaucoup pour votre attention. Monsieur le Président, je vous demande de bien vouloir appeler à la barre Monsieur le professeur Attila Tanzi.

**THE PRESIDENT:** I thank the Agent of Italy for her statement and I now invite Mr Tanzi to make a statement.

You have the floor, sir.

STATEMENT OF MR TANZI
COUNSEL OF ITALY
[ITLOS/PV.16/C25/5/Rev.1, p. 2–12]

**MR TANZI:** Mr President, Members of the Tribunal, it is an honour for me to be appearing before you on behalf of Italy, my country, for the second time during these proceedings.

In line with the Agent from Italy in her opening statement, I shall begin by recalling that article 75, paragraph 1, of the Rules of the Tribunal prevents a party from "go[ing] over the whole ground covered by the pleadings or merely repeat[ing] the facts and arguments these contain".

Therefore, I shall address some of the arguments made yesterday by the Agent from Panama that, more than others, are indicative of the significant confusions which have characterized the present case since its inception.

Mr President, I should like to stress how such confusions revolve around the basic distinction between the pursuit of public and private interests under the Convention. As I shall illustrate, such confusions account for the motives and the grounds of most of the Italian Preliminary Objections, both to the jurisdiction of this Tribunal and to the admissibility of Panama's claim. I will deal with them separately.

Mr President, Members of the Tribunal, I shall first address the basic confusion around the issue of the lack of representative character of Mr Carreyó, as it pertains equally to two objections to the jurisdiction of this Tribunal in the present case, namely, the inexistence of a dispute between the Parties and the non-fulfilment of article 283 of the Convention.

The Italian contentions on this issue cannot possibly be taken as a new objection. It is clearly an argument elaborated to substantiate the two objections in point. As I said during the first round, one should not confuse arguments with objections.

This emerges most clearly, if only, from the fact that the topic of "The irrelevance of the communications from Panama for lack of representative powers" appears as a subsection of Italy's Reply precisely on "The inexistence of a dispute between Panama and Italy". In that section, Italy elaborates the argument anticipated in its first written pleading under the section "The inexistence of a dispute between Panama and Italy". There, Italy argued that "no complaint, or protest, bearing on the facts complained of in the Application, has been raised in any legally appropriate manner by the Government of Panama with the Government of Italy, which the latter would resist or contest".

The same lack of representative power, Mr President, also provided one of the grounds for the objection on Panama's failure to meet the conditions under article 283 "in any meaningful and legally appropriate manner". This was anticipated in Italy's Preliminary Objections (paragraph 25) and referred to in its Reply (paragraph 51).

Mr President, yesterday, Mr Carreyó repeatedly criticized Italy for failing to specify the meaning of that expression but in interstate relations it is clear that only State organs, or individuals expressly authorized, may act for the State in those relations.

On this point, next to the arguments I put forward in the first round, I would like to focus on another confusion that emerged yesterday.

"I ask myself, when a lawyer obtains a power of attorney to lift the arrest of the vessel, is it not also authorized to communicate with another party in any terms?"

This may be so in domestic law when representing private clients, but in international law the power to act for a State for one specific purpose is not the same as the power to act for all purposes. In particular, the power for an individual to act "on behalf" of a State for the purpose of prompt release proceedings is a unique kind of power under article 292. It does not extend to the power to act on behalf of the State beyond those proceedings.

M/V "NORSTAR"

Mr President, Members of the Tribunal, allow me now to address Panama's contention concerning Italy's objection to the jurisdiction *ratione personae* of this Tribunal. I will not elaborate again on the grounds for this objection. Italy has already done so, both in its written pleadings and during the first round of this hearing.

The Agent from Panama told us yesterday that, in its Reply, Italy "objected" for the first time to the fact that the order for seizure does not amount *per se* to an internationally wrongful conduct. Here, again, as I anticipated on Tuesday, we are confronted with a confusion between an objection and an argument substantiating such an objection, namely, the lack of jurisdiction *ratione personae* of this Tribunal that Italy clearly raised at paragraph 22 of its Preliminary Objections, whereby "Italy is the improper respondent for Panama's claim". This was the logical corollary of the argument advanced in paragraph 21 of its Preliminary Objections, Mr President, where Italy claimed that "even though the order for seizure of the *M/V Norstar* has been issued by an Italian Public Prosecutor, the actual arrest and detention of the vessel has not been executed by Italian enforcement Officials, but by the Spanish Authorities".[1]

Yesterday, the Agent from Panama contended that "this case involves only the actions of Italy and not those of a third state".[2] He devoted a rather lengthy part of his speech to arguing that Italy, and Italy alone, should be the Respondent of the present case, since its conduct, and its conduct alone, is the object of the Panamanian claim.

Mr President, let me be very clear. In its Application, in which Panama has framed its claim, it is stated that "the Application concerns a claim for damages against the Republic of Italy caused by an illegal arrest of the *M/V Norstar*".

Yet just yesterday the Agent from Panama purported to reframe its claim, when it stated that "Panama contends that the conduct complained of was the order for the seizure".[3]

That is not the only confusion arising from yesterday's submissions on this point. In fact, Panama goes so far as to maintain that Italy was the "arresting State",[4] but of course it was not. The fact of the matter, Mr President, is that Italy has not carried out the conduct complained of by Panama in its Application.

These arguments plainly show that this case does not "involve only the actions of Italy and not those of a third state".[5]

Panama has implausibly submitted that Spain has acted "under the exclusive direction and control of Italy as the receiving or beneficiary State".[6]

Yet Panama has failed to respond, either to the relevant passages of the ILC commentary referred to by Italy or to the fact that the 1959 Strasbourg Convention gave to the Spanish authorities ample margin to refuse the Italian letter rogatory. As long as Spain is empowered to lawfully refuse to enforce a letter rogatory from Italy, it cannot be correct to say that Spain acted under the exclusive direction and control of Italy.

Mr President, Members of the Tribunal, turning to the indispensable party principle, the argument put forward by Panama is again confusing. The Agent of Panama claimed, on the one hand, that Spain is not involved in the present case, and, on the other, that "in the present case Panama considers that no wrong has been committed by the sending State (Spain)".[7]

[1] Preliminary Objections, para. 21.
[2] Transcript ITLOS/PV16/C25/3/E, p. 4, lines 9-13.
[3] Transcript ITLOS/PV16/C25/3/E, p. 26, lines 16-17.
[4] *Ibid.*, p. 17, line 44.
[5] Transcript ITLOS/PV16/C25/3/E, p. 4, lines 9-13.
[6] Transcript ITLOS/PV16/C25/3/E, p. 27, lines 46-48.
[7] *Ibid*, p. 28, lines 15-16.

STATEMENT OF MR TANZI – 22 September 2016, a.m.

Mr President, by claiming that Spain has made no wrong, Panama is reviewing its conduct. In so doing, it is assuming precisely what the indispensable party principle bars the Tribunal from doing in Spain's absence from these proceedings.

Mr President, Members of the Tribunal, Italy will now address the manifest irrelevance of the UNCLOS provisions upon which Panama relied in its Application. This issue is of particular relevance, since it affects both the jurisdiction of this Tribunal and the admissibility of the Panamanian claim.

As a preliminary matter, Italy challenges Panama's assertion according to which Italy has submitted this objection in an untimely manner in its Reply. This objection was clearly made by Italy in its Preliminary Objections when it stated: "Apart from the manifest irrelevance of the UNCLOS provisions invoked by the Applicant to sustain its claim."[8]

With that language, Italy highlighted one of the most obvious examples of confusion and incoherence in Panama's case. In fact, the incoherence is so clear that the Agent of the Republic of Panama expressly admitted it before this Tribunal. Indeed, he stated that: "First of all, Panama takes this opportunity to concede that article 73 … and article 226 … do not apply to this case, since these provisions fall under Part XII, which is devoted to the protection and preservation of the marine environment."

Mr President, Members of the Tribunal, Italy strongly maintains that not only are articles 73 and 226 of the UN Convention irrelevant to the present case; so are all the provisions Panama invoked in its Application. Even though it is not my task to reiterate the considerations extensively developed by my colleague Professor Caracciolo in her presentation, it is appropriate for me to record several key points.

