

# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2016

Public sitting

held on Wednesday, 21 September 2016, at 10 a.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,

President Vladimir Golitsyn presiding

## **THE M/V “NORSTAR” CASE**

Preliminary Objections

(Panama v. Italy)

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**Verbatim Record**

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<i>Present:</i>	President	Vladimir Golitsyn
	Vice-President	Boualem Bouguetaia
	Judges	P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Jin-Hyun Paik
		Elsa Kelly
		David Attard
		Markiyan Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
	Judges <i>ad hoc</i>	Tullio Treves
		Gudmundur Eiriksson
	Registrar	Philippe Gautier

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*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 Mørch, owner of the *Norstar*, Norway,  
Mr Magnus Einar Mørch, 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.*

1 **THE PRESIDENT:** Good morning. The Tribunal will today continue the hearing in the  
2 *M/V “Norstar” Case*. We will hear the first round of oral arguments presented by  
3 Panama. I now give the floor to Ms Janna Smolkina, Adviser to the delegation of  
4 Panama, to begin her statement.

5  
6 **MR CARREYÓ:** Good morning, Mr President. Ms Smolkina yesterday already  
7 introduced our delegation. I do not know whether it is possible to go straight to my  
8 oral presentation.

9  
10 **THE PRESIDENT:** Thank you. Maybe there was a misunderstanding in the  
11 information that was conveyed to the Registry. According to the information provided  
12 to me by the Registrar, she was supposed to speak for five minutes, after which you  
13 would take the floor. I would like to apologize for this misunderstanding, and I now  
14 call on the Agent of Panama, Mr Carreyó, to begin his statement. You have the floor,  
15 Sir.

16  
17 **MR CARREYÓ:** It was my mistake, because it was going to take five minutes for her  
18 to introduce the delegation and we thought that that was already covered, so we are  
19 very sorry.

20  
21 Good morning, Mr President, distinguished Members of the Tribunal, distinguished  
22 members of the Italian delegation and all the people involved with the technical  
23 matters as well.

24  
25 First of all, I thank God for allowing me to be here. It is a very privileged opportunity  
26 for me to represent my country and do my best in opposing the objections of Italy.

27  
28 I would like to start by saying that Panama instituted proceedings against Italy in a  
29 dispute concerning the arrest of the *Norstar*. Italy filed Preliminary Objections to the  
30 jurisdiction and admissibility of Panama’s Application. Panama submitted  
31 Observations based on these Objections to which Italy, in turn, replied. The Italian  
32 objections as to jurisdiction are based on three main grounds: firstly, Italy contends  
33 that this Tribunal has no jurisdiction *ratione materiae* because there is no dispute;  
34 secondly, Italy objects to the jurisdiction *ratione personae*, believing that it is not the  
35 proper respondent; and, lastly, Italy believes that Panama has not complied with the  
36 obligation to exchange views as required by article 283, paragraph 1, of UNCLOS.

37  
38 Panama has responded to these objections by showing that a dispute does indeed  
39 exist, this Tribunal having jurisdiction *ratione materiae*, and it has been demonstrated  
40 that Italy, and only Italy, is the proper respondent, this Tribunal also having  
41 jurisdiction *ratione personae*. Panama maintains that it has fulfilled the obligation to  
42 exchange views while Italy has omitted relevant facts regarding its own compliance  
43 with article 238, as well as other significant details explaining how this dispute, the  
44 subject matter, falls under the Convention.

45  
46 As to the admissibility of the claim, Italy has four further objections: firstly, the  
47 claimant has to hold Panamanian nationality; secondly, Panama did not exhaust  
48 local remedies; thirdly, the claim is time barred and Panama is estopped from  
49 pursuing this claim due to the length of time that has passed since the seizure; and,  
50 finally, Panama displayed a contradictory attitude by expressing its intention to apply

1 for prompt release and pursue compensatory damages without following through  
2 with either.

3  
4 With regard to the admissibility of the Application, Panama contends that its claim is  
5 valid because, according to international law, any country has the right to protect its  
6 subjects, either through diplomatic action or by means of judicial proceedings.  
7 Panama further contends that its claim is not time barred because its  
8 communications with Italy have interrupted and extended any time-limit and thus  
9 voided any prescription.

10  
11 Furthermore, estoppel does not apply because this is a merits defence and Italy has  
12 not relied on any pertinent statement of Panama. Panama also has challenged Italy's  
13 reference to the rule of exhaustion of local remedies because this only applies when  
14 the acts complained of are carried out within the territorial waters of a coastal State.  
15 This is not the case in this instance because the alleged offence occurred outside of  
16 territorial waters.

17  
18 First of all, I will refer to certain facts that are not disputed.

19  
20 Although Panama holds that its dispute with Italy is at the heart of this case, there  
21 are certain facts that are undisputed. For example, both Parties have recognized that  
22 from 1994 to 1998 the *Norstar*, and some other vessels registered and not registered  
23 in Panama, carried out bunkering activity outside the territorial sea of Italy and some  
24 other countries of the European Union, and that Italy wrongly considered this activity  
25 as criminal. It is also agreed that on 11 August 1998 Italy ordered the seizure of the  
26 *Norstar* as *corpus delicti* and, by way of letters rogatory, requested Spain to execute  
27 this order while the *Norstar* was moored at Palma de Mallorca, Spain. Both Parties  
28 also agree that Panama has sent, and Italy has received, several written  
29 communications requesting Italy to release the *Norstar* and pay compensation for  
30 damages. It is also stipulated by both Parties that although Italy ordered the seizure  
31 to be lifted, this decision has not been executed, and it is still for the Italian  
32 authorities to do so.

33  
34 Panama would now like to show that a dispute exists.

35  
36 Panama started communicating with Italy as long ago as 15 August 2001, stating the  
37 facts of the case and requesting compensation for the unlawful detention of the  
38 *Norstar*. Panama contends that this dispute has arisen because Italy has not even  
39 acknowledged, much less tried to resolve, Panama's claim. Panama respectfully  
40 requests that the Tribunal recognize its good faith and take the refusal of Italy to  
41 work with Panama on this issue as unambiguous evidence that a dispute exists.

42  
43 On the other hand, rather than respond to Panama's entreaties, Italy has accused  
44 Panama of making "no meaningful attempts at negotiated settlement", ironically  
45 using the adjective "putative" to belittle what is truly a disagreement between the two  
46 States. This accusation itself clearly indicates a significant difference between Italy's  
47 interpretations of the law and facts from those of Panama. By refusing to answer  
48 Panama's communications, Italy has implicitly taken a very different position from  
49 Panama.

1 In paragraph 87 of the *Land and Maritime Boundary* case, the ICJ stated that a  
2 dispute is a disagreement on a point of law or fact, a conflict of legal views or  
3 interests between parties, and cited the *Mavrommatis Palestine Concessions* and  
4 other cases. However, what is more substantial is that, in paragraph 89, the ICJ,  
5 after repeating its definition of a dispute, added that “[the dispute] need not  
6 necessarily be stated *expressis verbis*.”  
7

8 Thus, the Court indicated that it is not necessary that the difference be expressed in  
9 words. Its existence may be inferred simply from the behaviour of the parties. In  
10 other words, a dispute most certainly does exist in this case despite Italy’s  
11 protestations to the contrary. In paragraph 30 of the *Case Concerning the*  
12 *Application of the International Convention on the Elimination of all Forms of Racial*  
13 *Discrimination*, commonly known as the *CERD* case, the ICJ affirmed that a dispute  
14 can “be inferred from the failure of a State to respond to a claim in circumstances  
15 where a response is called for” and that, while it is not necessary that a State must  
16 expressly refer to a specific treaty, the judgment explained that “an express  
17 specification would remove any doubt about one State’s understanding of the subject  
18 matter in issue, and put the other on notice.”  
19

20 Therefore, a dispute may be deduced even from a failure of one State to answer  
21 when a reply is expected from another, as it has been in this case. If Italy truly  
22 believes that no dispute has arisen, it has to explain why it has not adjusted the  
23 claim made as a result of the unlawful arrest of the vessel as Panama has always  
24 requested.  
25

26 In the *CERD* case the Court also ruled that in an exchange of views the subject  
27 matter of the negotiations must relate to the subject matter of the dispute which, in  
28 turn, must concern the substantive obligations contained in the treaty in question. To  
29 this end, Panama has notified Italy that a dispute exists, has delimited the scope of  
30 the subject matter, and has placed it in the context of negotiations, in accordance  
31 with paragraph 1 of article 283. In paragraph 30 of the *CERD* case the ICJ said that  
32 “... [even though] the existence of a dispute and the undertaking of negotiations are  
33 distinct as a matter of principle, the negotiations may help demonstrate the existence  
34 of the dispute and delineate its subject-matter”, which in turn will help this Tribunal  
35 better to adjudicate this case.  
36

37 Panama now wishes to address the second objection made on the basis of the lack  
38 of jurisdiction *ratione personae*.  
39

40 The basis for this objection by Italy is that the actual arrest was not executed by Italy,  
41 but by Spain, so that Italy considers itself as an “improper respondent”. To support  
42 this line of reasoning, Italy has relied on the *Monetary Gold* case and the  
43 “indispensable third party” doctrine therein established, whereby the ICJ adjudged  
44 that it did not have jurisdiction due to the fact that interests of Albania (the missing  
45 third party in that case) were the subject –  
46

47 **THE PRESIDENT:** Mr Carreyó, I would like to apologize but the interpreters are  
48 having difficulty following your presentation. Could you speak a little slower so that  
49 your presentation can be interpreted?  
50

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

2  
3 To support this line of reasoning, Italy has relied on the *Monetary Gold* case and the  
4 “indispensable third party” doctrine therein established, whereby the ICJ adjudged  
5 that it did not have jurisdiction due to the fact that interests of Albania (the missing  
6 third party in that case) were the subject matter of the decision and that as a  
7 consequence its presence was indispensable.

8  
9 However, in the present case, Italy’s liability can be determined without Spain’s  
10 involvement. Panama contends that Spain does not have any interest of a legal  
11 nature which would be affected by the decision of the Tribunal. The arrest of the  
12 *Norstar* was based on an order given by Italy, not by Spain, and thus this case  
13 involves only the actions of Italy and not those of a third State.

14  
15 In the *Military and Paramilitary Activities in and against Nicaragua* case the ICJ  
16 stated in paragraph 88 that any other State which considers itself affected by a ruling  
17 in a case is at liberty to intervene, to voluntarily institute separate proceedings, or to  
18 employ the procedure of intervention within 30 days after the counter-memorial  
19 becomes available. However, in the present case Italy’s liability can be determined  
20 without Spain’s involvement.

21  
22 On the other hand, in paragraph 54 of the *Certain Phosphate Lands in Nauru* case,  
23 the ICJ stated that the absence of a request to intervene was no obstacle for the  
24 Court to have jurisdiction, “provided that the legal interests of the third State which  
25 may possibly be affected do not form the very subject-matter of the decision that is  
26 applied for.”

