Separate Opinion of Judge Ndiaye

(*Translation by the Registry*)

I voted in favour of the Judgment because I agree with the Tribunal's reasons concerning the principal issues. In particular, I subscribe to the arguments set out in paragraphs 97, 99, 100, 101, 102, 122, 132, 163, 210, 213, 216, 217, 231, 266, 270, 271, 300 and 307.

Although I consider that the decision whereby the Tribunal has jurisdiction and Panama's Application is admissible is justified, it is for a certain number of reasons going beyond those set out in the Tribunal's Judgment. I consider that the Judgment could have dealt with the new matter of procedural objections and established a legal regime in that regard before dealing with jurisdiction and admissibility of the Application. Furthermore, the operative part of the Judgment should have been more conventional. Pursuant to article 8, paragraph 6, of the Resolution on the Internal Judicial Practice of the Tribunal, the present separate opinion will be based on these points.

Panama's Application instigating the case in the matter of the *M/V "Norstar"* was filed on 17 December 2015. This Application concerns reparation for the damage allegedly caused to the *"Norstar"* by the conduct of the Italian authorities which was claimed to be contrary to international law. In order to establish the Tribunal's jurisdiction, the Application invokes Panama's declaration under article 287. On 11 March 2016, the Italian Government submitted preliminary objections, concluding, on the one hand, that the Tribunal did not have jurisdiction and, on the other, that the application was inadmissible.

During the proceedings, the Parties presented the following submissions:

> **"The Application**
>
> Panama submitted an Application on 17 December 2015 instituting proceedings against Italy in a dispute concerning the arrest and detention of the M/V "Norstar". A certified copy of the Application was transmitted to Italy, on 17 December 2015. In its Application, the "Applicant requests the Tribunal to adjudge and declare that:

1. Respondent has violated articles 33, 73 (3) and (4), 87, 111, 226 and 300 of the Convention;
2. Applicant is entitled to damages as proven in the case on the merits, which are provisionally estimated in Ten Million and 00/100 US Dollars [*sic*] (10,000,000); and
3. Applicant is entitled to all attorneys' fees, costs, and incidental expenses."

I PRELIMINARY OBJECTIONS

(1) Relevant provisions

– Article 294, paragraph 3, of the Convention.
– Article 97, paragraph 3, of the Rules.

(2) Filing of Preliminary Objections

Italy submitted Preliminary Objections pursuant to article 294, paragraph 3, of the Convention, on 11 March 2016.

– The Preliminary Objections were submitted within the time-limit of 90 days from the institution of proceedings (see article 97, paragraph 1, of the Rules).
– Proceedings on the merits were suspended (see article 97, paragraph 3, of the Rules).

Pursuant to the President's Order of 15 March 2016, Panama filed its written observations and submissions on 9 May 2016, and Italy its written observations and submissions in reply on 8 July 2016.

On 22 August 2016, Panama submitted a request dated 16 August 2016 "for a ruling concerning the scope of the subject matter based on the preliminary objections filed by Italy". Italy contested this request of Panama's by letter of 23 August 2016 (see also PV5, p. 11, ll.45–48).

(3) Submissions of the Parties

Italy

– "Italy respectfully requests that the Tribunal adjudge and declare that:

(a) it lacks jurisdiction with regard to the claim submitted by Panama in its Application filed with the Tribunal on 17 December 2015;
(b) the claim brought by Panama against Italy in the instant case is inadmissible to the extent specified in the preliminary objections" (Preliminary Objections, para. 36, see paras 5 and 27; see Reply, para. 178; see PV5, p. 12, ll. 16–39: Final Submissions).

Panama

– "Panama respectfully requests that this honourable Tribunal

FIRST, declare that
1. it has jurisdiction over this case;
2. the Application made by Panama is admissible; and
3. the Italian Republic has not complied with the rule of Due Process of Law;

SECOND, that as a consequence of the above declarations the Written Preliminary Objections made by the Italian Republic under Article 294, paragraph 3, of the Convention, are rejected" (Observations, "Petitum", p. 17; PV6, p. 17, ll. 27–37: Final Submissions).

II PROCEDURAL OBJECTIONS

(A) PANAMA'S REQUEST FOR RULING OF 16 AUGUST 2016 AND ITALY'S OBJECTION OF 23 AUGUST 2016

– **Were the preliminary objections submitted by Italy in a timely manner?**

Italy

– "Panama's Request [of 16 August 2016] is manifestly unfounded. In fact, all of Italy's arguments made in its Reply of 8 July 2016, either developed and specified its objections first raised on 16 March or responded to arguments made by Panama in its observations of 5 May 2016" (PV1, p. 7, ll. 8–11; see PV5, p. 11, ll. 10–11 and 25–30).

On the principle of "equality of arms": "[T]here can be no basis for Panama to claim that any breach of the principle of equality of arms may have occurred. Panama has had ample opportunity to respond to these objections and it has the further ability to respond to these objections during this hearing" (PV1, p. 8, ll. 34–38; see PV5, p. 11, ll. 12–15 and 35–40).

On "inherent powers" of the Tribunal: "Italy acknowledges that the Tribunal in any event has wide and inherent powers to consider its jurisdiction and the admissibility of the claim. These wide and inherent powers extend to empowering a tribunal to consider jurisdiction and admissibility where objections have not been timely made – and even if they have not been made at all – is part and parcel of general international law" (PV1, p. 8, l. 47 – p. 9, l. 2).

"[N]one of the six Preliminary Objections of which Panama complains was newly made in Italy's Reply" (PV1, p. 7, ll. 19–20).

On "lack of representative powers": see PV1, p. 7, ll. 27–39; PV5, p. 3, ll. 7–20;

On "irrelevance of rights invoked": see PV1, p. 7, ll. 41–47.

On "order for seizure not amounting to a breach of an international obligation": see PV1, p. 8, ll. 1–10; PV5, p. 4, ll. 1–14;

On "exchange of views": see PV5, p. 3, ll. 22–25;

On "attribution of conduct": see PV1, p. 8, ll. 12–14;

On "espousal nature" of the claim: see: PV1, p. 8, ll. 16–20; PV2, p. 1, ll. 9–14; PV5, p. 3, ll. 22–25;

On acquiescence, prescription and estoppel: see PV1, p. 8, ll. 22–23; PV 2, p. 19, ll. 16–41.

Panama

– " … it is not fair that Panama does not have the opportunity to reply to the objection by Italy except by way of these oral proceedings" (PV4, p. 19, ll. 40–41).

On Italy's arguments made in its Reply concerning "representative powers": "None of these points were included in the Preliminary Objections and therefore were not discussed by Panama in its written Observations and Submissions" (Request for a Ruling, para. 11; see PV4, p. 19, l. 35 – p. 20, l. 9).

On Italy's arguments made in its Reply concerning "relevance of provisions invoked by Panama": "In its Reply, Italy continues to argue against the relevance of each of the provisions invoked by Panama in its Application (Reply, paras 33–49). Panama is now unable to challenge these Objections in written form because Italy has raised them for the first time" (Request for a ruling, para. 13; see PV4, p. 20, ll. 11–21).

On Italy's arguments made in its Reply concerning "the order of seizure as a preparatory act": " … if we examine the Preliminary Objections filed by Italy, it is easy to note that this contention was not mentioned in that document. Consequently, in its Observations and Submissions to the Preliminary Objections of Italy, Panama did not refer to this matter, either" (Request for ruling, para. 17; see PV4, p. 20, ll. 23–32).

On Italy's arguments made in its Reply concerning "attribution of conduct": "The fact that Panama has claimed that the right of peaceful navigation was violated by Italy, and that Italy has now challenged this by stating that it did not actually carry out the arrest, constitutes a further new Objection based on the Independent Responsibility principle that

Panama did not anticipate, and raises new questions about how a state's conduct should be defined and how Article 6 of the ILC ASR provisions should be applied. These questions have now added a new dimension to this procedure to which Panama has so far been unable to respond" (Request for ruling, para. 21; see PV4, p. 20, ll. 34–42).