Panama seems to be oblivious to how UNCLOS should be interpreted. UNCLOS provides for different regimes depending on different maritime spaces. To that end, it is worth mentioning that the recent award of the Annex VII tribunal in the case *Philippines* v. *China* stressed this point considerably. I refer you to the relevant quote in my recent speech, without going through it orally.

> 231. … The Convention establishes limits for maritime entitlements and sets out the rights and obligations of coastal States – as well as other States – within such maritime zones. … The Convention thus provides – and defines limits within – a comprehensive system of maritime zones that is capable of encompassing any area of sea or seabed.
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> 245. … the Tribunal recalls its earlier observation (see paragraph 231 above) that the system of maritime zones created by the Convention was intended to be comprehensive and to cover any area of sea or seabed. The same intention for the Convention to provide a complete basis for the rights and duties of the States Parties is apparent in the Preamble, which notes the intention to settle "all issues relating to the law of the sea" and emphasises the desirability of establishing "a legal order for the seas".[9]

Mr President, Members of the Tribunal, all the provisions referred to by Panama in its Application manifestly concern maritime zones different from internal waters. Consequently, articles 33, 87 and 111 UNCLOS clearly do not apply to the facts of the instant case.

This is particularly true for article 111, which was mentioned extensively yesterday by the Agent of the Republic of Panama. Allow me to repeat that the reference to this provision is completely unfounded. Indeed, no hot pursuit was carried on by the Italian authorities with respect to *M/V Norstar*. Further to that, any reference to article 111 made by the Public

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[8] Preliminary Objections, para. 19.

[9] *South China Sea Arbitration (Philippines* v. *China)*, PCA Case No. 2013-19, Award, 12 July 2016, paras. 231 and 245 (emphasis added).

Prosecutor at the Tribunal of Savona is totally irrelevant for the present international law case. As stressed during the first round by Professor Graziani, this Tribunal is not called upon to interpret the decisions made by the Italian judicial authorities. The task of this Tribunal is just to ascertain whether Italy acted in compliance with UNCLOS.

Mr President, Members of the Tribunal, due to the predominant espousal nature of the Panamanian claim, the rule of the exhaustion of local remedies applies in the present case.

Italy does not intend to reiterate the assertions developed by Professor Graziani during the first round. However, it is necessary to clarify some arguments that Panama seems to have misunderstood.

Mr President, Italy refers to the contention made yesterday by the Agent of Panama that the applicability of the exhaustion of local remedies principle depends on the *locus* where the bunkering activities were carried out by the *Norstar*. This argument was already raised in identical terms in paragraph 74 of the Observations.

Italy strongly contends that this argument is moot and inconsistent. The core of the dispute between the Parties is clearly identified in the Application of the claimant State, where the subject matter of the dispute is strictly described as follows: "A claim for damages against the Republic of Italy caused by the illegal arrest of the *M/V Norstar*."

Panama has evidently mistaken the concept of *locus* relevant in the present case according to international law. Indeed, "*locus*" does not refer to the place where the bunkering activities causing the order of seizure were conducted. "*Locus*" refers precisely to the place where the alleged internationally wrongful conduct, namely the seizure itself, took place. That place is the Spanish internal waters.

Italy considers that this confusion, too, shows that Panama is conflating issues relevant in domestic law with issues relevant in international law. Indeed, the alleged wrongful conduct in discussion consists exclusively of the enforcement measures applied on the vessel, not on the exercise of criminal proceedings.

Mr President, Members of the Tribunal, Panama is also evidently mistaken on the Italian judicial narrative. What the Agent of the Republic of Panama asserted yesterday, while commenting on the decision by the Court of Appeal of Genoa, is telling.

As Professor Graziani illustrated extensively in the first round, it is absolutely necessary to clarify two distinct points.

Firstly, the seizure was lifted once and for all by the Tribunal of Savona on 13 March 2003. The Public Prosecutor has never appealed against this lifting, since the object of his appeal was solely the acquittal of the accused. Secondly, once the Tribunal of Savona ordered the lifting of the seizure and communicated this decision to the Spanish authorities, the release to the owner of the *M/V Norstar* removed the competence of the Italian judiciary.

Mr President, Members of the Tribunal, the indirect character of the injury invoked by Panama emerges plainly from a plethora of elements, which were elaborated upon by Professor Caracciolo on Tuesday. For ease of reference, allow me to rapidly go through them: (1) the manifest irrelevance and incoherence to the present case of all UNCLOS provisions relied upon in its Application by the Republic of Panama; (2) the unofficial nature of the written communications sent by Mr Carreyó, acting in his capacity as a private lawyer; (3) the content of these communications, including the letter of 3/6 August 2004, which is focused on defending the private interests of the owner of the *M/V Norstar* by seeking redress for the damages allegedly suffered due to the seizure; (4) the content of the notes verbales sent by Panama, which do not identify any UNCLOS provision allegedly violated by Italy or invoke the international responsibility of the Republic of Italy; and (5) the nature of the claim, as inferred in the Application of Panama, expressly aimed at obtaining compensation for damages allegedly caused to the owner of the *M/V Norstar*.

STATEMENT OF MR TANZI – 22 September 2016, a.m.

Mr President, Members of the Tribunal, yesterday the distinguished Agent of the Republic of Panama repeated several times that the *M/V "Norstar" Case* is materially the same as the *M/V "SAIGA" Case* and the *M/V "Virginia G" Case*.

Italy firmly contends that the factual circumstances of these cases are so different from the instant case that the Tribunal would reach a different conclusion concerning the applicability of the "preponderance test", if it ever came to that stage.

As for the *M/V "SAIGA" Case*, Professor Caracciolo has already stressed that the *M/V "Norstar" Case* does not present any clear parallel with that case.

Unlike in the present case, in *M/V "SAIGA"* Saint Vincent and the Grenadines filed an Application under article 292 of UNCLOS, instituting proceedings against Guinea in respect of a dispute concerning the prompt release of the vessel and its crew.

It is well known that prompt release is a procedure characterized by peculiar features, among which urgency stands out. The element of urgency is so relevant that, with regard to prompt release proceedings, there is no requirement to exhaust local remedies. I am referring specifically to the dictum in *"Camouco"* by this Tribunal:

> [n]o 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.

Mr President, Members of the Tribunal, Italy is well aware that in *M/V "SAIGA"* the Tribunal based its decision on the direct nature of the injuries invoked by the claimant States, without taking into consideration that the Application was brought before the Tribunal under article 292. Anyhow, account must be taken of the fact that in *M/V "SAIGA"* the Tribunal was confronted with a claim under article 292 of UNCLOS.

The original purpose behind article 292 is to balance the legal interests of the coastal State with those of the flag State in preventing an excessive detention of the vessel flying its flag.

It is therefore obvious that, within the context of a prompt release procedure, any application of the preponderance test aimed at establishing whether the claim was direct or indirect should be made taking into due consideration the nature of the prompt release procedure, i.e. a compulsory proceeding having the specific purpose to permit the release of the vessel and the crew by or on behalf of the flag State. Such consideration does not apply to the instant case.

Mr President, Members of the Tribunal, the *M/V "Virginia G" Case* also presents important differences from the instant case. The most important one is that in *M/V "Virginia G"* the Tribunal recognized that some UNCLOS provisions were pertinent and were effectively infringed by the respondent State. Consequently, the manifest violation of UNCLOS cannot but influence the application of the preponderance test in order to ascertain the direct or indirect nature of the injuries invoked by the claimant State.

Conversely, in the *M/V "Norstar" Case* the Panamanian Application relies upon UNCLOS provisions which are manifestly incoherent with respect to the facts of the present case, and therefore manifestly unfounded.

From this perspective, the manifest irrelevance of UNCLOS provisions contained in the Application corroborates that the dispute between the Parties, far from being a dispute concerning the interpretation or application of UNCLOS, is preponderantly related to the indirect violations of the rights of the owner of *M/V Norstar*.

It follows that Panama's claim is neither "genuine" nor "consistent", since Panama is trying to circumvent the exhaustion of local remedies principle by requesting the Tribunal to give a ruling on the interpretation and application of UNCLOS provisions.

Mr President, Members of the Tribunal, I will now turn to several short points related to acquiescence and extinctive prescription. Here again, some clarity is necessary as the statements made yesterday by Mr Carreyó have confused a number of issues that are in fact clear in the law, as illustrated by Mr Busco on Tuesday.