27  
28 Spain has not been mentioned, summoned, cited, or even referred to in this case  
29 either as defendant or as a third party, nor has it shown any interest in participating  
30 through any of the possible methods accepted by the Convention. The interests of  
31 Spain would not be affected by the judgment, much less constitute the “very subject  
32 matter of the decision”. Thus, this Tribunal can examine the present case and  
33 determine Italy’s responsibility without examining the conduct of Spain.

34  
35 I would also like to take issue with the Italian claim that Panama did not meet the  
36 obligation to exchange views.

37  
38 Once a claim requiring the interpretation or application of the Convention has been  
39 lodged, article 283 requests that the parties – and I emphasize the plural – proceed  
40 expeditiously to exchange views regarding a settlement by negotiation or other  
41 peaceful means. As Panama has already pointed out, Italy has used the word  
42 “putative” to characterize Panama’s claim, suggesting that a legitimate dispute does  
43 not exist. Oddly, Italy has juxtaposed this argument with one citing Panama’s failure  
44 to exchange views (thus implying the existence of a dispute) before resorting to  
45 international adjudication.

46  
47 By failing to answer any of the communications of Panama, Italy has been the party  
48 which has impeded this exchange. Yet in paragraph 18 of its Objections Italy reflects  
49 conflicting interpretations of article 283, paragraph 1, by saying that “no complaint ...  
50 bearing on the facts listed in the Application has been raised in any legally



1 appropriate manner by the Government of Panama.” Italy has never explained what  
2 it meant by “legally appropriate manner”. However, this argument ignores several  
3 relevant facts, as we will demonstrate.  
4

5 In paragraphs 4(b), 17(c), 19-20 and 34(c) of its Objections Italy has also stated that  
6 “no meaningful attempts at negotiated settlement were made over any ... difference  
7 between the two States.” By referring to the communications concerning the seizure  
8 as failing to comply with article 283, paragraph 1, because they improperly conveyed  
9 requests for prompt release and damages, Italy has resisted the basis for Panama’s  
10 claim on semantic grounds.  
11

12 Panama has always communicated with Italy with the aim of resolving the matter to  
13 the mutual satisfaction of both Parties by determining an appropriate amount of  
14 damages due as a result of the unlawful arrest. Nevertheless, in paragraph 31, Italy  
15 criticizes Panama’s communications for failing to be either “meaningful”, “genuine”,  
16 or “consistent”. In spite of the fact that in its Observations Panama requested Italy to  
17 explain its use of these terms, Italy has not explained what it means by these terms  
18 and how they specifically apply to Panama’s actions. Without any specific references  
19 explaining how its use of these pejorative remarks is justified, Italy has not only failed  
20 to show how Panama has refused to exchange views but has also clearly confirmed  
21 its own refusal to participate in this process.  
22

23 Panama’s contention has always been that one of its vessels was wrongfully  
24 detained upon an order from Italy. Italy was notified in writing of Panama’s claim,  
25 which clearly identified the scope and subject matter of the claim, delimited by the  
26 facts of the case, thereby fulfilling the requirements of article 283. Thus, the Italian  
27 allegation that Panama did not comply with article 283 lacks foundation.  
28

29 Panama now aims to show that Italy has not stated all the relevant facts about its  
30 failure to comply with article 283 of the Convention.  
31

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

46  
47 respectfully requests that the Italian State, within reasonable time decide if it  
48 wants to release the vessel and pay the damages.  
49

1 That was the first communication from Panama to Italy, 15 August 2001. In that  
2 letter, as you have seen, the *Norstar* had been inoperative and allowed to decay for  
3 over three years, so that the damages incurred by that time were approximately  
4 \$6 million and climbing.

5  
6 The letter went on to say why the detention was improper, and reminded Italy that  
7 ITLOS had declared the areas outside of territorial waters and the contiguous zone  
8 as open, based on the principle of freedom of commerce. The letter concluded with a  
9 request for Italy to release the vessel and pay damages, as we have seen. No  
10 response to this letter was ever received and, as of now, any specific objections of  
11 Italy regarding its shortcomings remain unclear.

12  
13 Italy also acknowledged receipt of Panama's second letter, dated 7 January 2002,  
14 specifically asking for a reply to the previous letter and repeating Panama's intention  
15 to institute proceedings before this Tribunal if a bilateral settlement could not be  
16 reached. Italy did not respond to this communication either.

17  
18 In paragraph 10 of its Objections, Italy also mentioned receiving the third letter from  
19 Panama, dated 6 June 2002. Italy considered that this communication only  
20 "reiterated" the earlier letter dated 15 August 2001, but the most important aspect of  
21 this third communication was that Panama stated that it had "not yet received the  
22 relevant acknowledgement of receipt" of its previous two messages, and that it was  
23 still waiting for an answer. To this third letter Panama attached a copy of the original  
24 communication dated 15 August 2001 as a reminder. Despite the importance  
25 Panama placed on its request, no reply was ever received.

26  
27 In fact, it was not until it filed its Preliminary Objections on 10 March 2016 that Italy  
28 first admitted, and Panama was also informed for the first time, that it had received  
29 these first three communications. Even so, Italy still neglected to mention the  
30 existence of a fourth communication, sent on 3 and 6 August 2004, which was  
31 written in Spanish, English, French and Italian. Needless to say, Italy did not reply to  
32 this communication either.

33  
34 If Italy had had any doubts about the intentions of Panama concerning its  
35 compliance with article 283, these should have been completely dispelled with this  
36 fourth communication, which clearly declared:

37  
38 This is a letter from the Panamanian Government to the Italian Government in  
39 accordance with article 283 of the United Nations Convention on the Law of  
40 the Sea.

41  
42 Due to a total lack of response by Italy as of this time, Panama used this fourth  
43 communication to restate its desire to reach a settlement with the Italian Government

44  
45 through the procedures given for the International Law of the Sea Tribunal.

46  
47 The letter went on to say that if Italy wished to have the dispute decided by ITLOS in  
48 accordance with article 287 of UNCLOS, Panama would be ready to proceed  
49 accordingly.

1 On 31 August 2004 Panama sent its fifth communication, the note verbale number  
2 2227. Once again, Italy, in its Preliminary Objections, referred to this message as  
3 one that only “reiterated the mandate”. However, with this note verbale Panama did  
4 more than that, requesting its Ministry of Foreign Affairs to use diplomatic channels  
5 to ensure that the communication dated 3/6 August 2004 had been received. Since  
6 Italy has now admitted receiving the message conveyed by this fourth letter, which  
7 clearly invoked article 283, Panama now wonders why Italy had not previously  
8 acknowledged its existence.

9  
10 On 7 January 2005, pursuant to the contents of note verbale 2227 of 31 August  
11 2004, Panama dispatched note verbale 97, its sixth communication. Italy mentions  
12 this communication in its Objections. However, Panama has drawn the attention of  
13 the Tribunal to Italy’s inaccurate translation of this message. This is highly  
14 significant, because this important piece of evidence has a direct bearing on  
15 jurisdiction and the admissibility of the Application, issues raised by Italy.

16  
17 As stated in paragraph 30 of its Observations, Panama takes strong exception to the  
18 Italian translation because it distorts the actual meaning of the original and is  
19 therefore misleading. For that reason, Panama has requested as evidence that the  
20 Tribunal review the translation provided by Italy and compare it to the original  
21 communication. We will come back to this issue later on.

22  
23 By the same token, Panama is also concerned by the failure of Italy to disclose that  
24 on 25 January 2005, its Embassy notified Panama that it had transmitted note  
25 verbale 97 to the appropriate authorities and that, as soon as the Embassy received  
26 an answer, it would inform Panama accordingly. Italy never did so but, because no  
27 objection has been raised, Italy has tacitly accepted the validity of this piece of  
28 evidence, which was not filed by Italy but by Panama.

29  
30 In paragraph 16 of its Objections Italy has also admitted receiving an eighth  
31 communication, this time a letter dated 17 April 2010, although it did not refer to its  
32 contents. In this letter Panama repeated the facts of the case and again asked Italy  
33 to decide whether it would pay damages or whether Panama should apply to the  
34 Tribunal. The primary purpose of this letter was to determine if Italy had received  
35 Panama’s previous messages, but Italy remained silent.

36  
37 The clear objective of all these communications was to obtain feedback from Italy  
38 about the Panamanian position on the subject matter and, consequently, the  
39 feasibility of a negotiation or settlement. There have been eight attempts made by  
40 Panama to understand the position of Italy concerning this case, all of them  
41 unsuccessful. Given its silence, it is unclear how Italy intended to comply with  
42 article 283. By completely ignoring all of Panama’s communications on this subject  
43 over the years, Italy has essentially blocked any productive exchange of views.

44  
45 The *travaux préparatoires* of UNCLOS show that exchanges of views are called for  
46 to prevent a State from unexpected proceedings instituted by another. As these  
47 communications demonstrate, Panama’s Application to the Tribunal should have  
48 come as no surprise to Italy. Furthermore, the repeated efforts of Panama to engage  
49 Italy in negotiations show that Panama has not submitted this case precipitously.

1 Similarly, in paragraph 60 of its decision in the *Southern Bluefin Tuna Cases*, the  
2 Tribunal said:

3  
4 A State Party is not obliged to pursue procedures under Part XV, Section 1,  
5 when it concludes that the possibilities of settlement have been exhausted.  
6

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

10  
11 Panama has maintained a genuine intention to peacefully negotiate even as late as  
12 28 January 2016 when, during consultations held by the Parties in the presence of  
13 the President and the Registrar, Panama indicated that it was still willing to reach a  
14 settlement, and also more recently, when the Italian Ambassador, Mr Marcello  
15 Apicella, and the Chargé d'Affaires, Mr Roberto Puddu, both from the Italian  
16 Embassy in Panama, approached the Director of the Legal Department of the  
17 Ministry of Foreign Affairs requesting that the possibility of negotiations be explored.  
18

19 Panama accepted and on 4 August 2016 sent a letter addressed to the Italian Agent,  
20 Ms Gabriella Palmieri, requesting ITLOS to suspend the proceedings. In spite of the  
21 fact that the Italian diplomatic representative promised, once again, that it would  
22 convey the Panamanian position to its Government's officials, Panama has not  
23 received any response regarding the possibility of negotiations to which its own  
24 authorities had referred. This can now be interpreted as an official rejection of all the  
25 Panamanian initiatives to exchange views. Although Panama did not file this  
26 document as evidence, it would be interesting to know whether the distinguished  
27 Agent of Italy received this latest communication from Panama and whether it has  
28 any answer to it.  
29

30 On page 31 of the Judgment in the *Factory at Chorzow (Germany v. Poland)* case,  
31 the Permanent Court of International Justice stated that a principle generally  
32 accepted in the jurisprudence of international arbitration is that  
33

34 one Party cannot avail himself of the fact that the other has not fulfilled some  
35 obligation, if the former Party has prevented the latter from fulfilling the  
36 obligation in question.  
37

38 The way Italy has used silence to prevent Panama from fulfilling its desire to frankly  
39 and fully exchange views coincides with the doctrine above, because Italy is now  
40 suggesting that Panama has not complied with its duty to exchange views, even  
41 when it was the Party responsible for impeding this compliance.  
42

43 Panama has to conclude that the Italian silence represents bad faith, because there  
44 is no excuse for not returning communications within a reasonable time, save to  
45 avoid the matter being brought up and discussed. Given Italy's unforthcoming  
46 approach, the possibility of reaching a mutually satisfactory resolution has become  
47 remote.  
48

49 In sum, the Italian contention that Panama failed to exchange views in "any  
50 meaningful or legally appropriate manner" related to article 283 is not true. Italy's  
51 silence should not be used to deny or evade its own obligations under article 283,

1 paragraph 1, nor should its suggestion that it has been Panama who has not  
2 complied with this provision of UNCLOS.