On Italy's arguments made in its Reply concerning "espousal nature of the claim": "Italy did not refer to this Objection in any of the arguments put forward in its Preliminary Objections. Therefore, Panama has not had the opportunity to refer to then in its Observations" (Request for ruling, para. 24; PV4, p. 20, l. 44 – p. 21, l. 2).

On Italy's arguments made in its Reply concerning "acquiescence": "[T]his is also the first time that Italy has described Panama's claim as Acquiescent" (Request for ruling, para. 27). " … since Italy did not include any of the above identified issues in its Preliminary Objections, all of them must be rejected due to its failure to timely address these concerns" (Request for ruling, para. 30; see PV4, p. 21, ll. 4–8).

(B) Status of Panama's Application

Panama's Application concerns the procedural question as to whether or not Italy's Reply of 8 July 2016 is admissible. We know that an application to declare a submission invalid is a procedural objection which has to be submitted *in limine litis. "In limine litis"* is a Latin expression of procedural law meaning "as soon as proceedings begin". It is used to recall that the formal aspects should be mentioned at the very beginning of a case and before the merits are discussed at all, so as to avoid the proceedings' pointlessly lasting interminably and to avoid this step being taken purely as a delaying tactic. In other words, objections on grounds of invalidity for formal defects should also be raised *"in limine litis*", that is, before any defence on the merits is entered. Contrary to the purely formal aspects mentioned above, the legal aspects (that is, the merits) may be mentioned "at any event", that is, until the deliberations take place. The subject of the dispute is established in the document instigating the case and Panama's Application deals with the *exercise of the right of action,* consisting of the application and means of defence.

1) Facts and procedure at the origin of the Application:

- On 16 November 2015 (17 December 2015) Panama instituted proceedings against Italy by filing an Application at the Tribunal in a dispute concerning the seizure and arrest of the *"Norstar"*, a vessel flying the Panamanian flag;
- On 11 March 2016, Italy raised preliminary objections that the Tribunal did not have jurisdiction and that Panama's Application was inadmissible;
- On 10 May 2016, Panama filed its written observations and submissions in response to Italy's objections; and
- On 8 July 2016, Italy filed its Reply to the Panamanian observations.
- On 22 August 2016, Panama submitted an Application "requesting a decision on the scope of the preliminary objections raised by Italy"; and
- On 23 August 2016, Italy opposed the Application submitted by Panama.

2) The Admissibility of the Application

(a) Admissibility in terms of form

Pursuant to article 97, paragraphs 1 and 2:

(1) "Any objection to the jurisdiction of the Tribunal or to the admissibility of the application, or *other objection the decision upon which is requested* before any further proceedings on the merits, shall be made in writing within 90 days from the institution of proceedings".
(2) "The preliminary objection shall set out the facts and the law on which the objection is based, as well as the submissions".

In other words, an objection may be for lack of jurisdiction or inadmissibility *but also for any other reason on which a party requests the Tribunal to decide,* provided that it precedes the merits.

This is precisely the case of the Panamanian objection: it is a procedural one! And in view of its preliminary objection pursuant to article 97, paragraph 2, of the Rules of the Tribunal, it can be concluded that the formal conditions for admissibility of the Application provided by the Rules are met.

(b) Admissibility based on the merits: this is assessed against several criteria

First, it is assessed against the purely legal criterion. A judicial body such as the Tribunal can act only on the basis of the law and must thus ensure that it has the power to adjudicate on the merits before it does so.

The second criterion concerns the correct administration of justice and the importance of proper justice.

The final criterion concerns the active role of the Tribunal as master of proceedings and custodian of judicial integrity. That is why the Tribunal is obliged to mention automatically any factors affecting judicial integrity or the proper administration of justice. Panama's arguments should be recalled in order to gauge them according to the above criteria:

(1) "It is in violation of the Principle of Due process of Law and procedurally anomalous to allow the respondent to file additional objections i. e. those that were not referred to either in the Preliminary objections or in the observations made by the applicant in response
(2) Panama requests that the Tribunal reject any and all of these objections as files because they are in contravention of paragraph 1 of 97
(3) The principle of Equality of Arms states that both parties to a dispute must be allowed the same opportunities
(4) Italy is unduly hindering Panama's case by now bringing up additional points
(5) If the new objections are deemed admissible, Panama will have been placed at a procedural disadvantage
(6) An elementary and fundamental requirement of due process in any proceeding is the opportunity for both parties to present their respective arguments on equal terms
(7) Italy has made objections beyond the 90 days time limit in its attempt to broaden the scope of its preliminary objections and,
(8 The only opportunity that Panama now has to make use of its right to contradict these arguments is in the oral proceedings. However, this would affect the principle of due process of law of contradiction, and of *égalité d'armes* because of the lack of time for Panama to study, corroborate and challenge these new objections and arguments."

Panama's Application invites the Tribunal to respond principally to the question as to whether the inadmissibility invoked by Italy constitutes *a fin de non-recevoir* or a procedural objection. This question is reminiscent of the one which the Permanent Court asked in the *Case concerning Certain German Interests in Polish Upper Silesia*, where the Court asked if it was a matter of

> those grounds of defence based on the merits of the case and calculated to cause the judge to refuse to entertain the application, such as are generally called – in French law for instance – by the name of *fins de non-recevoir*? Or is it not rather a genuine objection, directed – like that which has just been considered by the Court – not against the action itself and the legal arguments on which it is based, but against the bringing of the action before the tribunal? [*Judgment n° 6, 1925, P.C.I.J. Series A no. 6*, p. 19].

(3) Procedural Objections

It would appear that here we are confronted with a procedural objection. A procedural objection is any means which results either in the proceedings' being declared irregular or extinct or in their being suspended. Such objections include objections on grounds of invalidity, which include invalidity for formal defects, the annulment of submissions for formal defects assuming that two conditions are met: non-compliance with a substantive formality and proof of the damage the irregularity has caused.

In the case of this means of defence, it is not a matter of disputing the merits of the other party's claim themselves but of disputing the procedure.

It must be said that the word "objection" is ambiguous, since it can designate a veritable defence on the merits – for example, the objection for compensation in domestic law – or a means of defence in general, such as in the case of "*le juge de l'action est le juge de l'exception*".

When one State lodges a procedural objection against another State, it is indicating that, at least provisionally or temporarily, it is not accepting the debate on the merits – as in the present case – either in order to temporarily stall the proceedings to gain time or to terminate the proceedings or case.

In that respect, a procedural objection is also a preliminary objection in the sense that its aim is to suspend the proceedings on the merits in order to ensure that the questions raised are first examined. It is thus a

> means invoked during the first phase of a case and intending to ensure that the tribunal seized of the case decides on a preliminary question before examining the merits of the case, the aim of the objection most often being to prevent the merits being examined (Salmon (ed.) *Dictionnaire de droit international public*, Brussels 2001, p. 474) [*translation by the Registry*].

The annulment of a submission on grounds of formal defects is brought about by way of a procedural objection. It is indeed by way of a procedural objection that the party intending to declare a submission invalid has to raise the question of invalidity. In matters of invalidity objections, the judge has to be strict as concerns irregularities likely to affect the originating application which establishes the subject of the dispute and is thus essential for the entire proceedings. In other words, if the formal defect affects the originating application, invalidity must be invoked at the very beginning of the case, with all the other possible procedural objections, that is, those relating to the formal validity of a submission. It should be noted that the attitude of the International Court of Justice towards procedural defects varies according to whether it is a defect of the originating application or procedural defects in the true sense. The Court appears to be rather flexible, allowing defective originating applications to be amended.

On the other hand, it is very strict about any defect of the validity of submissions, particularly when it is a matter of ensuring the parties' equality and the proper administration of justice. That is why the Court in The Hague has to rule out the late submission of evidence or documents.