I will start with extinctive prescription. First of all, Mr Carreyó stated yesterday that there is no article in UNCLOS that delineates a time restriction after which claims are prescribed. The implication was that there was therefore no restriction at all under the Convention.

Mr President, Members of the Tribunal, this is patently wrong. According to article 293, paragraph 1, of UNCLOS, a court or tribunal having jurisdiction under section 2 of Part XV of UNCLOS shall apply the Convention and other rules of international law not incompatible with the Convention. As Mr Busco explained the day before yesterday, there is no doubt that extinctive prescription is a general principle of international law under article 38 of the Statute of the ICJ. It follows that, in accordance with article 293, paragraph 1, extinctive prescription is a rule of international law that the Tribunal must apply if its conditions are met.

I would now like to make a few points regarding those conditions. Mr Carreyó has submitted, drawing selectively on the ILC's Commentary on the Articles on State Responsibility that "once a claim has been notified to the respondent State, delay in its prosecution will not usually be regarded as rendering it inadmissible".

But as the *Wena* and *Gentini* cases, to which Mr Busco has already referred, make clear, a dispute that is laid to rest should not be resurrected if it has been abandoned for a long period of time. In other words a claim that is made, but that is not pursued, and that gives the impression to the respondent of having been abandoned, is not admissible. This is the principle of repose, Mr President and Members of the Tribunal, a principle long established in international law.

Mr President, Members of the Tribunal, it is also of no use to Panama for it to submit that international law sets down no precise time-limit. This is true, Mr President and Members of the Tribunal, but this does not mean that tribunals should never find that a claim is extinct by prescription: indeed, tribunals have in a number of cases found that claims are extinct by prescription even in the absence of a general rule setting out in general terms what the time for prescription is.

Indeed, as we have seen two days ago, but to which Panama failed to respond yesterday, the claim that Panama now makes before this Tribunal would be extinct by way of prescription in the domestic jurisdictions of Italy and Panama, and in the vast majority of other jurisdictions.

I would also like to add that, unlike what Panama states, the purpose of extinctive prescription in international law is not just about avoiding prejudice to a respondent State. Italy rather contends the purpose of extinctive prescription and acquiescence is also providing certainty. I would like to quote, in addition to the cases mentioned by Italy two days ago, the case of *Sarropoulos* v. *Bulgarian State*, in which the Graeco-Bulgarian Mixed Claims Tribunal explained that "stability and security in human affairs require that a delay should be fixed outside which it should be impossible to invoke rights or obligations".

I will also just revert very briefly to record that Panama also confuses the doctrine of laches in international law and the principle of extinctive prescription. Italy, I must make clear, does not rely on laches in this case.

A number of the considerations that have been made above with respect to extinctive prescription will also apply to acquiescence, due to the fact that the two concepts, albeit distinct, share some similarities.

STATEMENT OF MR TANZI – 22 September 2016, a.m.

However, I would nonetheless like to make one key point with respect to acquiescence. Yesterday, Panama quoted authorities to the effect that mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything that it can reasonably do to maintain its claim. Mr President, Members of this Tribunal, Italy never said that the mere passage of time without the claim being resolved amounts to acquiescence. What Italy said was that Panama's failure to act for a period of at least five years and eight months, in circumstances where Panama's action was required, amounted to acquiescence. Mr Carreyó stated in his letter of 17 April 2010 that Panama would commence proceedings within a reasonable time if Italy did not pay damages. Italy did not pay damages. Yet nothing was done for at least five years and eight months. Mr President, Members of the Tribunal, this is a situation in which a respondent State could reasonably have believed that the claim would no longer be pursued.

Finally, Mr President, Members of the Tribunal, I will now reply to Mr Carreyó's submissions late yesterday afternoon concerning the Request of the Republic of Panama for a ruling concerning the scope of the subject matter based on the Preliminary Objections filed by Italy.

On this issue I would like to begin by highlighting the confusing way in which Panama has pursued this Request during this hearing. The Tribunal, in order to accommodate Panama's concerns, granted both Parties an extra 30 minutes in which to address this issue during their first round of oral pleadings. However, it was not until the end of his submissions yesterday that Mr Carreyó belatedly returned to this issue. What puzzled us was that by then Mr Carreyó had already responded to all of Italy's Preliminary Objections. This included extensive responses to the same Preliminary Objections to which Panama had previously said that it had no time to respond. In fact, the fullness of Mr Carreyó's responses to all of Italy's Preliminary Objections served to prove the very point that I had made before you on the first morning of this hearing.

You may recall, Mr President, that on Tuesday I submitted that Italy made all of its preliminary objections in a timely manner and that therefore the equality of arms principle has been fully respected. The equality of arms principle has been fully respected because, first, Panama has had ample time to prepare its responses to these objections and, secondly, has had the opportunity to present those responses during this hearing, an opportunity of which it duly availed itself yesterday.

This may explain the brief nature of Mr Carreyó's submissions on this issue. In those submissions, Mr Carreyó basically restated that in his view six of Italy's preliminary objections were newly made in Italy's second written pleading. There was nothing new and Mr Carreyó failed to respond to the submissions that I made on the first morning of this hearing. I therefore do not propose to go through each of these allegedly new objections. I partially addressed them both on Tuesday and earlier on a number of key points.

Instead, I respectfully ask the Tribunal simply to refer back to earlier submissions where I explained that these alleged new objections were not new objections at all. Rather, each was a development or clarification of objections that Italy had already clearly made in its first written pleading. Such developments and clarifications are of course one of the most obvious rationales for having a second round of written pleadings.

Perhaps the only new point that Mr Carreyó raised yesterday, albeit in a vague and undeveloped manner, was his complaint that although Panama had clearly now had an opportunity to respond to all of Italy's arguments, it had not had a chance to respond *in writing* to some of those arguments. Mr Carreyó was not able to provide the Tribunal with any authority establishing the equality of arms principle and the reason why the arguments should be put forward both during oral proceedings and in writing. That is unsurprising. There is no reason

in principle why a party must be afforded two opportunities to make the same point. All that it would do is to unnecessarily prolong the proceedings.

If Mr Carreyó is seeking an opportunity to file further written submissions following this hearing, it is again difficult to understand what purpose would be served by it.

Mr President, I therefore respectfully request the Tribunal to answer the Request of the Republic of Panama for a ruling concerning the scope of the subject matter based on the Preliminary Objections filed by Italy by confirming that all of Italy's preliminary objections are admissible.

Mr President, this concludes my presentation. I kindly ask you to invite the Agent of Italy, Ms Gabriella Palmieri, to take the floor and present the final conclusions and submissions by Italy. I thank you for your attention, Mr President.

**THE PRESIDENT:** Thank you, Mr Tanzi.

I understand that this was the last statement made by Italy during this hearing. Article 75, paragraph 2, of the Rules of the Tribunal provides that, at the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read the party's final submissions. The written text of these submissions, signed by the agent, shall be communicated to the Tribunal and a copy of it shall be transmitted to the other party.

I now invite the Agent of Italy, Ms Palmieri, to take the floor to present the final submissions of Italy.

EXPOSÉ DE MME PALMIERI
AGENT DE L'ITALIE
[TIDM/PV.16/A25/5/Rev.1, p. 13–14]

**MME PALMIERI :** Merci, Monsieur le Président. Je donne lecture des conclusions finales de la République d'Italie, d'abord en français, puis en anglais.

Sur la base des motifs indiqués dans les exceptions préliminaires du 10 mars 2016, dans les observations et conclusions écrites en réponse aux observations et conclusions du Panama du 8 juillet 2016 et développées ensuite au cours de ces plaidoiries, la République d'Italie prie l'éminent Tribunal international du droit de la mer de dire et de juger que :

- le Tribunal n'a pas compétence à l'égard de la demande présentée par le Panama dans sa requête déposée auprès du Tribunal le 17 décembre 2015 ;

et/ou

- l'action présentée par le Panama contre l'Italie est irrecevable.

(*Continued in English*) For the reasons given in the Preliminary Objections dated 10 March 2016, in its Written Observations and Submissions in Reply to Panama's Observations and Submissions of 8 July 2016, and in the course of the present hearing, Italy requests that the International Tribunal for the Law of the Sea adjudge and declare that

The Tribunal lacks jurisdiction with regard to the claim submitted by Panama in its Application filed with the Tribunal on 17 December 2015

and/or that

The claim brought by Panama against Italy in the instant case is inadmissible.