3  
4 That Italy had prevented Panama from even knowing whether it had received its  
5 formal communications concerning its claim reflects an uncooperative attitude with  
6 regard to negotiations. In any case, Italy's lack of responsiveness does not negate  
7 the fact that Panama has made a sincere effort to consult with Italy, thereby fulfilling  
8 its own requirements under article 283. To resolve this conflict, Panama's only  
9 recourse has been to submit its claim to this Tribunal.

10  
11 Panama would next like to address the question of the interpretation and application  
12 of the Convention.

13  
14 In paragraph 9 of the Application, Panama identified the subject matter. Although it  
15 accepts that articles 73 and 226 are not applicable, Panama calls attention to  
16 article 297, which limits its applicability to disputes about the interpretation or  
17 application of the Convention, this provision being cited in the very first letter  
18 Panama addressed to Italy on 15 August 2001.

19  
20 Panama will now express its arguments as to the objection to the admissibility of its  
21 Application.

22  
23 Italy objects to the claim being admitted, firstly, because it is preponderantly of a  
24 diplomatic protection character, and the requirement of the nationality of the alleged  
25 victims has not been met. Secondly, Italy deems Panama's application inadmissible  
26 because Panama is time-barred, and estopped due to the lapse of 18 years since  
27 the seizure. Lastly, because the requirement of exhaustion of local remedies has not  
28 been met.

29  
30 We will now address each of these arguments, starting with the question of  
31 nationality and diplomatic protection.

32  
33 In paragraphs 28-29 of its Objections, Italy argued that the *Norstar* was not

34  
35 owned, fitted out, or rented, by a natural or legal person of Panamanian  
36 nationality ...

37  
38 suggesting that the claim is one of diplomatic protection and thus should be  
39 considered void. Panama submits that it is entitled to protect its vessels by  
40 diplomatic action or by international judicial proceedings, as paragraph 21 of the  
41 *Mavrommatis Palestine Concessions* case and paragraph 2 of the *Nottebohm* case  
42 both affirm.

43  
44 Italy contends that Panama could only validly bring the claim if the wrongful act had  
45 affected its own nationals. However, with this contention, Italy has only been  
46 referring to the nationalities of the *Norstar's* owner, charterer, captain, and crew, that  
47 is to say to persons, but not that of the *Norstar*, which holds Panamanian  
48 registration.

1 As set out in the Convention, Panama has the right and duty to protect its vessels  
2 and use peaceful means to assure that other States respect its rights. If Italy had  
3 taken into account the Panamanian nationality of the *Norstar* (the essence of what  
4 this claim is about), it would have not objected to the admissibility of the Application.  
5

6 Additionally, Italy has ignored the ruling of the Tribunal in the *M/V "SAIGA"* case,  
7 upholding the rights of a ship and its flag State to seek reparation for damage  
8 caused by other States and to institute proceedings through ITLOS by saying that  
9 the ship, everything on it, and every person involved or interested in its operations  
10 are treated as entities linked to the flag State. According to paragraph 106 of this  
11 decision, the actual nationalities of these persons are not relevant.  
12

13 In the *Certain Phosphate Lands in Nauru* case, the ICJ rejected the objection of  
14 Australia that Nauru had not made its claim until 20 years after having become  
15 independent. The ICJ stated that  
16

17 international law does not lay down any specific time-limit  
18

19 and that it was for the Court to determine, in the light of the circumstances of  
20 each case (those are the important words), whether the passage of time  
21 renders an application inadmissible.  
22

23 Although there were long periods of time during which the two parties did not  
24 communicate about the claim, in paragraph 32 of its decision the Court ruled that,  
25 "given the nature of relations between Australia and Nauru as well as the steps thus  
26 taken, Nauru's Application was not rendered inadmissible by passage of time."  
27

28 On page 561 of its decision in the *Gentini* case, the arbitral tribunal held that  
29

30 The presentation of a claim to competent authority within proper time will  
31 interrupt the running of prescription.  
32

33 Additionally, Panama also refers to page 595 in the *Giacopini* case where the court  
34 held that since the Government of Venezuela knew of the existence of the claim from  
35 an Italian citizen, it "had ample opportunity to prepare its defense" and referring to  
36 the *Gentini* case it stated that  
37

38 The principle of prescription finds its foundation in the ... avoidance of  
39 possible injustice to the defendant  
40

41 and that  
42

43 Full notice having been given to the defendant, no danger of injustice exists,  
44 and the rule of prescription failed.  
45

46 Both cases are cited by the author Tams and allowed him to conclude that lapse of  
47 time as such is not a sufficient reason to conclude that there is an extinction of  
48 claims unless it "placed the respondent at a disadvantage."  
49

50 That is on page 48 of his cited work.  
51

1 In the present case, in paragraph 32 of its Objections, Italy has asserted that  
2 Panama's claim should be rejected on the basis of time-bar because 18 years have  
3 elapsed since the seizure and because the agent merely expressed an intention to  
4 apply for prompt release without taking any action, thereby ultimately waiving the  
5 right to do so. However, since 15 August 2001, by referring to the arrest as  
6 connected to article 297 of the Convention, as well as to the principle of freedom of  
7 commerce, Panama effectively suspended any prescription period or time-bar lapse  
8 running, or any other delay that could affect its claim.

9  
10 We have shown that Panama has not ceased communicating with Italy. The fact is  
11 that Italy now admits that, as early as 2001, Panama sought redress and the prompt  
12 release of the *Norstar*, as can be proved by annexes G, H, L, M and N of the Italian  
13 Objections, and Annexes 1 to 5 of the Panamanian Observations. You have that  
14 information in the folder we have just delivered.

15  
16 This evidence is incongruent with Italy's time-bar objection or with any other delay  
17 issues that Italy has raised. Panama's consistent effort to communicate openly with  
18 Italy through formal written requests clearly refutes Italy's time-bar argument. We  
19 now know that Italy took due notice of the claim and has had ample opportunity to  
20 seek evidence and prepare its defence.

21  
22 The time-bar objection is also negated by the local judicial proceedings in Italy  
23 because, as early as 13 November 2006, the Court of Appeal of Genoa answered a  
24 request from Spain to demolish the *Norstar*. The answer of this court was that, after  
25 having noted that the judgment to release the vessel had to be enforced, the court  
26 responded there was no decision to be taken, given that the destiny of the vessel,  
27 after having been given back to the party entitled, does not fall within the  
28 competence of this court and in any case, given that the first instance judgment was  
29 confirmed – and this is the important part – any issue on the enforcement of the said  
30 judgment would be the competence of the Court of Savona. Italy's conduct in this  
31 case contradicts its own judicial order and therefore is an unsurmountable obstacle  
32 to the validity of its time-bar objection.

33  
34 The Court of Appeal of Genoa thus assumed that the vessel had been, or at least,  
35 would be, returned to its owner and that the case was closed. However, although it  
36 was decided that any issue on the enforcement of the said judgment would be the  
37 competence of the Court of Savona, to date that court has not issued a decision on  
38 this matter and therefore it is still pending. Meanwhile, the relevant authorities of Italy  
39 have made no effort to keep Panama apprised of these developments, much less to  
40 facilitate the return of the ship or to pay damages.

41  
42 In other words, the fact that the *Norstar*, the object of these proceedings, has not  
43 been returned to its owner despite the order issued by an Italian court, signifies that  
44 Italy's compliance with the judgment of its own authorities is still unrealized, this fact  
45 influencing any issue of delay.

46  
47 To argue now that this claim is time-barred denies all of Panama's efforts to obtain  
48 redress. Contrary to the principle of *nullus commodum capere de sua injuria propria*,  
49 with this objection Italy intends to reap advantage from its own failure to make timely  
50 reparations to Panama.

1  
2 Italy asserts that Panama is estopped from bringing this case, but its reasoning in  
3 this regard is also faulty, firstly because this is a merit argument. Wagner says that

4  
5 International estoppel requires the good faith reliance upon the representation  
6 or statement of one party by the other party either to the detriment of the relying  
7 party or to the advantage of the party making the representation ... However,  
8 if the complaining party never relied on the statement and consequently did  
9 not change its position, the change in policy cannot be said to lack good faith.

10  
11 In practice, if one party made a statement that another party relied on, in effect a  
12 promise, that it failed to keep, it is unable to benefit at the expense of the second  
13 party, i.e. it is estopped.

14  
15 Italy appears to be saying that it relied on Panama to file a petition for prompt  
16 release and was harmed when Panama did not ultimately do so. Italy also seems to  
17 believe that Panama indicated that it would not bring this case before this Tribunal,  
18 and that the fact that Panama has now done so is also causing it harm.

19  
20 First of all, Panama was not obligated to bring a petition to the Tribunal for prompt  
21 release, and has never promised Italy that it would do so. Panama has also never  
22 promised not to bring a claim for the wrongful arrest order and consequential  
23 damages before this Tribunal. Therefore, Italy, as the complaining party in its  
24 Objections, has not relied on, nor reacted to, any such statement. In light of this, the  
25 objection of Italy regarding estoppel is also unfounded and should be rejected.

26  
27 Panama raised the possibility of a petition for prompt release because Italy had not  
28 yet issued a final judgment and, therefore, Panama did not consider local remedies  
29 to have been exhausted. The *Norstar* was arrested in 1998 and the Court of Appeal  
30 of Genoa did not confirm the judgment of the Court of Savona until 2005, seven  
31 years later. Panama also declined to bring a prompt release petition because  
32 circumstances did not allow the posting of the necessary bond. Although prompt  
33 release proceedings were not initiated, Panama is not estopped on the basis of its  
34 decision not to make use of such an accessory or incidental proceedings since they  
35 are rights and, as such, are not mandatory, estoppel being a merits defence.