Paragraph 54 of the judgment of 26 February 2007 in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia-Herzegovina* v. *Serbia and Montenegro*) reads as follows:

> On 7 March 2006, Bosnia and Herzegovina provided the Court and the Respondent with a CD-ROM containing "ICTY Public Exhibits and other Documents cited by Bosnia and Herzegovina during its Oral Pleadings (07/03/2006)". By a letter dated 10 March 2006, Serbia and Montenegro informed the Court that it objected to the production of the CD-ROM on

> the grounds that the submission at such a late stage of so many documents "raise[d] serious concerns related to the respect for the Rules of Court and the principles of fairness and equality of the parties". It also pointed out that the documents included on the CD-ROM "appear[ed] questionable from the point of [view of] Article 56, paragraph 4, of the Rules [of Court]". By a letter dated 13 March 2006, the Agent of Bosnia and Herzegovina informed the Court of his Government's views regarding the above-mentioned objections raised by Serbia and Montenegro. In that letter, the Agent submitted, inter alia, that all the documents on the CD-ROM had been referred to by Bosnia and Herzegovina in its oral argument and were documents which were in the public domain and were readily available within the terms of Article 56, paragraph 4, of the Rules of Court. The Agent added that Bosnia and Herzegovina was prepared to withdraw the CD-ROM if the Court found it advisable. By a letter of 14 March 2006, the Registrar informed Bosnia and Herzegovina that, given that Article 56, paragraph 4, of the Rules of Court did not require or authorize the submission to the Court of the full text of a document to which reference was made during the oral proceedings pursuant to that provision and since it was difficult for the other Party and the Court to come to terms, at the late stage of the proceedings, with such an immense mass of documents, which in any case were in the public domain and could thus be consulted if necessary, the Court had decided that it was in the interests of the good administration of justice that the CD-ROM be withdrawn. By a letter dated 16 March 2006, the Agent of Bosnia and Herzegovina withdrew the CD-ROM which it had submitted on 7 March 2006.

The international court even has to raise *proprio motu* any grounds attaching to its judicial integrity, the conditions of general competence *ratione personae* and *ratione materiae*, and to material admissibility, such as standing and competence to act.

Thus it was in the *Case concerning the Administration of the Prince of Pless* that the Permanent Court stated:

> Whereas the claim thus made raises a question regarding the Court's jurisdiction, and as this question is connected with another, namely, whether, on the basis of Article 72, paragraph 3, of the Geneva Convention, a State, in its capacity as a Member of the Council, may claim that an indemnity be awarded to a national of the respondent State, who is a member of a minority; and as the latter question which the Court feels called upon to

> raise *proprio motu* concerns the merits, the Court cannot pass upon the question of jurisdiction until the case has been argued upon the merits (*Case concerning the Administration of the Prince of Pless* (*Preliminary Objection*), *Order of 4 February 1933, P.C.I.J. Series A/B, no. 52*, p. 15; see also *South West Africa Cases, I.C.J. Reports 1966*, pp. 18–19).

If – as in the present case – the alleged formal defect affects a submission made during a case, the party intending to have the submission invalidated must oppose the invalidity objection or demand that it be rejected before continuing with the discussion on the merits, it being understood that all of these means of having submissions invalidated must be invoked *ab initio* and simultaneously.

It should be underlined that the regime of procedural objections is stricter than that of a defence on the merits in that it leads one to believe that such a means of defence is essentially motivated by the concern to delay proceedings or even temporarily halt the case.

Although rare, these procedural objections are of prime importance and international courts and tribunals have a responsibility to raise them *proprio motu* insofar as they affect the very foundations of the proceedings: the proper administration of justice; the Tribunal is master of proceedings and custodian of judicial integrity; the interests of the States party to the Convention and thus to the Statute of ITLOS must be safeguarded; the same applies to the "due process of law" and the principles of *habeas corpus* and especially that of equality of arms of the parties to the proceedings, etc.

Panama further underlines another form of procedural intervention – what it qualifies as new objections and Italy calls new arguments. This intervention would be rather in keeping with those arising from the modification of the parties' claims or of the parties to the case: additional requests, incidental applications or interventions.

It should also be recalled that any means intending to have the opponent's application declared inadmissible without examination of the merits, for lack of a right to act, such as:

– lack of standing;
– lack of competence;
– prescription;

– preclusive time-limits; and
– *res judicata*;

constitutes a *fin de non-recevoir.*

In sum, it should be noted that Panama's Application involves a procedural objection and the Tribunal is competent to:

– adjudicate on procedural objections;
– adjudicate on interventions bringing a case to a close;
– consider that a procedure is irregular;
– prescribe any provisional measures, including any instructions;
– reject the new Italian objections as set out in the Reply; and finally
– agree a new time-limit for Panama, to allow it to respond in writing after the oral proceedings, because the common basis of the procedural provisions in all legal systems is the actual equality of the parties: this is a consequence of the judicial nature of the Tribunal.

It is the concern for complete equality between the two parties which forms the basis of the decisions taken as regards:

– the order in which the pleadings are presented;
– the burden of proof;
– the hearing of the parties and their right to respond in application of the principle *"auditur et altera pars"* (*Nottebohm case*);
– the allocation of time to prepare the files (memorial/counter-memorial, etc.);
– speaking time.

I believe that allowing Panama to respond in writing after the oral proceedings would have given the Tribunal greater freedom and greater certainty in its assessment of the probative value of the evidence submitted to it by Italy and Panama and in the establishment of legal truth. It is thus possible to adjudicate by being better informed! The Tribunal decided to allow each Party 30 minutes' additional speaking time during the hearing, in order to give their opinion on this matter, as mentioned in paragraph 30 of the Judgment.

III OBJECTIONS TO JURISDICTION

(1) Does a dispute between Italy and Panama exist and does the dispute relate to the interpretation and application of the Convention?

Italy

"There is no dispute between Panama and Italy pertaining to the facts complained of in the Application" (Preliminary Objections, paras 4 (a) and 17 (a); see Reply, para. 176 (a), and para. 8; see also PV1, p. 5, ll. 21–23 and p. 10, ll. 4–5).

Panama

– " … a dispute between Panama and Italy exists" (Observations, para. 5; for references to case law, see Observations, para. 9; see PV3, p. 3, ll. 10–35; PV6, p. 1, ll. 17–41).

Exchange of communications / representative powers

Italy

"The unilateral assertion of one's own claims does not, as such, fulfill the basic jurisdictional requirement of the existence of a dispute between the Parties. In fact, no complaint, or protest, bearing on the facts complained of in the Application, has been raised in any legally appropriate manner by the Government of Panama with the Government of Italy, which the latter would resist, or contest" (Preliminary Objections, para. 18; see PV1, p.10, ll. 16–38 and p. 11, ll. 17–20).

" … the communications received both from Mr Carreyó and the Government of Panama had no relevance for the purposes of the fulfilment of the requirement of the existence of an international dispute between Italy and Panama. First, Mr Carreyó's communications could not be deemed as coming from a State representative entitled to invoke Italy's responsibility … Second … they either concerned the anticipation that a prompt release procedure would be triggered – which has never been done – or consisted in advancing a claim for damages without advancing the legal grounds for such requests under international law, least

of all indicating the rights invoked in the *Application*" (Reply, para. 26, see para. 10).

"[T]he lack of a situation which could lead to a dispute between the Parties is due principally to Mr Carreyó's role not being a representative one … Mr Carreyó appeared to the Italian officials in his first letter of 15 August 2001 to be acting as a private individual, without any authorization to represent or negotiate on behalf of the Government of Panama" (PV1, p. 11, ll. 40–44).

"[W]e cannot confuse the power to litigate with the power to represent a State in diplomatic relations" (PV1, p. 12, l. 22–23). "In particular, the power for an individual to act "on behalf" of a State for the purpose of prompt release proceedings is a unique kind of power under article 292. It does not extend to the power to act on behalf of the State beyond those proceedings" (PV5, p. 3, ll. 38–43).