*(Poursuit en français)* Ainsi, Monsieur le Président, Madame et Messieurs les juges se termine mon intervention. Je vous prie de bien accepter les plus sincères remerciements de la délégation italienne et mes remerciements personnels. Je désire également remercier le Greffe du Tribunal, tout le personnel du Tribunal et les interprètes pour leur amabilité et leur précieuse et efficace collaboration.

Nos très cordiaux remerciements vont aussi à la délégation de la République du Panama. Merci pour votre attention.

**THE PRESIDENT:** Thank you, Ms Palmieri.

This concludes the oral arguments presented by Italy and this morning's sitting. We will continue the hearing in the afternoon to hear the second round of arguments of Panama from 3 p.m. The meeting is adjourned.

(*The sitting closed at 10.50 a.m.*)

M/V "NORSTAR"

**PUBLIC SITTING HELD ON 22 SEPTEMBER 2016, 3 P.M.**

**Tribunal**

*Present:* *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

**For Panama:** [See sitting of 20 September 2016, 10 a.m.]

**For Italy:** [See sitting of 20 September 2016, 10 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 22 SEPTEMBRE 2016, 15 HEURES**

**Tribunal**

*Présents :* M. GOLITSYN, *Président* ; M. BOUGUETAIA, *Vice-Président* ; MM. CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

**Pour le Panama :** [Voir l'audience du 20 septembre 2016, 10 h 00]

**Pour l'Italie :** [Voir l'audience du 20 septembre 2016, 10 h 00]

**THE PRESIDENT:** Good afternoon. We will now hear the second round of oral arguments presented by Panama. I give the floor to Mr Olrik von der Wense.

You have the floor, sir.

**Second round: Panama**

STATEMENT OF MR VON DER WENSE
COUNSEL OF PANAMA
[ITLOS/PV.16/C25/6/Rev.1, p. 1–13]

**MR VON DER WENSE:** Mr President, Members of the Tribunal, it is a particular honour to appear today before this Tribunal and to represent the Republic of Panama.

After addressing in detail the legal matters important for this stage of the proceedings over the past few days, I would like to focus on the aspects I believe to be most important and draw your attention to these arguments before presenting the final submissions of Panama for this hearing.

I would like to begin with the question of whether the Tribunal has jurisdiction over this case. In this regard, Italy objects to the idea that a dispute exists.

This objection, however, does not comply with the existing case law, which needs to be considered.

In the *Southern Bluefin Tuna* Cases, the Tribunal stated – as the International Court of Justice before – that "a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of the interests" ... and "[i]t must be shown that the claim of one party is positively opposed by the other".[1]

Furthermore, in the *Land and Maritime Boundary* case, the International Court of Justice asserted

> the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference.[2]

Moreover, the International Court of Justice stated in the *CERD* case, that "[t]he existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".[3]

Based on these rulings, there can be no doubt that a dispute exists in the present case.

In the letter of 3/6 August 2004,[4] Panama presented its interpretation of the law at length, arguing that the seizure of the vessel was a wrongful act. Panama pointed out that the illegal seizure resulted in substantial damages, which grew daily. The vessel had been damaged due to the long seizure and could no longer be used. Panama therefore requested Italy to indicate whether it intended to pay the damages caused by this illegal procedure. At that time Panama expressed its willingness to pursue this case before the Tribunal in accordance with article 287 of the Convention if the terms of a settlement could not be reached.

Given these circumstances, it would have been reasonable to expect a response from Italy. Based on Italy's failure to do so, however, Italy has shown its negative stance by inference.

The letter dated 2 December 2000[5] authorizing Mr Carreyó to act on behalf of Panama and the *M/V Norstar* covered all acts referring to the seizure of the ship, particularly the negotiation of claims for damages. Thus, this letter cannot be interpreted as relating to the

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[1] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, para. 44.
[2] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, para. 89.
[3] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, para. 30.
[4] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[5] Preliminary Objections of Italy of 10 March 2016, Annex L.

execution of prompt release proceedings only. For Italy to now object that the 2004 communication from Mr Carreyó cannot be attributed to Panama as he did not possess representative power is, therefore, not justified. This is obviously an illegitimate attempt to explain why Italy had not replied to the letters of Panama at all.

As a result, Italy cannot of course successfully argue that Mr Carreyó was only a "private lawyer" using his "personal headed paper". In fact, the Rules of the Tribunal do not prohibit a party being represented by a "private lawyer". The letterhead used by Mr Carreyó merely displayed the simple fact that he was the correspondent. Mr Carreyó acted neither as a public servant nor as a member of the diplomatic corps of Panama, but simply as its representative.

It also needs to be stressed that a correspondence does not need to include a written representative power for representation to be effective. An indication of the person or State who is represented is sufficient. Also, the relevant authorization can be given with retroactive effect by the State represented.

In the present case, with note verbale 2227 of 31 August 2004,[6] Panama expressly confirmed to Italy that its Ministry of Foreign Affairs had certified that lawyer Nelson Carreyó was empowered to act as the representative of the Republic of Panama before the International Tribunal for the Law of the Sea.

With note verbale 97 of 7 January 2005,[7] Panama again confirmed the representative power of Mr Carreyó by referring to him without any restriction as "Legal Representative of the Republic of Panama and of the interests of the owners of the motor vessel *Norstar*".

This note verbale does not contain any reference to prompt release proceedings. Thus, the authorization could not have been misunderstood as being restricted to prompt release proceedings.

Italy was therefore notified multiple times that Mr Carreyó was entitled to represent Panama in the present case and, in particular, was authorized to send the previously mentioned letter of 3/6 August 2004,[8] as well as other communications regarding this matter.

Ultimately, Italy did not object to the alleged lack of representative power until its Reply of 8 July 2016. With this behaviour, Italy has violated the principle of good faith. Therefore, Italy's argument that Mr Carreyó did not provide evidence of the mandate should not prevail, but rather should be dismissed.

Italy also argues that Mr Carreyó was acting in a private capacity, since his letters were certified under the Hague Convention of 5 October 1961. According to Italy, such a certificate or apostille may not relate to the content of the document nor may it ground the representative power of Mr Carreyó. This line of reasoning, however, misses the point since, according to the Rules of the Tribunal, whether the apostille fulfilled the requirements of the Hague Convention or not is of no relevance. Moreover, since Italy did not previously object to either the signature or the representative power of Mr Carreyó, the apostille is of no significance. The certification provided to Italy proved the authenticity of the signature and thus the identity of the correspondent. In this context, it must be noted that by initiating proceedings Panama was not pursuing diplomatic action or protection but a juridical decision.

Italy's objection to the representative power of the agent of Panama further contradicts the principle of good faith, since Italy expressively confirmed in note verbale 332 dated 25 January 2005[9] the receipt of Panama's note verbale 97 dated 7 January 2005[10] in which Mr Carreyó was expressly named representative of the Republic of Panama. Since this

[6] Preliminary Objections of Italy of 10 March 2016, Annex M.
[7] Preliminary Objections of Italy of 10 March 2016, Annex N.
[8] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[9] Observations and Submissions of Panama of 5 May 2016, Annex 5.
[10] Preliminary Objections of Italy of 10 March 2016, Annex N.

confirmation refutes the Italian argumentation of the alleged missing representative power, the question why Italy concealed this piece of evidence is self-explanatory.

In any event, the existence of a dispute cannot be denied even if the representative power of Mr Carreyó were in question.

In conclusion of that, despite Italy's protests to the contrary, a dispute most certainly exists.

Mr President, Members of the Tribunal, I will now address the next question pertaining to the jurisdiction of the Tribunal, which is based on whether the requirement of exchanging views, in accordance with article 283, has been met.

As previously stated, Panama has conveyed its position several times and has requested Italy to enter into negotiations particularly with respect to compensation for damages. In its letter dated 3 August 2004[11] Panama expressly referred to article 283.

I would like to emphasize the remarkable failure by Italy to refer to this letter. Why did Italy conceal this important message? The answer to this question seems obvious, since the letter clearly contradicts Italy's thesis that Panama did not meet the requirements of article 283.