36  
37 In paragraphs 29, 5(b), 27(a), 28 and 35(a) of its Objections, Italy alluded to the rule  
38 concerning the exhaustion of local remedies in a rather subtle manner, juxtaposing it  
39 with the issue of diplomatic protection. In paragraph 28 of its Objections, Italy stated  
40 that the requirements for the exercise of diplomatic protection apply, "whereby the  
41 victims of an internationally wrongful act should be nationals of the Applicant and  
42 should have exhausted local remedies in the Respondent State." We will now show  
43 why the exhaustion of local remedies objection is not applicable in this case.

44  
45 The very first reason why the exhaustion of local remedies rule does not apply is  
46 because the actions of Italy against the *Norstar* violated the internationally lawful use  
47 of the sea related to the freedom of navigation, as set out in the provisions cited in  
48 the Application.



1 The *M/V "SAIGA"* Case held that the rights which Saint Vincent and the Grenadines  
2 had claimed had been violated by Guinea were all rights that belonged to Saint  
3 Vincent and the Grenadines under the Convention.

4  
5 The parallels between the *M/V "SAIGA"* and the present case are clear because the  
6 *Norstar* was also arrested for acts performed in international, rather than in territorial  
7 waters and, for that reason, the rights invoked have been violated by Italy's wrongful  
8 and unlawful arrest of the *Norstar*.

9  
10 In the *M/V "SAIGA"* ruling, the Tribunal also affirmed that

11  
12 the conduct of a State has created a situation not in conformity with the result  
13 required of it by an international obligation concerning the treatment to be  
14 accorded to aliens.

15  
16 However, the Tribunal went on to add that none of the violations of rights claimed by  
17 Saint Vincent and the Grenadines could be described as breaches of obligations  
18 concerning the treatment to be accorded to aliens but that they were all direct  
19 violations of the rights of Saint Vincent, and that damage to the persons involved in  
20 the operation of the *Saiga* arose from those violations. Accordingly, this Tribunal  
21 concluded that the claims with respect to such damage were not subject to the rule  
22 that local remedies must first be exhausted.

23  
24 Italy has created just such a situation with regard to the *Norstar*. The rights claimed  
25 by Panama are not based on obligations concerning the treatment of aliens, but are,  
26 instead, based on the treatment of a Panamanian vessel (just as the rights of the  
27 *Saiga's* Saint Vincent nationality were violated); thus, the rule of exhaustion of local  
28 remedies is not applicable in this case either.

29  
30 Whether the local remedies rule applies also depends on the *locus* where the  
31 alleged activity of the *Norstar* was taking place. In paragraph 4 of the Application, it  
32 is not disputed that the *Norstar* was "in international waters beyond the Territorial  
33 Sea of Italy" that is to say, outside of Italian jurisdiction.

34  
35 Indeed, the facts of the case show that the *Norstar* was outside Italian territorial  
36 waters at the time of the alleged infraction, and that, therefore, Italy was not entitled  
37 to apply its customs rules to the *Norstar's* operation because of the lack of a  
38 jurisdictional connection between them.

39  
40 Panama would like to summarize the first part of its oral arguments as follows:

41  
42 Italy's refusal to respond to any of the formal communications it received from  
43 Panama constitutes a dispute. The facts allow this Tribunal to have jurisdiction  
44 *ratione personae* and to continue proceedings with Italy only as defendant, the  
45 presence of Spain not being indispensable for its adjudication.

46  
47 Panama has assiduously attempted to settle this case through bilateral means. On  
48 the other hand, Italy has advanced a contradictory interpretation of article 283,  
49 paragraph 1, of the Convention, contending that there is no dispute, while  
50 simultaneously declaring that Panama is obligated to exchange views. This

1 paradoxical approach has inhibited the very exchange Italy has professed to want.  
2 Moreover, the allegation of Italy that the Panamanian attempts at dialogue have not  
3 been “appropriate”, “genuine” or “meaningful” lacks specificity, substance, and a  
4 legal foundation, thereby undermining the principle of due process of law.

5  
6 Italy’s failure to file all communications received has been amplified by its omission  
7 of highly relevant facts about both its conduct and the case. It is extremely significant  
8 to note (as Italy has neglected to do) that the *Norstar* release was ordered because  
9 its activities were carried out beyond Italian territorial waters. Such omissions have  
10 affected not only the interpretation of the case, but also have impeded the  
11 Panamanian right to seek a resolution in an expeditious manner. This Tribunal has  
12 authority to deal with this matter because the dispute concerns the interpretation and  
13 application of several provisions of the Convention.

14  
15 Italy’s objections based on diplomatic protection do not correspond with reality.  
16 Panama asserts that it is using the international judicial proceedings to seek a  
17 resolution, the Application being admissible.

18  
19 Although many jurisdictions have established fixed rules regarding the  
20 implementation of prescription, this is not the case with international public law.  
21 Specifically, there is no article in UNCLOS that prescribes a particular time restriction  
22 regarding the bringing of cases. In the absence of a clearly stated definition of legal  
23 deadlines, as the time bar requires, this objection should be rejected.

24  
25 Even if the Tribunal were to consider such objections to be applicable, Panama has  
26 interrupted any limitation period by pressing its claim between 2001 and 2010,  
27 eliminating its bearing on the outcome.

28  
29 Estoppel depends on whether the complaining party relied on any statement of the  
30 party making the representation. Italy has not shown any evidence by which it relied  
31 on a statement from Panama having consequences against it. Estoppel does not  
32 apply simply because a claimant decides against filing a prompt release request in  
33 order to let the process of local remedies take its course, nor does it apply in the  
34 assurance that Panama would seek justice through the Tribunal.

35  
36 Finally, just as it was not in the case of the *Saiga*, the need to exhaust local  
37 remedies is not applicable in this case. Due to the lack of a jurisdictional connection  
38 between Italy, as the arresting State, and the Panamanian vessel *Norstar*, whose  
39 arrest was based upon activities that the vessel carried out in international waters  
40 beyond the territorial sea of Italy, there is no need for Panama to have exhausted  
41 local remedies before bringing this case.

42  
43 The detention of the *Norstar* has not been properly annulled since, in order to do so,  
44 the *Norstar* would have to be restored to the same condition it was in at the time of  
45 seizure, with updated trading and class certificates and a formal notification in that  
46 respect. The decision whether to restore the *Norstar* to its original state and deliver it  
47 back, or to pay compensatory damages, still rests with Italy. If, after all this time, Italy  
48 has not made a decision regarding the vessel’s fate, how long will Panama have to  
49 wait in order to obtain compensation?

1 Mr President, I have finished the first part of my presentation. I have divided my  
2 presentation into two parts. The first part is dedicated to the Objections originally  
3 filed by Italy. I will now turn to the second part of my presentation, dealing with Italy's  
4 Reply.

5  
6 **THE PRESIDENT:** Please proceed.  
7

8 **MR CARREYÓ:** As I said, Panama has dedicated the first hour of oral arguments to  
9 addressing the Italian Preliminary Objections. We will now address the Objections  
10 raised in the Reply.

11  
12 An introductory point that Panama would like to raise relates to the statement made  
13 by Italy in paragraph 5 of its Reply, which reads as follows: "Any failure in the  
14 present Reply to address specific allegations by Panama should not, of course, be  
15 construed or deemed as implicit admission of such allegations."  
16

17 We respectfully suggest that the Tribunal bears this in mind. Because Italy has not  
18 replied to several of the Panamanian Observations, Panama is forced to surmise  
19 that the suspicions contained within are indeed well founded. How else should we  
20 regard the specific allegations that Italy has failed to address? Panama is hoping that  
21 Italy will eventually clarify this when this issue is addressed tomorrow by Dr Olrik von  
22 der Wense.  
23

24 The first Italian objection that Panama will deal with concerns the non-compliance of  
25 Italy with article 283, paragraph 1, that is to say, the duty to exchange views. In this  
26 regard, Italy has claimed that there is no dispute, so it is not required to respect this  
27 provision, the Italian interpretation of article 283, paragraph 1, being contradictory  
28 when it contends that there is no dispute and at the same time declares that Panama  
29 was unilaterally obligated to exchange views, paradoxically inhibiting the very  
30 exchange that Italy has alleged it wants.  
31

32 Panama will show that this Tribunal has jurisdiction because Italy's refusal to  
33 respond to any of the formal communications that it has received from Panama has  
34 prolonged the existence of this dispute. Panama will also show that the Tribunal has  
35 jurisdiction *ratione personae*, the presence of Spain not being indispensable.  
36

37 Panama will demonstrate that Italy did not disclose all the communications received  
38 from Panama and omitted highly relevant facts about both its conduct and the case  
39 itself, such as the letter in which Panama specifically referred to article 283, the  
40 recognition of the full powers of the Agent, and the note verbale 97, which Italy  
41 misinterpreted, as well as that in which the Italian Embassy in Panama stated that as  
42 soon as Italy had an answer to the previous letters it would reply.  
43

44 It will also be proved that Italy has not considered that the *Norstar's* release was  
45 ordered by the Italian judiciary itself because its activities were carried out beyond  
46 Italian territorial waters, that is to say on the high seas, and thus were not unlawful  
47 acts. Such omissions have affected Italy's interpretation of the case and a resolution  
48 in an expeditious manner. The arrest of the *Norstar* was the direct result of the order  
49 issued by an Italian judicial authority without regard for the applicability of the  
50 principle of independent responsibility.

1  
2 Panama has always intended to communicate whereas Italy has used silence as its  
3 only means of defence. Panama's claim remains admissible because it was notified  
4 to Italy as early as 2001. This case entails a continuing representation of the unmet  
5 obligation of Italy to return the *Norstar*, which is still under the jurisdictional control  
6 and authority of the Italian public servants in the judiciary, thereby invalidating any  
7 delay or objection either in terms of estoppel, time bar or acquiescence.

8  
9 The clear case law of the Tribunal represented by the *M/V "Saiga"* and  
10 *M/V "Virginia G"* cases shows that there is no need to exhaust local remedies due to  
11 the lack of a jurisdictional connection between Italy and Panama, because the arrest  
12 was based only upon activities of the vessel carried out in the high seas outside of  
13 the territorial waters of Italy.

14  
15 Consequently, Panama maintains that all of the Italian objections should be  
16 dismissed because Italy has used silence, concealment and misrepresentation as a  
17 means of avoiding compliance with the Convention.

18  
19 Panama would like to state the fact that it has always been an interested party  
20 seeking a mutually agreeable solution to this case in accordance with UNCLOS,  
21 whereas Italy has always intentionally procrastinated in the resolution of this dispute,  
22 using silence as means of evading justice.

23  
24 Yesterday, my dear colleague Ms Caracciolo said that in the ten years from 2001 to  
25 2010 Italy received six written communications. We think that the arithmetic is  
26 incorrect, because Panama has sent eight communications to Italy on eight different  
27 occasions, the contents of which we will analyse within the context of the first new  
28 issue that Italy has raised in its Reply, namely the lack of representative powers of  
29 the Agent of Panama. In this framework, we will analyse the eight communications  
30 that are listed here, along with their locations within the files, as follows.