"Italy has not failed to respond to diplomatic communications from Panama on the matter in issue, it simply did not respond to Mr Carreyó since he was not vested with powers to negotiate with Italy over the facts of the present case" (Reply, para. 9).

"The communications received by the Italian Government on the facts in issue did not come from Panamanian governmental authorities" (Reply, para. 10).

"Italy, contrary to Panama's allegations, did not conceal communications from Mr Carreyó, or Panama, but argued the impropriety and irrelevance – for diplomatic, hence legal, purposes – of such communications…" (Reply, para. 11).

On the letter from the Panamanian Ministry of Foreign Affairs of 2 December 2000 to the Registrar of the Tribunal: "The document simply restricts itself to authorizing [Mr Carreyó] to litigate on behalf of Panama, clearly within the exclusive limits of prompt release proceedings within the meaning of article 292 of the Convention" (PV1, p. 13, ll.28–30).

On the letter of 31 August 2004: see PV1, p. 12, ll. 36–39

On note verbale *AJ 2227*: "In the third and fourth paragraphs, this letter indicates that it is sending to the Italian Government a letter from Mr Carreyó, dated 3 August 2004 and duly certified and apostilled. This is a curious way of proceeding and you might wonder who is representing whom in this case: public or private? Which way round is it?" (PV1, p. 15, ll. 9–13).

On specific communications: see Preliminary Objections, paras 10, 13, 14; see Reply, paras 12 to 26; see also PV1, p. 12, l. 40- p. 13, l. 30; p. 14, l. 45 – p. 17, l. 9.

Panama

– "… Panama would not have instituted proceedings before the Tribunal if it felt that a legitimate dispute did not exist" (Observations, para. 6).

"… the detention of the *M/V Norstar*, its acquittal, and the subsequent failure of Italy to pay damages constitute a dispute, and … Italy's refusal to respond to any of the formal communications it received from Panama concerning this matter have prolonged that dispute's existence" (Observations, para. 76).

On communications:

"By refusing to answer Panama´s communications, Italy has, in fact, implicitly taken a very different position from Panama by rejecting Panama's formal requests, thereby confirming the existence of a serious disagreement" (Observations, para. 9).

"I [the Agent of Panama] do not have to communicate in diplomatic language or with a note verbale. Perhaps presuming that Italy would raise this issue, I went to the Ministry of Foreign Affairs of Panama and requested that the communications I had been sending to Italy be then sent through diplomatic channels" (PV4, p. 12, ll. 38–41).

"Italy has not responded to any of the written communications sent by Panama … That Panama has made a claim which Italy has not acknowledged, much less attempted to resolve, clearly indicates the existence of a dispute. The Tribunal should recognize the good intentions of Panama

and take into account the silence of Italy as unambiguous evidence of its refusal of Panama's claim" (Observations, para. 7, see also para. 8).

"… the Rules of the Tribunal do not prohibit a party being represented by a 'private lawyer'" (PV6, p. 2, ll. 22–23).

"… a correspondence does not need to include a written representative power for representation to be effective. An indication of the person or state who is represented is sufficient. Also, the relevant authorization can be given with retroactive effect by the state represented" (PV6, p. 2, ll. 28–31).

"… with note verbale 2227 of 31 August 2004, Panama expressly confirmed to Italy that its Ministry of Foreign Affairs had certified that lawyer Nelson Carreyó was empowered to act as the representative of the Republic of Panama before the International Tribunal for the Law of the Sea" (PV6, p. 2, l. 33–39).

On the letter from the Panamanian Ministry of Foreign Affairs of 2 December 2000 to the Registrar of the Tribunal:

"The document simply restricts itself to authorizing [Mr Carreyó] to litigate on behalf of Panama. … [Italy] only adds that it was for the prompt release procedures. … when a lawyer obtains a power of attorney to lift the arrest of a vessel, is it not also authorized to communicate with another party in any terms?" (PV4, p. 13, ll. 22–26; see also PV6, p. 2, ll. 12–15).

On specific communications: see Observations, paras 19 to 33; PV3, p. 16, l. 24 – p. 17, l. 15; p. 17, l. 39 – p. 20, l. 2.

On the declarations pursuant to article 287 of the Convention: see Observations, para. 49; see Application, para. 2.

Does the dispute relate to the interpretation or application of the Convention (see article 288, paragraph 1, of the Convention)? / Relevance of the rights invoked by the Applicant.

Italy

– "… there is no dispute between Panama and Italy concerning the interpretation or application of UNCLOS … the provisions invoked by Panama in its *Application* are manifestly irrelevant to the present case and therefore Panama has failed to establish a *prima facie* case" (Reply, para. 28).

On correspondence: see PV 1, p. 18, ll.26–27 and p. 19, ll. 22–24.

On article 288 of the Convention: see Preliminary Objections, para. 18, and Reply, para. 29):

"… the provisions of UNCLOS that Panama relies upon are manifestly inapplicable to the facts of the present case, and therefore cannot provide an appropriate legal basis for sustaining Panama's Claims" (Reply, para. 32; see Preliminary Objections, para. 19).

"… Panama refers to provisions totally inconsistent, both *ratione loci* and *ratione materiae*, with respect to the seizure of the *M/V Norstar* in the Bay of Palma de Mallorca, that is, in Spanish internal waters, by the Spanish Authorities" (Reply, para. 32).

"[A]ll the provisions referred to by Panama in its Application manifestly concern maritime zones different from internal waters. Consequently, articles 33, 87 and 111 UNCLOS clearly do not apply to the facts of the instant case" (PV5, p. 6, ll. 24–27).

"It is not enough … for the Applicant to refer to a certain number of the provisions of the Convention when he files his application to obtain the jurisdiction *ratione materiae* of the Tribunal" (PV1, p. 18, ll. 38–40).

On article 33 of the Convention: see Reply, para. 33; PV1, p. 35, ll. 26–33;

On article 73 of the Convention: see Reply, paras 34 to 36; PV1, p. 35, l. 35 – p. 36, l. 12;

On article 87 of the Convention: see Reply, paras 37 to 39; PV1, p. 19, ll. 31–44; p. 36, ll. 14–34;

On article 111 of the Convention: see Reply, para. 41; PV1, p. 36, l. 36 – p. 37, l. 9; PV5, p. 6, l. 29–37;

On article 226 of the Convention: see Reply, paras 42 to 44; PV1, p. 37, ll. 10–30;

On article 300 of the Convention: see Reply, paras 45 to 48; PV1, p. 37, ll. 32–41.

Panama

– " … this dispute falls under the scope of the Convention and how its rules are interpreted and applied" (Observations, para. 5, see para. 79).

"The claim of the Republic of Panama is based on Respondent's violations of Articles 33, 73 (3) and (4), 87, 111, 226 and 300 and others of the Convention. The right of peaceful navigation of the Republic of Panama through the mv Norstar was violated by the Italian Republic agents the latter hindering the movements and activities of foreign vessels in the High Seas without complying with essential norms of the Convention …" (Application, para. 9; see Observations, paras 49 and 71).

"Panama takes this opportunity to concede that article 73 (Reply, paragraphs 34, 35, and 36) and article 226 (paragraphs 42, 43 and 44) do not apply to this case, since these provisions fall under Part XII, which is devoted to the protection and preservation of the marine environment" (PV3, p. 23, ll. 15–18; see also PV3, p. 9, ll. 14–15).

"In its Application to the Tribunal, Panama identified the subject-matter as 'a dispute concerning, inter alia, the contravention by the Italian Republic of the provisions of the Convention in regard to the freedoms of navigation and/or in regard to other international lawful uses of the sea specified in Article 58 of the Convention … for damages … caused by an illegal arrest of the Norstar'" (Observations, para. 49; see Application, para. 3; PV3, p. 23, ll. 23–26).

On article 87 of the Convention: PV3, p. 23, ll. 50–51; PV3, p. 24, ll. 12–13;

On article 111 of the Convention: PV3, p. 24, ll. 22–38;

On article 297 of the Convention: see Observations, para. 51; PV3, p. 9, ll. 15–18;

On article 300 of the Convention: PV3, p. 24, ll. 40–43.