This was also an attempt to conceal the fact that Italy has simply refused to enter into negotiations. With this refusal, the requirements of article 283 can be considered as met. Along these lines, Panama refers to the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor.*[12] In this case the Tribunal stated that "the obligation to "proceed expeditiously to an exchange of views" applies equally to both parties to a dispute"[13] and that "a State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention on the Law of the Sea when it concludes that the possibilities of settlement have been exhausted".[14]

Italy alleges that the Panamanian attempts at dialogue have not been "appropriate", "genuine" or "meaningful". The fact that Italy refuses to specify these objections reflects on its own confusion of this issue, however.

Furthermore, Italy has neglected its duty to proceed with an exchange of views and, by doing so, has also prevented Panama from fulfilling its corresponding duty to proceed appropriately.

Based on Italy's refusal, the possibilities of a settlement must therefore be considered exhausted and thus the requirements of article 283, paragraph 1, of the Convention on the Law of the Sea have been met.

Mr President, Members of the Tribunal, I will now move on to the last point pertaining to the jurisdiction of the Tribunal, being whether the Tribunal has jurisdiction *ratione personae* or, in other words, whether Italy is the proper respondent in this case.

Italy is pleading that it did not actually carry out the seizure of the vessel but that the seizure was carried out by Spain and that Italy is therefore not the proper respondent in this case.

However, Italy can of course not succeed with this argument. After all, Spain itself had no interest in the seizure of the vessel. Without the order of Italy, Spain would never have carried out the seizure. Italy therefore merely used Spain as its executive body.

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[11] Observations and Submissions of Panama of 5 May 2016, Annex 3.

[12] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10.

[13] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 38.

[14] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 47.

As already the title of Annex D,[15] "International Letters Rogatory of the Tribunal of Savona to the Spanish Authorities, 11 August 1998" reveals, Italy's order was an international request for judicial assistance made by Italy to Spain. Italy is therefore responsible for the letters rogatory being issued and, therefore, is also responsible for the commission of the actual offence. Spain, as the State providing judicial assistance, was neither obligated nor expected to investigate whether an offence existed or whether the seizure was justified. Spain was merely responsible for the manner and methods of the seizure, that is to say, for example, the careful attention of the integrity of the ship and its crew during the seizure. This definition of mutual accountability is immanent in the system of mutual assistance.

This distinction in accountability between the State seeking and the State providing judicial assistance also entails that if a criminal charge were not ratified, the State seeking judicial assistance would be liable for paying damages, not the State providing judicial assistance. Any other conclusion would cause States to be unwilling to provide judicial assistance at all.

Italy's argument that, according to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ASR), Italy is not responsible in this case, is not correct. Italy argues that when drafting article 6, the International Law Commission was referring to the *Xhavara* case[16] where the European Court of Human Rights found Italy responsible for the sinking of an Albanian ship in the course of an investigation at sea by Italian authorities even though this investigation had been requested by Albania under the Convention between Italy and Albania of 1997. However, this case is not comparable with the present case. In the *Xhavara* case Italy did not act in the context of mutual assistance, but rather based on a bilateral agreement authorizing the Italian navy to board and search Albanian boats. Thus, Italy's action was made in execution of its own decision and not a mere execution of mutual assistance. The *Xhavara* case is also different from the present case since during the execution of the seizure several crew members were killed.

In the present case, it was not Spain as the executing State but Italy who decided and ordered the seizure of the *M/V Norstar*; Spain merely provided judicial assistance. Italy is therefore responsible for the consequence of its wrongful order.

Italy has suggested during the first round of the hearing that Spain made clear that its assistance will only be given when the alleged offence of the vessel is also a breach of Spanish law.

However, this suggestion redounds upon Italy itself, because it is obvious that this implies that Italy has pretended that there has been a breach of Spanish law. It is undisputed, however, that there has been no breach of law at all, neither of Italian law nor of Spanish law. Thus, the responsibility and guilt of Italy is to be assessed even more evident.

Furthermore, Italy has pointed out during the first round of the hearings that Spain was not obliged to execute the seizure. This, however, is of no relevance for this case. Spain acted on the basis of mutual judicial assistance. Doing this, Spain obviously relied in a reasonable manner on the information they had received from Italy. Thus Italy bears full responsibility for its action.

Italy's responsibility is also proven by the communication between Italy and Spain. This communication not only reveals that Italy was fully responsible for the seizure but also that both States, Italy and Spain, assessed the responsibility of Italy accordingly.

Attached to the letter of Italy dated 18 March 2003[17] Italy has submitted the judgment of the Court of Savona to Spain and requested to execute the release order. Thus Italy itself assumed that a request of Italy was necessary to release the vessel.

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[15] Preliminary Objections of 10 March 2016, Annex D.

[16] *Xhavara and Others* v. *Italy and Albania*, Application No. 39473/98, ECHR, Judgment of 11 January 2001.

[17] Observations and Submissions of the Italian Republic of 8 July 2016, Annex J.

STATEMENT OF MR VON DER WENSE – 22 September 2016, p.m.

By letter dated 6 September 2006 Spain asked Italy to authorize the demolition of the vessel. This demonstrates however that Spain also assumed that the vessel was still at order of Italy.

Thereby both States revealed that only Italy was responsible for the decision to seize the vessel and also had sole power to decide on the subsequent fate of the vessel.
Italy contests that the Court of Appeal of Genoa on 31 October 2006 answered, on request of Spain, not to have jurisdiction and "there is no necessity to decide".

The grounds of this verdict however read as follows:

> Being of the opinion that this Court confirmed entirely the first instance judgment ordering the release from seizure and restitution of the said m/v "NORSTAR" to the company INTERMARINE A.S.;
>
> Having noted that this judgment obviously has to be enforced and there is no decision to be taken given that the destiny of the vessel, after having been given back to the party entitled, does not fall within the competence of this Court (and in any case, given that the first instance judgment was confirmed, any issue on the enforcement of the said judgment would be the competence of the Court of Savona pursuant to Article 665 of the Code of criminal procedure).[18]

The Court of Appeal of Genoa did not deny the necessity of a decision due to the alleged jurisdiction of Spain. On the contrary, the Court's decision was based on a prior decision of the Court, thereby implicitly affirming the competence of the Italian jurisdiction. Thereby the Court of Appeal of Genoa has confirmed that Italy had the competence and obligation to decide upon the fate of the vessel until its restitution to the owner.

Should the Tribunal not follow our argumentation, it should be considered in the alternative that, even if Spain would have conducted a wrongful act itself, the responsibility of Italy's actions were not affected. In this case Italy and Spain would be independently liable to Panama for the damage incurred, and Panama was entitled to make a claim to Spain as well as to Italy. Therefore Italy would be the proper respondent also in the case of a wrongful act of Spain. Therefore the question whether Spain conducted a wrongful act is of no relevance for this case.

This also revokes the basis of Italy's further argument, which is that Panama's claim would involve the ascertainment of rights and obligations of a third State, in its absence from the present proceedings and without its consent. As stated before, Italy is responsible for its actions, since Italy based its request for judicial assistance on an alleged offence which was not actually committed. The claim is, therefore, not about the rights or obligations of Spain, but only about the obligations of Italy. This also applies under hypothetical consideration of Spain and Italy being jointly and severally liable for the damage incurred. In that case also the present case would not affect the interest of Spain. In the hypothetical event of a claim of Panama against Spain, the present case would in no way prejudice the legal situation of Spain in that case.

In conclusion, Italy is the proper respondent in this case. The fact that the seizure was carried out by Spain does not prevent the Tribunal from having jurisdiction over this case.

Mr President, Members of the Tribunal, I will now move on to the question of whether the claim is admissible.

Italy argued that the claim is one of diplomatic protection, and that Panama allegedly did not exhaust local remedies. This reasoning cannot be accepted. In the *M/V "Virginia G"*

[18] Preliminary Objections of Italy of 10 March 2016, Annex O.

*Case* the Tribunal declared that the exhaustion of local remedies rule does not apply where the claimant State is directly injured by the wrongful act of another State.

In that case, the claimant had challenged the violation of its freedom of navigation and other internationally lawful uses of the seas in the exclusive economic zone of a coastal State, as well as the contention that the coastal State had enforced its laws in conformity with article 73 of the Convention. In response, the Tribunal reiterated the rights that belonged to the claimant State under the Convention and that their violation thus amounted to direct injury to the claimant State. Given the nature of the rights which were claimed to be violated, the Tribunal found that the claim as a whole was brought by the claimant on the basis of an injury to itself. The Court dismissed the fact that the claimant also demanded compensation for damages on behalf of the owner and the crew, none of which were of the same nationality as the claimant.