31  
32 Mr President, distinguished Members of the Tribunal, nine documents are shown in  
33 the slide. The communications in red (numbers 4 and 8) were not mentioned in  
34 Italy's original Objections, namely the letters of 3 and 6 August 2004 and the note  
35 verbale from the Italian Embassy to Panama, stating that they would convey all the  
36 communications and note verbale 97 to the Italian authorities, on which they would  
37 come back to us when they had a response.

38  
39 The documents can be found in your Judges' folders as follows: the first letter at  
40 Annex 14; the second letter at Annex 15; the third letter at Annex 16; the fourth letter  
41 at Annex 17 – the letter that was written in four different languages and sent to Italy,  
42 which Italy did not file in its Preliminary Objections but has not objected to as  
43 evidence and has even used as evidence; the note verbale 2227 at Annex 18; the  
44 fax attaching the first Power of Attorney at Annex 19; the note verbale 97 of  
45 7 January 2005 at Annex 20; the note verbale 0332 from the Italian Embassy at  
46 Annex 21; and the final communication from Panama on 17 April 2010 at Annex 22.

47  
48 You can also see from the slide the places where you can find the objections, the  
49 annexes and the replies, because all those documents have been repeated several  
50 times.

1  
2 The first letter conveyed the complaint that the detention of the *Norstar* was  
3 improper, noting that this Tribunal had declared the contiguous zone as outside of  
4 territorial waters and thus open based on the principle of freedom of commerce. This  
5 letter also mentioned that Panama was considering bringing the case to this  
6 Tribunal.

7  
8 The second letter (Annex 15) specifically asked for a reaction to the previous letter  
9 conveying to Italy the intention to institute proceedings within a specified time.

10  
11 The third letter (Annex 16) also enclosed a copy of the first letter. Panama would like  
12 to stress that the most important aspects of this third communication were that it  
13 stated that Panama was expecting an answer and that it had “not yet received the  
14 relevant acknowledgement of receipt” of its previous two messages. However, Italy  
15 did not respond either to this letter or the previous two.

16  
17 In its Preliminary Objections –

18  
19 **THE PRESIDENT:** Mr Carreyó, unfortunately, the Registry has not been able to copy  
20 all the documents and make them available to the Judges before the sitting.

21  
22 **MR CARREYÓ:** We handed them in.

23  
24 **THE PRESIDENT:** Yes. I suggest that we now adjourn for 30 minutes to allow these  
25 attachments to be circulated, and we will then continue at 11.45 a.m., when all the  
26 Judges will have the annexes in front of them and it will be easier for them to follow  
27 your presentation.

28  
29 **MR CARREYÓ:** We will be much obliged. Thank you.

30  
31 **THE PRESIDENT:** We will therefore adjourn for 30 minutes and resume the sitting at  
32 11.45 a.m.

33  
34 *(Break)*

35  
36 **THE PRESIDENT:** We now resume the morning sitting. Mr Carreyó, please continue  
37 your statement.

38  
39 **MR CARREYÓ:** We were reviewing the letters I previously mentioned. The letters  
40 are within the annexes. The first is in annex 14 at page 19; annex 15, page 21 is the  
41 second one; annex 16, page 23 is the third one; the fourth one is annex 17, page 34.

42  
43 I have already said that the fourth letter Panama had, as you can see in annex 17, in  
44 the very first paragraph says

45  
46 This is a letter from the Panamanian Government to the Italian Government in  
47 accordance with article 283 of the United Nations Convention on the Law of  
48 the Sea.

1 It also says that Panama was trying to reach a settlement with the Italian Government  
2 through the procedures of the international law of the sea.

3  
4 On 31 August 2004 – that is the next document, which is on page 27, annex 18 –  
5 Panama sent a fifth and a sixth communication, the former being the note  
6 verbale 2227 and the latter being a facsimile, page 19, attaching a power of attorney.  
7 It was a facsimile of the document which officially endowed the Panamanian agent  
8 with the power of attorney to represent Panama regarding this matter, characterized  
9 by Italy itself in its Preliminary Objections as “a document of full powers”. It is  
10 important to note how Italy referred to this sixth piece of evidence in paragraph 13 of  
11 its Objections, when it accepted the mandate with the following statement, in which I  
12 have stressed the pertinent parts:

13  
14 Mr Carreyó forwarded ... a document of full powers ... Such a document  
15 merely authorized Mr Carreyó to represent Panama ... On the same date ...  
16 the Ministry of Foreign Affairs ... sent to Italy Note Verbale AJ No. 2227 which  
17 reiterated the mandate of Mr Carreyó.

18  
19 That was the Italian statement in paragraph 13 of its Objections. According to the  
20 Italian translation of note verbale 2227, Italy was informed by means of the note  
21 dated 2 December 2000:

22  
23 Lawyer NELSON CARREYO acts as representative of the Republic of  
24 Panama ... before the Court of International Tribunal for the Law of the Sea.

25  
26 It is not a very well written letter. At that time my English was not as bad as it is now.

27  
28 Also, in its second paragraph, the accompanying power of attorney read as follows:

29  
30 Lawyer NELSON CARREYO will represent before the International Tribunal  
31 for the Law of the Sea the interests of the Motor Vessel *Norstar* flying  
32 Panamanian flag ....

33  
34 In paragraph 14, Italy stipulated that on 7 January 2005, Panama sent a seventh  
35 communication, note verbale 97. However, Italy summarized the content of this note  
36 verbale as only “urging Italy to lift the seizure”. This note verbale did more than that.  
37 With this note verbale, Panama requested its Ministry of Foreign Affairs to use  
38 diplomatic channels to verify that Italy had received the four letters of August 2004,  
39 while offering to work with Italy to come to an agreement in accordance with the  
40 procedures of the Tribunal.

41  
42 At this point, Panama wishes to remind this Tribunal that, during the written stage,  
43 Panama expressed a serious concern in paragraph 30 of its Observations, namely  
44 that the translation of note verbale 97 provided to the Tribunal by Italy was  
45 inaccurate. This translation distorted the meaning of the original and is therefore  
46 misleading. Panama requested that the Tribunal review the translation provided by  
47 Italy and compare it to the original, and Italy did not object to this.

48  
49 Nevertheless, in spite of the very clear concern that Panama expressed, Italy, with  
50 full intention, repeated this misrepresentation in its Reply. This is particularly  
51 important because a significant part of Italy’s defence is the supposed lack of

1 representative powers vested in the representative Agent of Panama and, by  
2 obscuring the truth in this way, Italy has perpetrated a falsehood.

3  
4 In paragraph 25 of its Reply, Italy erroneously described what the Ministry of Foreign  
5 Affairs of Panama said in note verbale 97. The Italian translation says that

6  
7 lawyer Nelson Carreyó ... requests that the case of the Government of the  
8 Italian Republic be submitted to the attention of the Judiciary

9  
10 and asked Italy

11  
12 to provide information on the progress of the case at issue.

13  
14 However, if we compare the Italian translation to what Panama truly wrote, we will  
15 see that Panama did not mention the “Judiciary” as the Italian translation says; it  
16 simply wanted to determine the status of its notes verbales and obtain feedback.

17  
18 For the sake of clarity, we will show on the screen the English translation filed by Italy  
19 and the English translation that Panama deems correct.

20  
21 If we make a comparative analysis, in paragraph 25 of its Reply, Italy has  
22 unequivocally stated “in even clearer terms” that the wording used by Panama, that is  
23 to say, that the case be submitted to the attention of the Judiciary,

24  
25 cannot refer to anything different from the criminal proceedings before the  
26 Italian judiciary concerning the offences committed through the *M/V Norstar*

27  
28 and that, as such, Panama was requesting Italy to provide information on the  
29 progress of the proceedings before the Italian domestic courts.

30  
31 However, Panama does not accept such a statement, because the clear wording was  
32 to determine the result of its attempts to communicate with Italy. Clearly, therefore,  
33 Italy has put words in Panama’s mouth, particularly when note verbale 97 expressly  
34 stated that, first of all, it was sent considering the contents of note verbale 2227,  
35 which in turn made a neat reference to the authority vested in the Agent by means of  
36 the note dated 2 December 2000 empowering him as representative of Panama, and  
37 even informing Italy that he had requested to send Italy the claim by diplomatic  
38 means.

39  
40 If we read note verbale 97, as correctly translated, we will see that what Panama  
41 asked for was, taking into account the content of the previous note verbale 2227, to  
42 provide the status of its petition through its letters and note verbale 2227.

43  
44 This may have been an inadvertent error but, had Italy respected the powers vested  
45 in the Panamanian Agent, as mentioned, it would likely not have made such a  
46 mistake. In any case, by misrepresenting Panama’s intentions, Italy not only  
47 avoided taking any action at the time this message was received, but has continued  
48 to refuse to take the Agent at his word. As was previously noted, Italy had already  
49 received official notice that the Panamanian Agent was duly authorized to engage in  
50 negotiations on Panama’s behalf. By altering the meaning of his inquiry in this

1 communication, Italy is still seeking to cast aspersions on the Panamanian Agent  
2 which are manifestly unjustified.

3  
4 Based on its misrepresentation of this note verbale, Italy has argued in  
5 paragraphs 12 and 25 of its Reply, as we also heard yesterday, that the  
6 communications sent by Panama had no relevance because they

7  
8 could not be deemed as coming from a state representative entitled to invoke  
9 Italy's responsibility ..., as Panama's communications never appropriately  
10 vested Mr Carreyó of representative powers encompassing the substantive  
11 scope of the Application in the instant case.

12  
13 I would respectfully ask how can Italy now state that the Agent of Panama did not  
14 have representative power after previously acknowledging that he did?

15  
16 Moreover, in paragraph 10 of its Preliminary Objections, Italy indicated that in the  
17 very first letter from Panama the named Agent stated "he was acting on behalf of  
18 the Panamanian Government", and also recognized that the Agent forwarded to the  
19 Italian Embassy in Panama the sixth communication, dated 31 August 2004, which  
20 it identified in paragraph 13 of the Preliminary Objections, as

21  
22 a document of full powers sent by the Panamanian Government to ITLOS on  
23 2 December 2000.

24  
25 Italy did not question the representative powers of the Agent in its Preliminary  
26 Objections, nor did Italy raise any objection when receiving any of the  
27 communications. It is difficult to understand how, 12 years later, Italy can now  
28 question the legitimacy of Panama's official representative, having previously  
29 acknowledged it back in 2004.

30  
31 Italy now suggests, in paragraph 12 of its Reply, that the power of attorney was  
32 granted to a "private lawyer who was acting in the interest of the owner of the  
33 *Norstar*" rather than of Panama. On what basis does Italy reach this conclusion,  
34 when the evidence submitted to this Tribunal says otherwise?