For Italy, there is a lack of powers of representation, which has given rise to:

a) the inexistence of a dispute;
b) non-respect of the obligation to proceed with an exchange of views. In its opinion
c) only State organs or persons expressly authorized may act on behalf of a State and a distinction has to be made between
d) a specific aim and general aims.

It is noted that communications with Italy started on 15 August 2001. The dispute came about as a result of the fact that Italy did not acknowledge Panama's Application. It appears that the refusal to collaborate is the formal proof of the existence of a dispute.

The legal regime of the dispute:

In the absence of a definition of the dispute in the statutes of international courts and tribunals, recourse must be made to their case law in order to establish its legal regime, since the contentious jurisdictional function of tribunals leads them to be seized of disputes which have to be settled on the basis of the law; that is, the dispute must exist and be justiciable.

(1) According to the P.C.I.J., "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment no. 2, 1924, P.C.I.J. Series A no. 2*, p. 11; definition repeated by the Tribunal in the *Southern Bluefin Tuna cases*).

(2) The question as to whether a dispute exists in a given case must be "objective[ly] determin[ed]" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, first phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

(3) The Court states that "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; *Armed activities on the territory of the Congo, Judgment, I.C.J. Reports 2006*, p. 40, paragraph 90).

(4) The Court's determination "must turn on an examination of the facts. The matter is one of substance, not of form" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), *Preliminary Objections, Judgment, I.C.J. Reports 2011* (*I*), p. 84, para. 30.)

(5) In principle, the dispute must exist at the moment when the application is submitted to the court (*Aerial Incident at Lockerbie, I.C.J. Reports 1998*, paras 42–44).

(6) "However, a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party (*Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 275, para. 89).

(7) The ICJ also stated that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (G*eorgia/Russian Federation, op. cit.* paragraph 30).

(8) According to the ICJ:

> If the Court is seized on the basis of declarations made under Article 36, paragraph 2, of the Statute, it is not necessary for negotiations to be held unless one of the relevant declarations states otherwise (*Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria*), *Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 275, at p. 322, para. 109). Moreover, "although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a … protest is not a necessary condition … in determining whether a dispute exists or not" (*Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea* (*Nicaragua* v. *Colombia*), *Preliminary Objections, Judgment, 17 March 2016,* para. 72). Similarly, the notification of the intention to bring proceedings is not necessary for the purpose

of being able to seize the Court (*Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria*), *Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 297, para. 39).

(9) Furthermore:

The existence of a dispute must be established objectively by the Court on the basis of an examination of the facts (*Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea* (*Nicaragua* v. *Colombia*), *Preliminary Objections, Judgment, 17 March 2016,* para. 50). To that end, it takes account in particular of all the declarations or documents exchanged between the parties (*Questions relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), *Judgment, I.C.J. Reports 2012* (*II*), p. 422, at pp. 443–445, paras 50–55), and exchanges which have taken place in multilateral fora (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), *Preliminary Objections, Judgment, I.C.J. Reports 2011* (*I*), p. 70, at p. 94, para. 51, p. 95, para. 53). In so doing, it pays particular attention "to the author of the statement or document, their intended or actual addressee, and their content" (*ibid.*, p. 100, para. 63).

(10) The Parties' conduct may also be taken into account, in particular in the absence of diplomatic exchanges (*Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea* (*Nicaragua* v. *Colombia*), *Preliminary Objections, Judgment, 17 March 2016,* paras 71 and 73). As the Court stated

> "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis* … as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party" (*Land and maritime boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.)

In particular, the Court judged that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances

where a response is called for" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), *Preliminary Objections, Judgment, I.C.J. Reports 2011* (*I*), p. 84, para 30, citing *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, par. 89).

(11)

The evidence must show that the "points of view of the parties ... [are] clearly opposed" as concerns the question brought before the Court (see paragraph 37 above). As earlier decisions of the Court show, in which the question of the existence of a dispute was being examined, a dispute exists when it is demonstrated, on the basis of evidence, that the defendant was aware, or could not be not aware, that its views conflicted with the "positive opposition" of the applicant (*Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea* (*Nicaragua* v. *Colombia*), *Preliminary Objections, Judgment, 17 March 2016*, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), *Preliminary Objections, Judgment, I.C.J. Reports 2011* (*I*), p. 70, at p. 99, para. 61, pp. 109–110, para. 87, p. 117, para. 104).

(12)

In principle, the date when the existence of a dispute must be determined is the date when the application is filed (*Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea,* (*Nicaragua* v. *Colombia*), *Preliminary Objections, Judgment, 17 March 2016,* para. 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia* v. *Russian Federation*), *Preliminary Objections, Judgment, I.C.J. Reports 2011* (*I*), p. 85, para. 30). When it says, in article 38, paragraph 1, of the Statute of the Court, that its mission is "to decide in accordance with international law such disputes as are submitted to it", it is indeed disputes existing at the date when they are submitted which are intended.

(13)

The parties' conduct after the application has been submitted (or the application proper) may be relevant from various aspects and, in particular, in order to confirm that a dispute exists (*East Timor* (*Portugal* v. *Australia*),

Judgment, I.C.J. Reports 1995, p. 90, at p. 100, para. 22 and at p. 104, para. 32), to clarify what its subject is (*Obligation to negotiate access to the Pacific Ocean* (*Bolivia* v. *Chile*), *Preliminary Objection, Judgment, I.C.J. Reports 2015* (*II*), p. 602, para. 26), or to determine whether it has disappeared at the moment when the Court decides (*Nuclear Tests* (*Australia* v. *France*), *Judgment, I.C.J. Reports 1974,* p. 253, at pp. 270–271, para. 55; *Nuclear Tests* (*New Zealand* v. *France*), *Judgment, I.C.J. Reports 1974,* p. 457, at p. 476, para. 58).

(14) However, neither the application nor the subsequent conduct of the parties or declarations made by them during the case could enable the Court to conclude that it was satisfied that the condition of the existence of a dispute had been met in this case (*Questions relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), *Judgment, I.C.J. Reports 2012* (*II*), pp. 444–445, paras 53–55). If the Court had jurisdiction with regard to disputes resulting from exchanges which had taken place during the proceedings before it, the respondent would be deprived of the possibility to react, before the case was introduced, to the claim concerning its behaviour. Moreover, the rule whereby the dispute must in principle already exist at the date when the application is filed would be rendered devoid of substance.

In the light of these different decisions, there is no doubt that a dispute does exist between Panama and Italy in the present case.

– The content of the letters of 3 and 6 August 2004 concerning the illegal seizure did not receive any response; and
– the letter of 2 December 2000, authorizing Mr Carreyó to act on behalf of Panama and the *M/V "Norstar"* all concerned the actions associated with the seizure of the vessel and in particular the negotiations for the request for reparations. This letter goes further than the conduct of prompt release proceedings.

Note verbale no. 2227 of 31 August 2004, confirmed by the Ministry of Foreign Affairs of Panama, shows that Mr Nelson Carreyó had been mandated to act as Panama's representative before the International Tribunal for the Law of the Sea.

Note verbale no. 97 of 7 January 2005 confirms Mr Carreyó's mandate as "legal representative of the Republic of Panama and the interests of the owners of the vessel '*Norstar*'".

The communications from Panama concerning the case received no reply from Italy, and Italy only put forward its argument concerning the lack of powers of representation in its Reply of 8 July 2016.

This lack of any reaction in circumstances calling for one constitutes a dispute. And this attitude of the Italian Party also affects the conditions provided for in article 283, paragraph 1, of the Convention, which requires the Parties to a dispute to proceed promptly to an exchange of views concerning the settlement of the dispute by negotiation or any other peaceful means. It should be recalled that the exchange of views should concern the dispute-settlement means alone, and the respondent is obliged to react since an exchange of views requires two parties as one can hardly negotiate with one's own shadow.

In sum, it can indisputably be concluded that a dispute does exist in the present case.