The decision in the *M/V "Virginia G" Case*[19] applies to the present case. Panama is *inter alia* claiming the violation of its freedom of navigation. The claim as a whole is therefore brought on the basis of an injury to Panama itself. This also derives from the fact that these injuries of Panama itself constitute the first Request preceding the claim for damages. I quote the Application:

> Accordingly, Applicant requests the Tribunal to adjudge and declare that:
> 1. Respondent has violated articles 33, 73 (3) and (4), 87, 111, 226 and 300 of the Convention;
> 2. Applicant is entitled to damages as proven in the case on the merits, ....[20]

The fact that Panama is also demanding compensation for damages suffered by the vessel's owner therefore should not impact the Tribunal's decision here.

In conclusion, this is not a case of diplomatic protection and, consequently, the local remedies rule is not applicable.

In this context, Italy's further objection to Panama's assertion of the violation of its freedom of navigation and other rights asserted is not convincing. Italy argues that Panama has not established, at least *prima facie*, an adequate link between the facts of the present case and the provisions of the Convention on the Law of the Sea referred to with respect to the seizure of the *M/V Norstar* in the Bay of Palma de Mallorca, that is, in Spanish internal waters. However, it is not important where the seizure took place, since Italy accused Panama of having committed tax offences by supplying oil to mega yachts on the high seas. Italy intended to restrict Panama's freedom of navigation and had the seizure carried out in order to assert this violation. Panama has in fact shown that Italy has violated its rights, particularly its freedom of navigation, by applying its national customs laws on the high seas.

Even if one were to presume that the violation was not primarily one against Panama's rights but rather against the rights of an individual, namely the owner of the vessel, this would not affect the applicability of the local remedies rule. In the *M/V "SAIGA" Case*[21] the Tribunal explained that, even if some of the claims made in respect of natural or juridical persons did not arise from direct violations of the rights of the claimant State, the question remains whether the rule that local remedies must be exhausted still applies.

A prerequisite for the application of this rule is that there must be a jurisdictional connection between the person suffering damage and the State responsible for the wrongful act which caused the damage.[22] The Tribunal further explained:

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[19] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4.
[20] Application of the Republic of Panama of 16 November 2015, p. 4.
[21] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10.
[22] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 99.

> In the opinion of the Tribunal, whether there was a necessary jurisdictional connection between Guinea and the natural or juridical persons in respect of whom Saint Vincent and the Grenadines made claims must be determined … on the question whether Guinea's application of its customs laws in a customs radius was permitted under the Convention. If the Tribunal were to decide that Guinea was entitled to apply its customs laws in its customs radius, the activities of the Saiga could be deemed to have been within Guinea's jurisdiction. If, on the other hand, Guinea's application of its customs laws in its customs radius were found to be contrary to the Convention, it would follow that no jurisdictional connection existed.[23]

As a result, the Tribunal concluded that "by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention"[24] and therefore that "there was no jurisdictional connection between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims. Accordingly, on this ground also, the rule that local remedies must be exhausted does not apply in the present case."[25]

In this case, as the Court of Appeal of Genoa determined, Italy did not apply its customs laws or its criminal law in its actual internal waters but on the high seas. According to the ruling in the *M/V "SAIGA" Case*, this does not constitute a jurisdictional connection, further indicating that the local remedies rule does not apply.

In his statement of this morning Professor Tanzi argued that the reference to the *M/V "SAIGA" Case* is not admissible since that case referred to prompt release proceedings. This argumentation must be rejected, however, since the Tribunal was confronted with two cases concerning the *M/V Saiga*. The prompt release proceedings were subject to case number one. Panama refers, however, to Case No. 2, which did not relate to prompt release proceedings.

Professor Tanzi has argued this morning that Panama's claim is concerned essentially with private law issues, issues which have been dealt with by the Italian national courts. Italy is therefore arguing that Panama's claim is not justiciable in terms of public international law. Panama does not deny the fact that the *Norstar* was the subject of cases before national courts. However, Panama contends that there can be private law issues which have preceded this case at the Tribunal, and that the task of the Tribunal is to identify and adjudicate on public international law issues.

Just because there were other issues involving the *Norstar,* that does not impede the Tribunal from having jurisdiction in this case. This approach, suggested by Italy, would limit the competence of the Tribunal drastically, since it would exclude all cases which have other, private aspects as well. There is extensive case law supporting Panama's view.

A very important Advisory Opinion concerning the *Conditions of Admission of a State to Membership in the United Nations* made it even more clear. The ICJ said:

> The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. The Court is not concerned with the motives which may have inspired this

[23] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 100.
[24] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 136.
[25] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 100.

> request … It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it.[26]

So even when there are other motives behind the request, Panama has invited the Tribunal to rule on aspects concerning UNCLOS.

In the *Teheran Hostages* case the ICJ maintained that to dismiss a case because the legal aspect is only one element of a political dispute would be to impose a "far-reaching and unwarranted restriction upon the role of the Court in the peaceful settlement of disputes".[27]

In the *Case concerning Military and Paramilitary Activities in and against Nicaragua* the US produced an argument claiming that Nicaragua's allegations were "but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region".[28]

The Court rejected the argument, holding that it should not decline to take cognizance of the legal aspects of a dispute merely because the dispute had other aspects as well.[29] In that respect, the [Tribunal] should also declare that it has jurisdiction by focusing on the public international issues, despite other private law aspects preceding this case.

Mr President, Members of the Tribunal, as my last point on the matter of admissibility of the claim, I would like to address Italy's arguments regarding acquiescence, extinctive prescription and estoppel.

Before doing so, however, I would like to point out strongly that Panama argues that the examination of this principle is a matter of the merits only. Thus, the fact that we are discussing these objections must not be deemed as prejudicial to the question of whether the principles are a matter of admissibility or of the merits.

The following applies to all three of these principles: contrary to national law, international law does not provide deadlines for a claimant to assert his claim. The amount of time which must have passed for acquiescence, extinctive prescription or estoppel to apply is therefore not set, but is instead determined by the courts, based on the specific circumstances of the case.

Italy's opinion that the statute of limitation of its respective national laws should serve as a guideline is therefore incorrect. This is not a national case, but an international dispute between States.

Further, the case law of the Tribunal and the International Court of Justice does not substantiate the belief that the statute of limitation in national laws is applicable or should serve as a guideline for an international ruling. On the contrary, in the *Certain Phosphate Lands in Nauru* case,[30] the International Court of Justice considered the action as admissible even though nearly 20 years had passed before the action was filed and despite the fact that the Parties had not communicated for almost nine years.

I would now like to address the principle of acquiescence.

Acquiescence requires the claimant to have failed to assert its claims in circumstances that would have required action. This includes circumstances where the respondent State could legitimately expect that the claim would no longer be asserted.

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[26] *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, I.C.J. Reports 1948,* p. 57, <http://www.icj-cij.org/docket/files/3/1821.pdf> accessed 30 May 2015 [61].

[27] Rebecca Wallace and Olga Martin-Ortega, *International Law* (6th ed., Sweet and Maxwell 2009), p. 355.

[28] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392.

[29] Eduardo Valencia-Ospina, The Role of the International Court of Justice in the Pact of Bogotá, in C.A. Armas Barea et al. (ed.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Kluwer Law International 2000), p. 327.

[30] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240.

Whether this requirement has been met in this case must be established by the Tribunal based on the specific circumstances of the case.

It is our opinion that the following points should be considered: (1) Panama has sent Italy numerous letters claiming the existence of a wrongful act. Panama further made it clear in its communication that it had suffered substantial damages and that Italy is obligated to pay damages. Panama further announced that proceedings would be initiated before the Tribunal if the parties were unable to reach a settlement. After the Court of Savona lifted the arrest of the vessel, Panama declared, in its letter of 3 August 2004,[31] that Italy was obligated to pay damages and that if no agreement was reached, Panama would initiate proceedings before the Tribunal. In its letter dated 17 April 2010,[32] Panama again declared that if Italy was not willing to pay damages, Panama would apply to the Tribunal. (2) During all of this time, Italy did not return the vessel to the owner despite the ruling of the Court of Savona and despite the final and resolute determination of the Court of Genoa that Italy was obligated to release the vessel. Thus, Italy knew the case was not yet closed.