35  
36 If Italy had had a real intention to negotiate in good faith (as was its duty according to  
37 article 283), it would have communicated any concerns it had about the power of  
38 attorney at the time it received the initial messages. This would have demonstrated a  
39 positive, honest and firm intention to comply with article 283, and we would not need  
40 to be discussing this issue now. However, Italy did not do that.

41  
42 How long did Italy believe that the actual Agent "was not vested with powers to  
43 negotiate with Italy"? 15 years? Was this "knowledge" difficult to verify? Is it good  
44 faith that one of the parties to a dispute keeps silent about something which that  
45 very party considers necessary under article 283? Or is it more in line with  
46 article 283 that both parties play an active role in looking for avenues of real  
47 communication? Who has hindered the exchange of views? How long did Italy  
48 question the qualifications of the Panamanian Agent? Why did Italy not raise this  
49 issue in its Preliminary Objections, but only in its Reply?



1 If an Agent is empowered for incidental proceedings, such as a prompt release  
2 procedure, he should also be considered qualified to exchange views. Was it  
3 necessary that the power of attorney contain a more express authorization for the  
4 Agent to exchange views and to apply for compensation? I have not seen any such a  
5 requirement or provision related to the law of the sea. Italy no longer has any reason  
6 to deny the attempts that Panama made to communicate before 2004, and certainly  
7 has no justification for failing to respond after that date.

8  
9 We may then conclude that the objection concerning the lack of sufficient power or  
10 authority vested in the Agent from the time the first letter was sent to Italy does not  
11 hold and should be rejected.

12  
13 Those are not all the Italian misrepresentations. In paragraph 35 of its Reply, Italy  
14 again made the following out-of-context citation:

15  
16 the business of supplying oil offshore to mega yachts constituted a criminal  
17 act ...

18  
19 Further, in Italy's misrepresentation and out-of-context citation in paragraph 8 of the  
20 Statement of Facts in the Italian Objections, Italy referred to

21  
22 offences of criminal association aimed at smuggling ... and tax fraud ...  
23 committed by the *Norstar*,

24  
25 and classified the *Norstar* as a "*corpus delicti*, i.e. the means through which the crime  
26 was perpetrated".

27  
28 However, Italy did not refer to the previous portion of the Savona court's  
29 ruling in which it was stated that the seizure of the *Norstar* was based on  
30 erroneous information regarding violations which the Italian Republic  
31 authorities knew, or should have known were false.

32  
33 In this context, it is important to notice that Italy has acknowledged the absence of a  
34 rationale for believing that an offence had been committed within its territorial waters,  
35 stating that

36  
37 There are no logical reasons for believing that an offence does exist.

38  
39 and then added that

40  
41 It has been committed without any connection to the national territory.

42  
43 This represents a very important contradiction and by continuing to refer to the  
44 *Norstar* as a *corpus delicti*, Italy is excluding evidence and promoting an inaccuracy.

45  
46 Furthermore, the Savona Court judgement also stated that the activity performed by  
47 the *Norstar*, i.e. purchase of fuel intended to be stored on board by leisure boats  
48 outside the territorial sea line, was not "any offence" and at the end of paragraph 6  
49 that

1 the fact does not exist, the seizure of motor vessel *Norstar* shall be revoked  
2 and the vessel returned.

3  
4 We kindly request you to check all the citations in annexes 23 and 35. In annex 23 at  
5 page 26 you will see:

6  
7 There are no logical reasons for believing that an offence does exist but it has  
8 been committed without any connection to the national territory.

9  
10 On page 37:

11  
12 The purchase of fuel intended to be stored on board by leisure boats outside  
13 the territorial sea line ... shall not be subject to the payment of import duties.

14  
15 However, neither in its Statement of Facts, in its Objections, nor in any part of its  
16 Reply, did Italy refer to or cite this reasoning of its own judiciary, suggesting that  
17 these facts are of no relevance. Italy also failed to concede that its judiciary's  
18 decision to release the *Norstar* was based on the fact that none of the offences with  
19 which it was charged were sustained because in order to criminally prosecute the  
20 *Norstar* it was necessary to prove the *locus* where the activity complained of  
21 occurred and that if this were outside the territorial waters no offence would have  
22 been committed. As it turned out, this was indeed the case.

23  
24 Panama, then, has legitimate reasons to request the Tribunal to consider the merits  
25 of this case in light of these omissions.

26  
27 In paragraph 161 of the *CERD* case, the Court said that the absence of an express  
28 reference to the treaty in question does not bar the invocation of the compromissory  
29 clause to establish jurisdiction and that these negotiations must relate to the subject  
30 matter of the treaty.

31  
32 In other words, the subject matter of the negotiations must relate to the subject  
33 matter of the dispute which, in turn, must concern the substantive obligations  
34 contained in the treaty in question.

35  
36 The normal sequence of events is that negotiations are based on the stated or  
37 prescribed subject matter which, in turn, must refer to the responsibilities of State  
38 signatories to the Convention which have become substantive obligations.

39  
40 If we examine paragraph 3 of the Application, we will see that Panama identified the  
41 subject matter accordingly as

42  
43 a dispute concerning, *inter alia*, the contravention by the Italian Republic of the  
44 provisions of the Convention in regard to the freedoms of navigation and/or in  
45 regard to other international lawful uses of the sea specified in Article 58 of the  
46 Convention ... for damages ... caused by an illegal arrest of the *Norstar*.

47  
48 We may also note that in paragraph 9, Panama claims its legal basis to be the

49  
50 Respondent's violations of articles 33, 73 (3) and (4), 87, 111, 226 and 300  
51 *and others* of the Convention. The right of peaceful navigation of the Republic

1 of Panama through the *M/V Norstar* was violated by Italian Republic agents  
2 hindering the movements and activities of foreign vessels in the High Seas  
3 without regard for the norms of the Convention, i.e. those relating to the  
4 General Principle of Free Navigation.

5  
6 In paragraph 19 of its Objections, Italy has asserted in response that there has been

7  
8 a manifest irrelevance of the UNCLOS provisions invoked by Panama

9  
10 and in paragraph 28-49 Italy again described the provisions invoked by Panama as  
11 irrelevant. Although this is not the moment to discuss the merits of this case, we do  
12 not have any other choice other than to explain briefly why we contest the Italian  
13 assertion.

14  
15 First of all, Panama takes this opportunity to concede that article 73 (Reply,  
16 paragraphs 34, 35, and 36) and article 226 (paragraphs 42, 43 and 44) do not apply  
17 to this case, since these provisions fall under Part XII, which is devoted to the  
18 protection and preservation of the marine environment.

19  
20 Panama maintains, however, that articles 33, 58, 87, 111 and 300 among others are  
21 applicable to this case, nonetheless. Italy violated article 33, which applies to its  
22 contiguous zone, because none of the activities of the *Norstar* which led to its arrest  
23 fell within the Italian territorial sea as this provision requires. It was also the Italian  
24 order of arrest that impeded the free navigation of the *Norstar* in violation of  
25 article 87 which protects the freedom of navigation, and article 58, which specifically  
26 refers to activities within the exclusive economic zone.

27  
28 As the *Norstar* was arrested following the orders of Italy, Italy should be held  
29 accountable for any violation of the UNCLOS provisions. I would like to pose another  
30 question: would the *Norstar* have been arrested by Spain if Italy had not issued the  
31 arrest order and sent the rogatory letter to Spain to execute such an order?

32  
33 In paragraphs 38-40 of its Reply, Italy cited the *M/V "Louisa" Case* where this  
34 Tribunal said that

35  
36 Article 87 cannot be interpreted in such a way as to grant the *M/V Louisa* a  
37 right to leave the port and gain access to the high seas notwithstanding its  
38 detention in the context of legal proceedings against it.

39  
40 However, Italy did not cite the previous part of the same paragraph which the  
41 Tribunal had written as follows:

42  
43 The Tribunal notes that article 87 of the Convention deals with the freedom of  
44 the high seas, in particular the freedom of navigation, which applies to the high  
45 seas and, under article 58 of the Convention, to the exclusive economic Zone.  
46 It is not disputed that the *M/V Louisa* was detained when it was docked in a  
47 Spanish port.

48  
49 The reasons for the arrest of the *Norstar* were different from the reasons for the  
50 arrest of the *Louisa*. While the *Norstar* was arrested due to its activities on the high  
51 seas, the *Louisa* was arrested for its activities within Spanish territorial waters.

1  
2 The Tribunal stated in paragraph 104 of its ruling that

3  
4           The detention was made in the context of criminal proceedings ... in Spanish  
5           territory.  
6

7 You can check that in annex 25, page 39.  
8

9 In no way does this commentary have any bearing whatsoever on the present case.  
10 The activities carried out by the *Norstar* were held to be in accordance with the law  
11 by the Italian judiciary itself. Italy determined that the activities which the *Norstar*  
12 engaged in were not illegal, but lawful, so the order for its arrest breached UNCLOS  
13 article 87 and constituted a serious violation of the freedom of navigation.  
14

15 Italy contends that the Panamanian claim is unfounded *ratione loci* under article 111  
16 of UNCLOS because this provision deals with the right of hot pursuit and the facts  
17 underlying Panama's claim show that the seizure took place when the *Norstar* was in  
18 Spanish waters. In order to better appraise the validity of the Italian contention we  
19 would invite the Tribunal to examine the Italian order of seizure in annex C of the  
20 Objections. (We have not provided that piece of evidence, but you will surely look at  
21 it when you decide.)  
22

23 Article 111 was invoked because it was Italy which first used it as the basis for  
24 issuing the arrest order. An examination of the arrest order confirms that Italy  
25 determined that the *Norstar* had to be "acquired as *corpus delicti*" and as an "object  
26 through which the investigated crime was committed", in spite of the fact that *Norstar*  
27 "positioned itself beyond the Italian territorial seas".  
28

29 It was in this context that Italy cited article 111, noting that the seizure should "be  
30 performed also in international seas and hence beyond the territorial sea", and due  
31 to "actual contacts between the vessel that is to be arrested and the State coast (so  
32 called 'constructive or presumptive presence' pursuant to articles 6 of the Criminal  
33 Code and 111 of the Montego Bay Convention)".  
34

35 As we can see, it was Italy that used article 111 of UNCLOS in the first place to  
36 justify its unlawful order of seizure. Therefore the Italian contention that this provision  
37 has no link to the facts laid down in the Application is false.  
38

39 Article 300, good faith and abuse of rights, also deals with the rights of the *Norstar*  
40 which were violated by the Italian order of arrest. However, since our main purpose  
41 here is discuss the Preliminary Objections, the Observations, and the Reply, we will  
42 not go into detail about this article here.  
43

44 Finally, in terms of the subject matter of the dispute, the Court stated in the *CERD*  
45 case that the dispute must be defined

46           with respect to the interpretation or application of [the] Convention.  
47  
48

49 While it is not necessary that a State expressly refer to a specific treaty in its  
50 exchanges, it must refer to the subject matter of the treaty with sufficient clarity to

1 enable the State against which a claim is made to identify that there is, or may be, a  
2 dispute with regard to that subject matter.