(2) Does the Tribunal have jurisdiction *ratione personae*?

Italy

– "Italy is not the proper respondent in this case and, in any event, Panama's claim would inevitably involve the ascertainment of rights and obligations of a third State in its absence from the present proceedings and without its consent" (Preliminary Objections, paras 4(b) and 17(b), see para. 22; see Reply, para. 176(b)).

Panama

– " … Italy, and only Italy, is the proper respondent to these proceedings" (Observations, para. 5).

Relevance of the order for seizure of the M/V "Norstar" for the purpose of establishing the existence of an internationally wrongful act

Italy

– "In order to assess whether Italy is the proper respondent in the present case, it is essential to determine whether the order for seizure of the M/V Norstar can engage the international responsibility of Italy" (Reply, para. 61).

"[T]he order for seizure issued by the Italian judicial authorities, together with a request for its enforcement addressed to the Spanish authorities, did not amount per se to a breach of the Convention" (Reply, para. 64).

"… the order for seizure of the Italian judiciary could only be deemed as conduct 'preparatory' to an internationally wrongful act …" (Reply, para. 67; see PV1, p. 25, ll. 29–33).

"… the actual conduct complained of by Panama is not the order for seizure, but the material arrest and detention of the *M/V Norstar*, which cannot be attributable to Italy, neither as a matter of fact, nor of law" (Reply, para. 68; see PV1, p. 24, ll.23–26 and p. 25, ll. 35 – p. 26, l. 10; see also PV5, p. 7, ll. 4–9).

"[T]he Agent from Panama purported to reframe its claim, when it stated that 'Panama contends that the conduct complained of was the order for the seizure'" (PV5, p. 4, ll. 30–34).

"Since the order for seizure was not enforced by the Italian authorities, nor was it enforced in Italy, the Panamanian Claim has been addressed to the wrong respondent, both as a matter of fact and law, irrespective of its merits" (Reply, para. 70).

Panama

– "Panama contends that the conduct complained of was the order for the seizure, the physical detention being the natural consequence of the wrongful conduct of Italy's order: sequestration, arrest, detention, seizure. The order of arrest was an internationally wrongful act because it was issued in contravention of several provisions of UNCLOS. If Italy had respected such provisions it would not have ordered the arrest of the Norstar, and its responsibility would not have accrued" (PV3, p. 26, ll. 16–22).

Is an alleged international wrongful act in the present case attributable to Italy?

Italy

– "[T]he arrest and detention of the M/V Norstar cannot in any way be attributed to Italy" (PV1, p. 29, ll. 42–43, see also p. 26, ll.8–10).
– "[E]ven though the order for seizure of the *M/V Norstar* has been issued by an Italian Public Prosecutor, the actual arrest and detention of the vessel has not been executed by Italian enforcement Officials, but by the Spanish Authorities. The Applicant acknowledged this matter of fact in its letter dated 17 April 2010 to the Italian Ministry of Foreign Affairs, in which it stressed that the vessel was still being kept in Palma de Mallorca" (Preliminary Objections, para. 21). Panama's "proposition is oblivious to the basic international rules of the law of State responsibility regarding the attribution of an internationally wrongful act, on the one hand, and the 'independent responsibility principle', on the other" (Reply, para. 74).

On attribution of conduct:

"[T]the conduct of the authorities of Spain could be attributed to Italy only if they could be deemed to have acted as 'organs put at the disposal' of Italy under Article 6 ASR. The circumstances complained of in the Application show that this is not the case" (Reply, para. 76; see PV1, p. 27, ll. 31–33).

"[T]he 1959 Strasbourg Convention gave to the Spanish authorities ample margin to refuse the Italian letter rogatory" (PV5, p. 5, ll. 5–9).

On the 1959 Strasbourg Convention: see PV1, p. 28, l. 34 – p. 29, l. 33.

On the "independent responsibility principle":

"The principle in question is particularly germane to the circumstances of the present case, where the enforcement of the arrest of the vessel was carried out by a State other than the Respondent State upon request by the latter …" (Reply, para. 81; see PV1, p. 26, ll. 12–32).

Panama

– "Panama has not instituted proceedings against Spain and does not consider Spain to have any liability in this case. The detention of the *M/V Norstar* was based on an order given by Italy, not by Spain. Thus, this case does not involve the actions of a third State, only those of Italy" (Observations, para. 12, see also para. 76; see also PV3, p. 28, ll. 8–10).

"Italy admits that the order for the seizure of the M/V Norstar was issued by an Italian Public Prosecutor" (Observations, para. 10).

"Italy is still responsible for issuing such an order and, according to article 1 of the ASR, every internationally wrongful act of a State entails responsibility" (PV3, p. 27, ll. 6–7).

" … by accepting the Italian request for the execution of its arrest order, it is evident that the Spanish authorities were indeed put at the disposal of Italy" (PV3, p. 27, ll. 37–38).

"Without the order of Italy, Spain would never have carried out the seizure. Italy therefore merely used Spain as its executive body" (PV6, p. 4, ll. 42–44; see also PV6, p. 5, ll. 1–34; PV 6, p. 5, l. 46 – p. 6, l. 3; PV6, p. 6, ll. 44–48).

Does the "indispensable party" principle apply, preventing the exercise of jurisdiction over the instant case?

Italy

– "Since Spain is not a party to the present proceedings, Italy respectfully contends that this Tribunal should dismiss the claim advanced by Panama in the Application for lack of jurisdiction" (Preliminary Objections, para. 24).

On the "indispensable third party" principle:

"[I]t is Spain's arrest and detention of the vessel that constitutes the very subject matter of the judgment that Panama asked this Tribunal to render" (PV1, p. 31, ll. 35–36; see also PV1, p. 31, ll. 45 – p. 32, l. 9).

"The principle in question prevents the exercise of jurisdiction because the assessment of the legality of the order for seizure issued by Italy could not be made irrespective of the assessment of the legality of the arrest of the vessel in question by Spain, but the reverse is equally true, namely, this Tribunal's jurisdiction would likewise be prevented, by way of corollary, because the assessment of the legality of the order for seizure by Italy would *a fortiori* imply an assessment of the legality of its enforcement by Spain" (PV1, p. 32, ll. 11–17; see also Preliminary Objections, para. 22).

With reference to the *Monetary Gold Case*, Panama's claim should be dismissed on the basis of the "indispensable party principle" (Reply, para. 87; see Preliminary Objections, para. 23).

With reference to the *Certain Phosphate Lands in Nauru Case*, "[t]he facts of the instant case fully satisfy such a restrictive approach, in so far as the relationship between the order for seizure and its enforcement is, indeed, not one of a purely temporal succession, but also of logical connection" (Reply, para. 89).

With reference to the *East Timor Case*, "[s]hould the Tribunal entertain its jurisdiction over the conduct of Italy about which Panama complains, it would be inevitably assessing whether Spain had the right to materially arrest and detain the *M/V Norstar*" (Reply, para. 91).

Panama

– "[T]he only legal interests which may be affected are those of Italy, not those of Spain, and the very subject matter of a decision on its merits would concern only Italy as Respondent" (Observations, para. 15).

"Italy is responsible for its actions, since Italy based its request for judicial assistance on an alleged offence which was not actually committed. The claim is, therefore, not about the rights or obligations of Spain, but only about the obligations of Italy" (PV6, p. 7, ll. 6–9).

"Spain has not been mentioned, summoned, cited, or even referred to in this case either as defendant or as a third party, nor has it shown any interest in participating through any of the possible methods accepted by the Convention" (Observations, para. 15).

On the "indispensable third party" principle:

"Italy's liability can be determined without Spain's involvement" (PV3, p. 4, ll. 9–10).

With reference to the *Monetary Gold Case*, "this case is fundamentally different and, thus, the Italian argument based on the Indispensable Third Party doctrine is misleading" (Observations, para. 12; see also paras 10, 11).