In its note verbale No. 332 dated 25 January 2005,[33] Italy disclosed having received the Panamanian note verbale No 97 dated 7 January 2005[34] saying that the Italian Embassy would forward the response to the Ministry of Foreign Affairs of Panama after receiving it from the Italian Foreign Ministry. This response, however, never came.

After seizing the vessel on 11 August 1998 and after the owners' application for a release of the vessel was refused by the authorities of Italy in January 1999, the Italian courts took until October 2005 to effectively dismiss all criminal charges.

So in summary, these circumstances show: (1) Panama announced several times and emphatically that if Italy did not compensate the damages, it would initiate proceedings before the Tribunal; (2) Italy has been aware that the matter was in no way closed; (3) Italy delayed settling the dispute by either failing to respond or by promising a response which never came; (4) the Italian courts took a total of seven years since the vessel was seized in 1998 to effectively conclude the case.

Since it was therefore obvious to Italy that Panama would not forego seeking damages but would instead assert these before the Tribunal, the argument that action being filed in 2015 could not have been anticipated is misleading, particularly since Italy itself delayed the settlement of the dispute by failing to respond to Panama's letter while promising a response which was never fulfilled.

Based on all of this, the present case does not meet the requirements for acquiescence.

I will now address the principle of extinctive prescription. Again, there is no specific time-limit within which a claim is to be asserted. The period is to be determined by the circumstances of the case.

At this point I refer to my previous remarks, as they also apply to the principle of acquiescence.

Italy has asserted that a claim may be barred in circumstances when its late pursuit would create unjust prejudice to the respondent. In Panama's calculation, damages suffered as a consequence of the allegedly illegal conduct of Italy have only increased due to the extended lapse of time. If Panama had been able to pursue its claim in a timely fashion, the prejudice that would derive to Italy would have been significantly less.

However, Italy itself is responsible for the accrual of damages that have increased over time.

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[31] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[32] Preliminary Objections of Italy of 10 March 2016, Annex P.
[33] Observations and Submissions of Panama of 5 May 2016, Annex 5.
[34] Preliminary Objections of Italy of 10 March 2016, Annex N.

Panama has repeatedly pointed out to Italy that the damages were increasing. I refer to the letters dated 15 August 2001,[35] 3 August 2004,[36] and 17 April 2010,[37] in which Panama *inter alia* stated, that the damages, roughly calculated, amounted to no less than 6 million dollars and were increasing day by day, due to inactivity of the ship and its continuous degradation.

Thus, Italy has been aware of the fact that the damages have been continually increasing. However, since Italy has preferred not to respond to Panama's compensation claims, it can no longer maintain that it is now suffering from unjust prejudice.

Regarding the principle of extinctive prescription, it follows that the circumstances of the case do not lead to the claim being inadmissible on these grounds.

Finally, we come to our last point: the principle of estoppel.

International estoppel requires the fulfilment of three elements. First, the statement creating the estoppel must be clear and unambiguous; second, the statement must be voluntary, unconditional, and authorized; and finally, there must be good-faith reliance upon the representation of one party by the other party either to the detriment of the relying party or to the advantage of the party making the representation.

In the present case, none of these conditions apply.

Firstly, Panama has made no statement that compensation for damages would not be claimed from Italy. On the contrary, Panama has consistently stated that it would claim compensation before the Tribunal if Italy does not agree to pay damages beforehand.

Secondly, Italy has not stated in any way why it trusted Panama to not claim compensation for the damages.

Thirdly, Italy has not demonstrated that it has changed its position to its detriment or to the advantage of Panama on the basis of this trust.

Moreover, Panama's notes verbales of 31 August 2004[38] and of 7 January 2005[39] cannot – as Italy contends – be interpreted as a clear statement that Panama would submit prompt release proceedings but not a compensation claim for damages. As I have already pointed out, Panama has not only written these two notes verbales to which Italy refers, but has also expressively and clearly stated, in the letters of 3 August 2004[40] and of 17 April 2010,[41] that unless Italy agreed to pay compensation for damages procedures would be initiated before the Tribunal.

Taking the entire correspondence from Panama to Italy into consideration, it is clear that Panama has in no way given the impression that it would waive its compensation claim for damages or neglect to initiate proceedings before the Tribunal concerning this matter.

It thus follows that the conditions of the principle of estoppel are not met.

This brings me finally to the end of my remarks with the overall conclusion that all of Italy's objections are unfounded and the Tribunal has jurisdiction over the case and the claim is admissible.

Mr President, Members of the Tribunal, thank you very much for your attention.

I would now like to ask you to give the floor to Mr Hartmut von Brevern.

**THE PRESIDENT:** Thank you, Mr von der Wense.

I now give the floor to Mr von Brevern.

[35] Preliminary Objections of Italy of 10 March 2016, Annex F.
[36] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[37] Preliminary Objections of Italy of 10 March 2016, Annex P.
[38] Preliminary Objections of Italy of 10 March 2016, Annex M.
[39] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[40] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[41] Preliminary Objections of Italy of 10 March 2016, Annex P.

STATEMENT OF MR VON BREVERN
COUNSEL OF PANAMA
[ITLOS/PV.16/C25/6/Rev.1, p. 14–17]

**MR VON BREVERN:** Mr President, distinguished members of the Tribunal, it is a special honour to appear before this Tribunal again after 19 years when I was privileged to participate in the very first case, *M/V "SAIGA"*, of which you and I have best memories. I am proud that the *M/V "SAIGA" Case* is quoted in many, many books. I have to thank Panama for my taking part in its representation here.

In my presentation I will address the question whether Panama is in any form time-barred from having assessed its claim on the merits. This question has been discussed already with regard to the principles of acquiescence, extinctive prescription and estoppel by both Parties, as we have just heard.

However, in the following I want to stipulate in short (at the end of these three days it is good to have a short intervention) certain aspects of the application of these principles to our case.

Italy has argued that due to the lapse of 18 years since the seizure of the vessel *Norstar* and Panama's contradictory attitude throughout that time, Panama's claim is time-barred and [Panama is] estopped from validly bringing this case to the International Tribunal for the Law of the Sea. According to Italy, the principles of acquiescence, extinctive prescription and estoppel apply, rendering the claim by Panama inadmissible.

However, Italy failed to substantiate their legal basis and the application of their prerequisites to this specific case. Instead, Italy describes those principles abstractly simply as representing the fundamental purpose of ensuring "the guarantee, the certainty of rights and the predictability of their exercise".

Even though the application of the above principles in international law might be accepted generally, which, however, is not the case, just to mention the European Convention on Human Rights, it is important to point out that since there are no fixed rules based on prerequisites, the criteria given by Italy as to "the guarantee, the certainty of rights and the predictability of their exercise" are of no relevance on a stand-alone basis.

Also, contrary to the attempt of Italy, it is not legitimate to draw any conclusions from national statutory law. According to McGibbon the development of estoppel from a municipal into an international concept has broadened the principle so greatly that the analogy with municipal estoppel is misleading.[1]

There is no procedural limitation of action under international law. Nor is a claim barred or estopped after a particular lapse of time, say 20 or 30 years.

Instead it is also necessary to establish both the behaviour of both parties and the effect of the alleged time lapse on the party which invokes the above principles. According to Wagner[2] this also can be described as the "good faith basis" of estoppel or as McGibbon has underlined with regard to estoppel "the emphasis ... upon an insistence on good faith and equitable conduct coupled with a lively awareness of the dangers of adopting inconsistent attitudes at different times".[3]

Any use of extinctive prescription and related provisions should aim to find a fair and just result. To achieve this, the relevant actions of the parties involved have to be considered in order to determine why and how this dispute arose.

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[1] MacGibbon, *Estoppel in International Law*, 7 INT'L AND COMp. L.Q. (1958), p. 468, at p. 477.
[2] Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, California Law Review, Vol. 74 (1986), p. 1777, at p. 1778.
[3] MacGibbon, *Estoppel in International Law*, 7 INT'L AND COMp. L.Q. (1958), p. 468, at p. 487.