3  
4 The express specification would remove any doubt about one State's understanding  
5 of the subject matter in issue and put the other properly on notice, as Panama has  
6 done.

7  
8 We will now consider the Italian Objection as to jurisdiction *ratione personae*.  
9 Mr President, would this be a good time to break?

10  
11 **THE PRESIDENT:** If I understand you correctly, you suggest that we take a break  
12 for lunch at this stage, and then you will continue after lunch?

13  
14 **MR CARREYÓ:** I can finish in ten minutes, at half past twelve, and we are going  
15 to start with a new subject.

16  
17 **THE PRESIDENT:** No, actually we are continuing until one o'clock. We will take a  
18 break at one o'clock for lunch.

19  
20 **MR CARREYÓ:** I am going to deal now with the Italian Objection to jurisdiction  
21 *ratione personae*.

22  
23 That Spain has not intervened in this case reinforces Panama's point that the legal  
24 interests of Spain would not be affected by the judgment of this Tribunal, much less  
25 "constitute the very subject matter of the decision", and that this Tribunal has  
26 jurisdiction to examine the present case and determine Italy's responsibility without  
27 examining the conduct of Spain.

28  
29 In paragraph 64 of its Reply, Italy stated that the seizure itself did not amount to an  
30 international wrongful act *per se*, contending that its order for seizure together with a  
31 request for its enforcement addressed to Spain was not a breach of the Convention.  
32 This further strengthens Panama's assertion that Italy is the sole respondent.

33  
34 However, along these lines, Italy went on to introduce a new objection as to whether  
35 it was the proper respondent by distinguishing between conduct that completes a  
36 wrongful act from conduct that precedes it, arguing that the latter does not qualify as  
37 wrongful. In other words, this Italian hypothesis is based on the assumption that the  
38 actual arrest was internationally unlawful, but that its own order was not.

39  
40 In paragraph 67, Italy again stated that

41  
42 the order for seizure of the Italian judiciary could only be deemed as conduct  
43 "preparatory" to an internationally wrongful act

44  
45 and would not qualify as wrongful act.

46  
47 In paragraph 68 of its Reply, Italy expands this reasoning by stating that

48  
49 the actual conduct complained of by Panama is not *the order* of seizure but  
50 the *material arrest* and detention, which cannot be attributable to Italy

1  
2 and later repeats this argument, stating that “it was not the Italian authorities that  
3 held the vessel” and that “the order for seizure was not enforced by Italy nor was it  
4 enforced in Italy”.

5  
6 In short, Italy has based its Objection to jurisdiction *ratione personae* on the fact  
7 that, since it did not carry out the actual arrest, it is an “improper respondent”. Italy  
8 has based this assertion on the *Monetary Gold* case and the “indispensable third  
9 party” doctrine. However, any references to these precedents are misleading  
10 because the arrest was the direct consequence of an order given by Italy, not by  
11 Spain. Italy is basically arguing that a wrong was committed and that Spain should  
12 be the State to blame. Panama accepts the first conclusion, but not the second.

13  
14 Contrary to what Italy has affirmed, Panama contends that the conduct complained  
15 of was the order for the seizure, the physical detention being the natural  
16 consequence of the wrongful conduct of Italy’s order: sequestration, arrest,  
17 detention, seizure. The order of arrest was an internationally wrongful act because it  
18 was issued in contravention of several provisions of UNCLOS. If Italy had respected  
19 such provisions it would not have ordered the arrest of the *Norstar*, and its  
20 responsibility would not have accrued. Even its own judiciary has held that the order  
21 of arrest was unlawful without differentiating between conduct that completes a  
22 wrongful act from conduct that precedes it.

23  
24 In paragraph 77 of its Reply, Italy relies on the ILC Commentary to article 6 of the  
25 ASR by saying that “for an organ of State A to be considered to have been put at the  
26 disposal of State B the organ must also act in conjunction with the machinery of that  
27 State and under its exclusive direction and control, rather than on instructions from  
28 the sending State”.

29  
30 Panama will now deal with Italy’s interpretation of article 6.

31  
32 In paragraph 78, Italy further relies on article 6 of the ASR and article 2 of the  
33 Additional Protocol to the 1959 Strasbourg Convention on Mutual Assistance in  
34 Criminal Matters to support this conclusion, stating that the Spanish authorities were  
35 not put at the disposal of Italy since “[a]rticle 6 is not concerned with ordinary  
36 situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise”.

37  
38 In addition, in paragraph 78 Italy contends that the present case falls within the legal  
39 reasoning of the ILC because “the Spanish authorities could not be held to have  
40 been put at the disposal of Italy” under article 6 of the ASR when enforcing the order  
41 for seizure by the Italian authorities.

42  
43 Moreover, in paragraph 79 Italy maintains that the ILC has sustained article 6 by  
44 referring to the decision in the *Xhavara* case issued by the European Court of  
45 Human Rights which assessed the responsibility of Italy for the sinking of a ship in  
46 the course of an investigation upon a request from Albania, concluding that since the  
47 conduct of Italy was not attributable to Albania, “likewise the conduct of Spain was  
48 not attributable to Italy.”

1 Panama challenges this proposition, however, by noting that in the *Xhavara* case the  
2 damage caused to the ship was caused when the Italian vessel collided with the  
3 Albanian ship, directly causing the damage to the claimants.

4  
5 Italy is still responsible for issuing such an order and, according to article 1 of the  
6 ASR, every internationally wrongful act of a State entails responsibility. The order of  
7 arrest was held to be unlawful by the Italian judiciary itself, which concluded that  
8 there were no breaches of Italian criminal law committed by the *Norstar* and  
9 consequently that the arrest was an illegal act. It is then not difficult to conclude that  
10 by ordering the arrest Italy contravened the provisions of the ASR.

11  
12 Panama also challenges Italy's contention by noting that it relies on just one part of  
13 article 6 of the ASR entitled "Conduct of organs placed at the disposal of a State by  
14 another State". Paragraph 2 of this section states that when performing functions on  
15 behalf of another State

16  
17 "[n]ot only must the organ be appointed to perform functions appertaining  
18 to the State at whose disposal it is placed, but in performing the functions  
19 entrusted to it by the beneficiary State, the organ must also act in  
20 conjunction with the machinery of that State and under its exclusive  
21 direction and control, rather than on instructions from the sending State".

22  
23 Thus, Italy claims that the beneficiary State has to work in coordination with the  
24 sending State.

25  
26 However, the context of this statement changes when the previous paragraph of that  
27 decision is also considered.

28  
29 The commentary should be read completely to be fully understood. A complete  
30 reading of this commentary shows that the words "placed at the disposal of" in  
31 article 6 express the essential condition that must be met in order for the conduct of  
32 the organ to be regarded under international law as an act of the receiving State  
33 (Italy) and not of the sending State (Spain). Therefore, the notion of an organ being  
34 "placed at the disposal of" the receiving State (Italy) is a specialized one, implying  
35 that the organ is acting with the consent of, under the authority of, and for the  
36 purposes of the receiving State (Italy).

37  
38 Italy intends to evade its responsibility by suggesting that Spain acted independently  
39 rather than under the exclusive direction and control of Italy as the receiving State.  
40 On the contrary, by accepting the Italian request for the execution of its arrest order,  
41 it is evident that the Spanish authorities were indeed put at the disposal of Italy.

42  
43 That the Spanish authorities were put at the disposal of Italy is evidenced in the  
44 documents that Italy filed with its Preliminary Objections as annex E, the Statement  
45 of Detention of the *Norstar*, in which the Spanish authorities said that the *Norstar*  
46 "will remain at the disposal of the Office of the Public Prosecutor attached to the  
47 Court of Savona". This was also confirmed more recently when the Spanish  
48 authorities asked permission of the Italian Court of Appeal to demolish the *Norstar*.

1 These two pieces of evidence are sufficient to show that Spain did not act  
2 independently but rather under the exclusive direction and control of Italy as the  
3 receiving or beneficiary party.

4  
5 Additionally, the European Court of Human Rights found in the *Xhavara* case that  
6 article 6 of the ASR “is not concerned with ordinary situations of inter-State  
7 cooperation or collaboration, pursuant to treaty or otherwise”. The Court then stated:  
8 “[t]he Court notes at the outset that the sinking of the *Kater I Rades* was directly  
9 caused by the *Sibilla* Italian warship. Therefore, any complaint on this point must be  
10 regarded as being directed exclusively against Italy.”

11  
12 The same reasoning applies to the present case. The *Norstar* was arrested upon an  
13 order issued by Italy, the wrong being caused directly by Italy, and therefore any  
14 complaint must be regarded as being directed exclusively against Italy.

15  
16 If, for example, in the present case, Spain had used excessive force and had  
17 damaged the *Norstar* when putting its organ at the disposal of Italy, Panama would  
18 have considered Spain as the respondent for the wrongful act of the sending State.  
19 In the present case Panama considers that no wrong has been committed by the  
20 sending State (Spain).

21  
22 Panama agrees with Italy’s proposition that the independent responsibility principle  
23 states that “each State is responsible for its own internationally wrongful conduct, i.e.  
24 for conduct attributable to it which is in breach of an international obligation of that  
25 State”.

26  
27 Panama also agrees that “this principle is particularly germane to the circumstances  
28 of the present case” because the arrest of the vessel was ordered by the respondent  
29 State since, as in most cases of collaborative conduct, any State’s culpability for any  
30 wrongful act will be determined according to the principle of independent  
31 responsibility.

32  
33 Panama adds that if, according to the international law of the sea, the order of arrest  
34 issued by Italy is considered unlawful because it breached the obligation to respect  
35 the right and freedom of navigation of foreign vessels in the high seas, there should  
36 be no doubt that this act, according to article 1 of the ASR, entails the international  
37 responsibility of Italy. Panama again considers that this is not the stage at which to  
38 discuss the responsibility issues that arise from this case, because they pertain to  
39 the merits.

40  
41 Panama will now address the objection to the admissibility of the Application.

42  
43 Italy’s contentions in this respect are: first, that the claim is one of a diplomatic  
44 protection character and that the exhaustion of local remedies requirement has not  
45 been met; secondly, that Panama is time-barred and estopped from bringing this  
46 case due to the 18 years that have elapsed since the seizure of the vessel; and,  
47 thirdly, that Panama has acquiesced, which is a new issue introduced in the Reply.