"The interests of Spain are not an issue in this case, which is why it was not summoned to the proceedings as a Respondent. Thus, the *Monetary Gold Case*, cited by Italy as support for its argument, is of a different nature and is based on different reasoning" (Observations, para. 13).

"The interests of Spain would not be affected by the judgment, much less constitute the 'very subject matter of the decision'" (PV3, p. 4, ll. 30–32).

" … Spain has the opportunity to intervene if it so desires" (Observations, para. 12).

"Panama's assertion that Italy's liability in this case can be determined regardless of Spain's involvement was supported by a similar case", referring to the *Certain Phosphate Lands in Nauru* case (Observations, para. 14).

Italy claims that it is Spain which seized the *"Norstar"*, and that is therefore not the appropriate respondent in the present case. The clauses in the Strasbourg Convention of 1959 which attribute prerogatives are clear. They present a requesting State and a requested State, which acts in the name and on behalf of the former, in conformity with the Convention.

In truth, Spain itself had no interest in seizing the *"Norstar"*. Its action simply follows the "international letter rogatory sent by the Court of Savona to the Spanish authorities, on 11 August 1998" and Italy's order constituted a request for international judicial cooperation sent by it to Spain. It is thus Italy which initiated the letter rogatory and, consequently, it is Italy which is responsible for the actions of the Spanish authorities, carried out in its name, since, with Spain being the requested State, they were hardly responsible for conducting an investigation into the validity of the seizure of the vessel, or the lack thereof, in the context of a request for cooperation. Spain was accountable only for the manner in which the seizure was carried out; that is for the protection of the integrity of the vessel and crew when seized. This definition of mutual responsibility is inherent in the system of judicial cooperation

The effect of this distinction between the responsibilities of the requesting State and of the requested State in the area of judicial cooperation is also that, if a criminal accusation is invalid, it is the requesting State which is liable for compensation, not the requested State; any other conclusion would result in the States' refusal to accept a request for judicial cooperation.

As it is, Spain contented itself with providing judicial cooperation pursuant to the 1959 Strasbourg Convention and, consequently, it is for Italy to assume the consequences attaching to its order, as the communication between the two States shows. It indicates that not only did Italy assume full responsibility for the seizure, but also that the two States had assessed the question of Italy's responsibility in the matter.

What is more, in annex to its letter of 18 March 2003, Italy sent Spain the judgment of the Savona court, requesting it to carry out the release order. That is to say, Italy thus considered its request necessary in order for the vessel to be released. Similarly, Spain considered that the vessel was still Italy's responsibility when it requested its authorization to break up the vessel, in its letter of 6 September 2006.

The legal argument to be borne in mind here is that the Tribunal's decision hardly affects the interests of Spain, the requested State, which is not the appropriate respondent. That is to say, Panama's request would hardly involve the

determination of the rights and obligations of Spain, without its being party to the present proceedings and without its consent. It is Italy which assumes responsibility for its actions since it based its request for judicial cooperation on an alleged offence which was not committed. Consequently, the Application concerns the obligations of Italy, which is indeed the appropriate respondent, and the Tribunal has jurisdiction in this case.

(3) Did an exchange of views take place regarding the settlement of the dispute by negotiation or other peaceful means (see articles 286 and 283 of the Convention)?

Italy

– "Panama has failed to appropriately pursue the settlement of the dispute by negotiation or other peaceful means under Article 283, paragraph 1, UNCLOS" (Preliminary Objections, paras 4(c) and 17(c); see Reply, para. 176(a); PV1, p. 23, ll. 38–41).

"… no 'exchange of views' with Italy has been pursued by Panama in any meaningful and legally appropriate manner with a view to reaching the settlement of the putative dispute by negotiation, or through other means of dispute resolution, under Article 283, paragraph 1, UNCLOS" (Preliminary Objections, para. 25, see para. 19; see Reply, para. 50).

On communications:

"… the contacts between Panama and Italy … cannot qualify as an 'exchange of views', nor as genuine attempts to pursue it, under Article 283 UNCLOS. For a communication to be considered relevant for the purposes of an 'exchange of views' it should be made by State representatives.… this is not the case in the instant proceedings" (Reply, para. 51, see also para. 52; see Preliminary Objections, paras 19 and 26).

"Just as [Mr Carreyó] was not entitled to act on behalf of the Panamanian State in order to create a disagreement between the two States, he was also unable himself to proceed to an intergovernmental exchange of views with Italy on behalf of Panama" (PV1, p. 21, ll. 34–37).

"... the lack of consistency and continuity of Mr Carreyó's communications renders such communications incapable of meeting the requirement in question" (Reply, para. 56; see PV1, p. 23, ll. 28–31).

"... the only communication in which reference was made to Article 283 is the letter sent by Mr Carreyó on his headed paper to Italy of 3/6 August 2004, i.e., before Italy was ever notified that the sender in question was vested with any governmental capacity" (Reply, para. 57). "[I]n that correspondence there is no real proposal for consultation providing a sufficient indication of the outlines of the alleged dispute having a genuine link with the Convention" (PV1, p. 22, ll.37–39).

On specific communications: see Preliminary Objections, paras 10, 13, 14 and 16; see Reply, paras 12 to 26; see also PV1, p. 23, ll. 6–36.

Panama

– "Panama has fulfilled its part in the obligation to exchange views with Italy regarding this matter" (Observations, para. 5). "... Panama notified Italy in writing of its claim by identifying the scope and subject matter delineated by the facts of the case, thereby fulfilling the stipulations of Article 283" (Observations, para. 16; PV3, p. 5, ll. 24–26).

"... Italy has omitted relevant facts regarding its and Panama's compliance with Article 283, as well as significant points related to the case itself" (Observations, para. 5).

"Italy has neglected its duty to proceed with an exchange of views and, by doing so, has also prevented Panama from fulfilling its corresponding duty to proceed appropriately" (PV6, p. 4, ll. 25–27).

On communications:

"Panama undertook communication with Italy in order to resolve the matter by mutually determining the appropriate amount of damages due for the unlawful arrest of the *M/V Norstar*" (Observations, para. 18; PV3, p. 5, ll. 12–14).

"Panama avers that it has only used judicial proceedings, and that its communications are not to be taken as diplomatic actions, but only as evidence of compliance with paragraph 1 of article 283, as a true and good-faith intention to engage in negotiations before resorting to judicial proceedings" (PV4, p. 1, ll. 38–41).

"The clear objective of all of the communications sent by Panama that are referred to above was to obtain feedback from Italy about the Panamanian position on the subject matter, and therefore, the feasibility of a negotiation and/or settlement. There have been seven (7) attempts made by Panama with the purpose of understanding the position of Italy concerning this issue, yet all of them have been unsuccessful. Given its silence, it is unclear how Italy intended to comply with Article 283. Italy, by completely ignoring all of the communications sent throughout the years, has effectively impeded any productive exchange of views" (Observations, para. 33; PV3, p. 7, ll. 37–43).

"… by failing to answer any of the communications of Panama, Italy has been the party which has precluded this exchange" (Observations, para. 17; see paras 33 and 77; PV3, p. 4, ll. 47–48).

"The exchange of views set out by Article 283 has been undermined by the silence of Italy, which has hindered, rather than promoted, Panama's attempts to settle this dispute with Italy by mutual agreement" (Observations, para. 44; PV3, p. 8, l. 49 – p. 9, l. 2).

"… the time passed between the first communication sent to Italy and the submission of the application shows that Panama did not submit the case precipitously to the tribunal" (Observations, para. 34; PV3, p. 7, ll. 48–49).

On power of attorney:

"If an Agent is empowered for incidental proceedings, such as a prompt release procedure, he should also be considered qualified to exchange views" (PV3, p. 21, ll. 1–2; see also PV4, p. 13, ll. 32–33; PV4, p. 14, ll. 4–8).

On due process of law:

"The absence of such information undermines Panama´s right to defence and violates the Due Process of Law Principle" (Observations, para. 18).

" … the Italian Republic has not complied with the rule of Due Process of Law" (Observations, "Petitum", p. 17).