Therefore, it is inadmissible for Italy to merely rely on the lapse of time and assert that because 18 years had elapsed from the seizure of the *Norstar* until the institution of proceedings, time bar, acquiescence, and estoppel do automatically apply. This approach does not consider that the applicability of these principles is dependent on the particular circumstances of this case. "Given the particular circumstances of this case" is the key to deciding the case.

In specification of the circumstances of the case it is necessary to assess the timeline and behaviour of the parties involved.

Therefore, I would like to address the behaviour and actions of the Parties since the vessel was seized, firstly with regard to Panama.

The seizure of the vessel took place in 1998.

The decision of the Court of Savona stating that this was illegal was made in 2003.

The Appeal Court of Genoa did not confirm the judgment of the Court of Savona until 2005.

However, the Appeal Court of Genoa was unable to issue its reasons for the verdict in due time. These were issued and subsequently transmitted to Panama only years later, not before 2009. Imagine: the decision was in 2005 and the reasons came in 2009! The grounds of the verdict however are of course relevant for the decision of Panama how to pursue its claims.

Thus another time-consuming aspect for Panama was the question where the claim should be registered, be it in an Italian civil court or with ITLOS. This decision included the evaluation of the economic consequences of the illegal arrest, the difficulties in determining where to register the claim within Italy's jurisdiction, the numerous meetings needed between the Government of Panama, the Tribunal, and various parties involved, and the need for Panama to ratify the jurisdiction of the Tribunal.

The same applies to the time-consuming efforts to get a new power of attorney for Mr Carreyó. The decision not to pursue claims before the Italian courts was made in due course to receiving the grounds of the verdict of the Court of Appeal of Genoa. This decision followed the recommendations of experts of Italian law and Italian litigation procedures. Furthermore the decision was made in the awareness of the own experience in regard to the fact that the Appeal Court in Genoa was not able to deliver the grounds for its verdict within reasonable time and also in awareness of many cases relating to the European Convention on Human Rights, due to the extreme long duration of court cases in Italy. Taking these circumstances into account, the decision against pursuing the claims before the Italian courts must be considered reasonable.

Subsequently Panama was confronted with the question deriving from the fact that when ratifying UNCLOS Panama had not opted for ITLOS. Accordingly, it was necessary to establish the procedures which were necessary to lay the foundation for bringing the case to ITLOS.

The time-consuming clearance with the concerned parties and institutions including ITLOS, as stated before, started in 2010. As a result of that clearance, a declaration of the Government of Panama was submitted in 2015 to the United Nations to opt for the Tribunal with respect to the case of the *M/V Norstar*.

Lastly, it needs to be stressed that the institution of proceedings by one State against another is not something to be taken lightly. Governments have to invest a great deal of time, personnel, and material resources to prepare a case of such importance as we have it. In addition, it must be kept in mind that the proceedings have involved the review of many documents to be copied and translated in order to be analyzed by the Panamanian Government.

Considering all this activity, it can be concluded that, contrary to Italy's allegations, Panama's conduct and activities cannot be considered as waiving its rights. Even more, Italy could not reasonably rely on that conduct and conclude that Panama would not pursue its claims any more. As has been shown, the contention of Italy that Panama has shown a contradictory attitude throughout that time is to be dismissed.

STATEMENT OF MR VON BREVERN – 22 September 2016, p.m.

Italy's objections with regard to the above principles must also be dismissed based on its own contradictory behaviour. The conduct of Italy with reference to the series of letters sent by Panama in connection with this case has already been addressed in the previous statements of my colleagues. As has already been stated above, it was only in 2009 that the grounds of the verdict of the Appeal Court of Genoa were received by Panama.

The comparison of the behaviour of both Parties can be summarized as follows: Panama's actions were exclusively aimed at the persecution of its rights; there is no single action of Panama which might be interpreted differently. In contrast, the behaviour of Italy is characterized, against all diplomatic rules and law principles, by refusing any reasonable action or response.

As a result, it can be concluded that Italy does not deserve protection by means of the principle of legitimate expectations, which are a core of extinctive prescription, acquiescence and estoppel.

In the alternative to the dismissing of the objections, Panama contests that the objections by Italy on the basis of extinctive prescription, acquiescence and estoppel do not constitute a *prima facie* defence. Under the particular circumstances of this case, the Written Observations and Submissions of Italy dated 10 March 2016 and 8 July 2016 do not meet the necessary requirements of a preliminary nature as described by article 294 of the Convention because in order to examine such circumstances the Tribunal would have to get into its merits.

Thank you, Mr President. I come to the conclusion that the objections of Italy on the basis of extinctive prescription, acquiescence and estoppel have to be dismissed.

I would now ask you, Mr President, to pass the floor to my colleague Mr Nelson Carreyó.

**THE PRESIDENT:** Thank you, Mr von Brevern, for your statement.

I understand that this was the last statement made by Panama during this hearing. Article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of the last statement made by a party to the hearing, its agent, without recapitulation of the arguments, shall read the party's final submissions. The written text of these submissions, signed by the agent, shall be communicated to the Tribunal and a copy of it shall be transmitted to the other party.

I now invite the Agent of Panama, Mr Carreyó, to take the floor to present the final submissions of Panama.

STATEMENT OF MR CARREYÓ
AGENT OF PANAMA
[ITLOS/PV.16/C25/6/Rev.1, p. 17–18]

**MR CARREYÓ:** Good afternoon, Mr President, distinguished Members of the Tribunal, members of the Italian delegation. I will proceed to read the final submissions of Panama.

22 September 2016
Final submissions of Panama concerning jurisdiction and admissibility

For the reasons explained in the Application and the Observations and during the oral hearings the Republic of Panama requests the International Tribunal for the Law of the Sea to adjudge and declare that:

(1) The Tribunal has jurisdiction over this case;

the claim made by Panama is admissible; and

(2) As a consequence of the above declarations the Written Preliminary Objections made by the Italian Republic under article 294, paragraph 3, of the Convention are rejected.

Nelson Carreyó, Agent
Dr Olrik von der Wense, Counsel

With your permission, Mr President, I will now take this opportunity to thank God for allowing me to be here before this honourable Tribunal; to you, Mr President, for permitting me and the Republic of Panama to make use of its rights, as well as conducting this hearing in an orderly manner; and, through you, Mr President, to all of the honourable Judges for listening attentively to the Parties' oral arguments during these three days; to you, Ms Palmieri and, through you, to all members of the Republic of Italy's delegation; and to the Registrar, Mr Gautier, and the members of staff for giving us all the necessary support concerning logistics, and especially to the interpreters for their patience and understanding when I was speaking too fast.

With that, Mr President, I end my presentation of the Republic of Panama's submissions and final remarks.

**THE PRESIDENT:** Thank you, Mr Carreyó.

**Closure of the Oral Proceedings**
[ITLOS/PV.16/C25/6/Rev.1, p. 18]

**THE PRESIDENT:** This brings us to the end of the hearing on the preliminary objections raised by Italy in the *M/V "Norstar" Case*.

On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both Italy and Panama. I would also like to take this opportunity to thank both the Agent of Italy and Agent of Panama for their exemplary spirit of cooperation. The Registrar will now address questions in relation to documentation.

**THE REGISTRAR:** Thank you, Mr President.

Pursuant to article 86, paragraph 4, of the Rules of the Tribunal, the Parties may, under the supervision of the Tribunal, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the meaning and scope thereof. Those corrections should be done only as regards the official language used by the Party concerned during the hearing. I should add that these corrections relate to the checked versions of the transcripts in the official language used by the Party in question. The corrections should be submitted to the Registry as soon as possible and, at the latest, by Monday 26 September 2016 at 4.00 p.m. Hamburg time.

Thank you, Mr President.

**THE PRESIDENT:** Thank you, Mr Registrar.

The Tribunal will now withdraw to deliberate. The date for the reading of the Judgment on preliminary objections raised by Italy in this case is tentatively scheduled to take place at the beginning of November 2016. The Agents of the Parties will be informed reasonably in advance of the date of the reading of the Judgment on the preliminary objections.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the Judgment.

The hearing is now closed.

(*The hearing closed at 4.10 p.m.*)

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *The M/V "Norstar" Case (Panama* v. *Italy), Preliminary Objections.*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire du navire « Norstar » (Panama c. Italie), exceptions préliminaires*

Le 17 juillet 2017
17 July 2017

Le Président
Vladimir Golitsyn
President

Le Greffier
Philippe Gautier
Registrar