48  
49 The Italian reasoning for its first objection is that the *Norstar* was not owned by a  
50 natural or legal person with Panamanian nationality. Italy concludes that this means



1 that the claim is one of diplomatic protection. However, as we have already  
2 demonstrated, it is important that when States bring cases either “by resorting to  
3 diplomatic action or to international judicial proceedings”, in reality they are asserting  
4 their own rights. On page 16 of the *Panevezys-Saldutiskis Railway* case, the  
5 Permanent Court of International Justice held that the rule of international law is that  
6 in taking up the case of one of its nationals, either by resorting to diplomatic action or  
7 international judicial proceedings on his behalf, a State is in reality asserting its *own*  
8 rights.

9  
10 In the second paragraph of page 41 in annex 27 you can see the quotation:

11  
12 [i]n the opinion of the Court, the rule of international law on which the first  
13 Lithuanian objection is based is that in taking up the case of one of its nationals,  
14 by resorting to diplomatic action or international judicial proceedings on his  
15 behalf, a State is in reality asserting its own right.

16  
17 We have already demonstrated that Italy only referred to the nationalities of the  
18 *Norstar*'s owner, charterer, captain, and crew, neglecting to refer to the nationality of  
19 the *Norstar* itself. Had Italy taken into account the nationality of the *Norstar*, it would  
20 have had to accept that Panama is entitled and even obligated by international law to  
21 bring this case to protect vessels holding Panamanian nationality and use all  
22 peaceful means to assure that the other members of the international community  
23 respect its rights. This claim is based on the deprivation of property – in this case a  
24 vessel registered in Panama.

25  
26 With this in mind, the precedents set in the *Mavrommatis Palestine Concessions* and  
27 *Nottebohm* cases are significant. On page 12 of the *Mavrommatis* decision the ICJ  
28 ruled that although the case began between a private person and a State (Great  
29 Britain), when the Greek Government entered the case in support of one of its  
30 citizens the dispute became a bilateral one between two States and therefore was  
31 subject to international law. The Court held that it is an elementary principle of  
32 international law that a State is entitled to protect its subjects against acts committed  
33 by another State.

34  
35 Thus, by taking up the case of one of its subjects, either by resorting to diplomatic  
36 action or international judicial proceedings on his behalf, a State is actually asserting  
37 its own rights.

38  
39 We would now like to approach the issue of diplomatic action or international judicial  
40 proceedings. You will have noticed that I have always emphasized the word “or”,  
41 which separates both statements – diplomatic action *or* international judicial  
42 proceedings.

43  
44 In this sense, it is important to remember that in the *M/V “SAIGA” Case* the Tribunal  
45 held that “the ship, everything on it, and every person involved or interested in its  
46 operations are treated as an entity linked to the flag State” and that, therefore, their  
47 specific nationalities were irrelevant.

1 In the *Mavrommatis Palestine Concessions* case the Court concluded that “[o]nce a  
2 State has taken up a case on behalf of one of its subjects before an international  
3 tribunal, in the eyes of the latter the State is sole claimant” (annex 28, page 42).

4  
5 On page 24 of the Judgment in the *Nottebohm* case the ICJ restated the principle  
6 above as follows:

7  
8 Diplomatic protection and protection by means of international judicial  
9 proceedings constitute measures for the defence of the rights of the State and  
10 continued: As the Permanent Court of International Justice has said and  
11 repeated, “by taking up the case of one of its subjects and by resorting to  
12 diplomatic action or international judicial proceedings on his behalf, a State is  
13 in reality asserting its own rights – its right to ensure, in the person of its  
14 subjects, respect for the rules of international law.

15  
16 In addition, according to paragraph 10 of the United Nations ILC Preliminary Report  
17 on Diplomatic Protection prepared by Special Rapporteur Mr Mohamed Bennouna,  
18 diplomatic protection is the use of diplomatic action or *other means* of peaceful  
19 settlement as a procedure to attribute responsibility to a host State for the injury to  
20 foreign natural or legal persons.

21  
22 Italy frames this case as one of diplomatic protection, adding that therefore it is one  
23 of an espousal or indirect nature, as opposed to one of adversarial jurisdictional  
24 proceedings. Italy also suggests that this Tribunal applies case law different from its  
25 own, and even contrary to its jurisprudence. It is then important to remember, as the  
26 international case law has maintained, that there is a difference between diplomatic  
27 action and judicial proceedings.

28  
29 Panama has contended that it

30  
31 has the right to protect its national subjects by diplomatic action or through the  
32 institution of international judicial proceedings.

33  
34 The ILC commentary to article 2 of the Rules on Diplomatic Protection defines a  
35 State’s right to exercise diplomatic protection, saying that

36  
37 although a State has the right to exercise diplomatic protection on behalf of a  
38 national, it is under no duty or obligation to do so and that the internal law of a  
39 State may oblige a State to extend diplomatic protection to a national, but  
40 international law imposes no such obligation.

41  
42 Therefore, although Panama has had the right to exercise diplomatic protection in  
43 this case, it has not done so. Panama has only been supporting its claim with the  
44 rules governing international judicial proceedings. Italy has not shown any evidence  
45 that Panama has used diplomatic action to protect the rights of the motor vessel  
46 *Norstar*. Since Panama has not done so, none of Italy’s objections regarding  
47 diplomatic protection is inapplicable

48  
49 **THE PRESIDENT** (*Off microphone*)

50

1 **MR CARREYÓ:** I am trying really hard. I am not a diplomat, I am not a public  
2 servant, I am a simple private lawyer dedicated to international law of the sea  
3 studies, who practices privately and has been hired by the Panamanian Government  
4 to defend its case here. If I were a diplomat, probably I would accept Italy's views  
5 concerning diplomatic protection provisions.  
6

7 In paragraph 119 of its Reply, Italy relies on article 15 of the ILC Draft Articles on  
8 Diplomatic Protection, which refer to cases where there is no need to exhaust local  
9 remedies. However, Italy neglects the reference the author Tams (page 1062) has  
10 made with respect to the previous article 14, which codifies the customary rule on  
11 exhaustion of local remedies by saying that  
12

13 The exhaustion of local remedies rule applies only to cases in which the  
14 claimant State has been injured "indirectly", that is, through its national. It does  
15 not apply where the claimant State is directly injured by the wrongful act of  
16 another State, as here the State has a distinct reason of its own for bringing  
17 an international claim. This position is codified in paragraph 3.  
18

19 Panama also challenges the Italian invocation of article 18 of the Articles of  
20 Diplomatic Protection because this provision deals exclusively with the protection of  
21 ship's crews and not with the protection of ships themselves. Article 18 states:  
22

23 The right of the State of nationality – and I stress the following part – of the  
24 members of the crew of a ship to exercise diplomatic protection is not affected  
25 by the right of the State of nationality of a ship to seek redress on behalf of  
26 such crew members ....  
27

28 Article 18, used by Italy in paragraph 97 of its Reply, is thus inapplicable to this case,  
29 not only because the instant case is not one of diplomatic protection but also  
30 because article 8 deals only with the protection of ships' crews.  
31

32 On the other hand, article 1 of the same document states that diplomatic protection  
33 consists of the invocation by a State, through diplomatic action or other means of  
34 peaceful settlement, of the responsibility of another State for an injury caused by an  
35 internationally wrongful act of that State to a natural or legal person that is a national  
36 of the former State. I want to stress the word "person". Reference is made to natural  
37 or legal persons. According to the ILC, the use of diplomatic protection requires an  
38 injury to occur to "natural or legal persons".  
39

40 The cases cited by Italy in which the rules for diplomatic protection have been  
41 applied, such as the ICJ *Interhandel* and *ELSI* cases, have not been cases involving  
42 vessels but legal persons or corporations. All chapters of the ILC Draft Articles on  
43 Diplomatic Protection refer to "natural persons" (Chapter II), "legal persons"  
44 (Chapter III), and even in the case of article 14 on the exhaustion of local remedies,  
45 "nationals or other persons".  
46

47 In paragraph 98, Italy said that the object and purpose of the applicants' claims in the  
48 *Interhandel* and *ELSI* cases (Switzerland and the United States respectively) was  
49

50 to secure the interests of their nationals and not to vindicate their own rights.  
51

1 Panama does not contest this. What Panama challenges is that Italy has tried to  
2 equate the facts of the *Interhandel* and *ELSI* cases to those of the *M/V "SAIGA"* and  
3 the *M/V "Virginia G"* cases by saying, contradictorily, that ITLOS

4  
5 has repeatedly relied on the same line of reasoning

6  
7 in the *M/V "SAIGA"* Case.

8  
9 This is misleading because the cases of *Interhandel* and *ELSI* did not involve  
10 freedom of navigation and, as was stated by the Chamber in the *ELSI* case, it was  
11 not possible

12  
13 to find a dispute over alleged violation of the FCN Treaty resulting in direct  
14 injury to the United States, that is both distinct from, and independent of, the  
15 dispute over the alleged violation in respect of Raytheon and Machlett.

16  
17 In the present case, the dispute is over the alleged violation of the Convention,  
18 resulting in direct injury to Panama, which is distinct and independent of the dispute  
19 over any violation with respect to any person related to the *M/V Norstar*. The  
20 breaches claimed by Panama are not those concerning the treatment of aliens, such  
21 as persons and corporations, but of Panama itself.

22  
23 Panama avers that it has only used judicial proceedings, and that its  
24 communications are not to be taken as diplomatic actions, but only as evidence of  
25 compliance with paragraph 1 of article 283 as a true and good-faith intention to  
26 engage in negotiations before resorting to judicial proceedings.

27  
28 Whereas all references of the ILC Draft Articles on Diplomatic Protection allude to  
29 *persons*, Italy has not presented any evidence nor clearly indicated who it considers  
30 to be the "national subject", or other person, whom Panama is supposed to be  
31 espousing. The only reference by Italy to the claimant has been made in paragraph 7  
32 of its Objections, where several corporations related to the *Norstar* were mentioned.

33  
34 In paragraphs 96-97 of its Reply Italy expressly accepted the Tribunal's ruling in the  
35 *M/V "SAIGA"* Case that

36  
37 the ship, everything on it and every person involved or interested in its  
38 operations are treated as an entity linked to the flag State.

39  
40 However, in paragraph 98, Italy went on to say that the claims put forward by the flag  
41 State (Panama) were indirect and, when lodged to seek redress for the individuals  
42 involved in the operation of the ship, the local remedies rule would apply on the  
43 same grounds as in a diplomatic protection case.

44  
45 Again, Italy did not define who the "individuals involved in the operation of the ship"  
46 were, nor to whom it was referring for the purposes of its contention that the claim  
47 was of an espousal or indirect violation nature. Instead, in paragraph 121, Italy said  
48 that it was the companies involved in the use of the *Norstar* which should have  
49 brought civil proceedings for compensation of damages under the Italian Civil Code,  
50 thereby suggesting that Panama is not entitled to bring this case to the Tribunal.  
51 Panama challenges this attempt to abridge its rights of national sovereignty.

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**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.)*