On communication dated 3/6 August 2004: see Observations, paras 25 to 27; PV6, p. 1, l. 43 – p. 2, l. 6; PV6, p. 3, ll. 43–46.

On application of the principle of venire contra factum proprium: see Observations, para. 44.

On specific communications: see Observations, paras 19 to 32; PV3, p. 5, l. 32 – p. 7, l. 43.

On case law: see Observations, paras 35 to 39.

According to Italy, Panama did not satisfy the obligation to proceed with an exchange of views.

The Parties are obliged to proceed with an exchange of views concerning settlement by negotiation or some other peaceful means as soon as an application concerning the interpretation and application of the Convention is filed.

Italy's argument contains a logical contradiction, a contradiction *in se,* in that it proposes that a dispute actually exists, which is, moreover, contested by that country. By not responding to any of Panama's communications, in particular the letter of 3 August 2004, which expressly mentions article 283 of the Convention and is obscured, Italy appears to be the Party which hampered the exchange of views. In the light of the various letters sent to Italy, it appears that Panama communicated with Italy with the object of settling the dispute, fixing an amount for compensation for the damages resulting from the illegal arrest of the *"Norstar".* Italy has failed to show how Panama had refused to proceed with an exchange of views, but, equally, its attitude demonstrates its refusal to participate in this process.

In the light of Italy's obvious refusal, the possibilities for settlement must be considered to have been exhausted and, hence, the conditions set out in article 283, paragraph 1, of the Convention are met.

The article provides:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

The applicant, for its part, indicates that it has on several occasions requested that meetings be held in order to examine the concerns of each party with a view to settling the dispute amicably. It states that the respondent has repeatedly refused to proceed with consultations, failing to respond to the various letters Panama sent.

There would thus be a principle of exhaustion prior to negotiations; hence the objection *in limine litis,* which is what poses the problem of the actuality of the dispute. Negotiations are understood as both a way of determining the subject of the dispute and as a way of settling it. It is in the first sense that the Permanent Court of International Justice explains that

> before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations (*The Mavrommatis Palestine Concessions, Judgment no. 2, 1924, C.P.I.J. Series A no. 2*, p. 15).

That is to say, the parties' attitude should be such that it allows them to reach an agreement. However, they are not obliged to accept a basis for settlement which would harm their own interests. Similarly, a State Party is not obliged to proceed with an exchange of views when it arrives at the conclusion that the possibilities for reaching an agreement have been exhausted (see *MOX Plant* (*Ireland* v. *United Kingdom*)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 107, para. 60).

It appears that the respondent's persistent refusal to examine the opposing party's claims had forced it to resort to the procedure instigated in the present case.

Has the applicant thus violated the provisions of article 283, paragraph 1?

The rule of the prior exhaustion of negotiations is found in certain international conventions (for example, the Covenant of the League of Nations, article 13, paragraph 1). Its customary nature, on the other hand, is questionable. The rule appears to be a condition for the jurisdiction of courts and tribunals or a condition of the admissibility of proceedings introduced by way of an application.

In the first case, international courts and tribunals examine the conditions set and determine them very easily. It is essentially a factual examination of the two parties' attitudes. The ICJ's way of deciding on the question of jurisdiction in this field is entirely applicable to the facts of the present case.

The Court states:

> The true value of this objection will readily be seen if it be remembered that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation.
>
> But it is equally true that if the diplomatic negotiations between the Governments commence at a point where the previous discussions left off, it may well happen that the nature of the latter was such as to render superfluous renewed discussion of the opposing contentions in which the dispute originated. No general and absolute rule can be laid down in this respect. It is a matter for consideration in each case (*South West Africa Cases, Preliminary Objections, Judgment I.C.J. Reports 1962*, pp. 345–346).

In the present case, it is clear that an impasse on the matters under discussion has been reached. The prior exhaustion of negotiations also appears to be a legal prerequisite to the seizing of an international court or tribunal. The admissibility of the application is then subject to respect for the rule. However, this rule applies only if the parties have a contractual obligation binding on

them. That is to say, that the party invoking the rule of prior exhaustion of negotiations should provide proof that a contractual engagement in that respect binds it to the opposing party.

In this case – since both States are party to the Convention – the respondent did not have to prove that such an undertaking existed between the Parties. That is to say, the Tribunal has jurisdiction and can exercise its judicial power and hear the claims of the Parties in order to adjudicate the matter.

Although the rule of the prior exhaustion of negotiations is found in certain treaties, it hardly applies in general international law. The International Court of Justice has refused to allow it on several occasions. It even judged, on the basis of State practice, that the application could be submitted to it whilst negotiations were ongoing.

In the *Aegean Sea Continental Shelf case,* the Court stated:

> The Turkish Government's attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu.* Several cases, the most recent being that concerning the *Trial of Pakistani Prisoners of War* (*I.C.J. Reports 1973,* p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function (*I.C.J. Reports 1978,* p. 12, para. 29; see also *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 1984*, p. 440, paras 106–108; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 303).

On the basis of the above, the Tribunal could have thrown out the objection to jurisdiction raised by the respondent, especially since it had already determined that a State Party is not obliged to pursue the proceedings provided for in section 1 of Part XV of the Convention when it concludes that the possibilities for settling the dispute have been exhausted (see *Bluefin Tuna Cases* (*New Zealand* v. *Japan / Australia* v. *Japan*), *Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 295, para. 60).

"IV. OBJECTIONS TO ADMISSIBILITY

(1) Is Panama's claim of an espousal nature (nationality of claims / diplomatic protection)?

Italy

– "[T]he facts in the present case demonstrate that the latter is manifestly one of diplomatic protection. Accordingly, under the well established rules of international law on diplomatic protection, Panama could validly bring the present claim only if the alleged internationally wrongful act complained of in the Application had affected its own nationals …" (Preliminary Objections, para. 28; see also paras 27(a), 5(a), 28 and 35(a); Reply, para. 177(a)).

On the relevant "locus": "… 'locus' does not refer to the place where the bunkering activities causing the order of seizure were conducted. 'Locus' refers precisely to the place where the alleged internationally wrongful conduct, namely the seizure itself, took place. That place is the Spanish internal waters" (PV5, p. 7, ll. 12–15).

On diplomatic protection: "[A]gainst the background of the factual circumstances of the present case, Panama's Claim predominantly, if not exclusively, pertains to alleged 'indirect' violations and that, therefore, Panama's Claim is of an espousal nature" (Reply, para. 96; see paras 106 and 113; see also PV1, p. 34, ll. 6–11; PV2, p. 1, ll. 19–22; PV5, p. 7, ll. 37–50).

With reference to article 18 of the ILC Articles on Diplomatic Protection, "[t]he claims put forward by the State of nationality or by the flag State under such circumstances are equally 'indirect' in nature. Accordingly, when a claim is lodged by the flag State, preponderantly, if not exclusively,

to seek redress for the individuals involved in the operation of the ship, the local remedies rule applies on the same grounds as in a diplomatic protection case" (Reply, para. 98).

On article 14 of the ILC Articles on Diplomatic Protection: see also PV2, p. 1, l. 33 – p. 2, l. 7.

"It clearly emerges from each and all of the communications sent by Mr Carreyó, or Panama, on the matter at issue, that the nature of the Claim and the remedy sought by Panama concern preponderantly, if not exclusively, the monetary interests of the owner of *M/V Norstar*" (Reply, para. 107; see PV2, p. 4, ll. 27–31).

On the content of communications: see PV2, p. 4, l. 33 – p.6, l. 27.

On the content of notes verbales: see PV2, p. 6, l. 46 – p. 8, l. 2.

"In fact, Mr Carreyó was defending the financial interests of the M/V Norstar's owner, acting in his capacity as a private lawyer specializing in commercial and maritime law" (PV2, p. 3, ll. 31–33).

On the use of Mr Carreyó's personal headed paper: see PV2, p. 3, ll. 35–37;

On the apostille under the Hague Convention of 1961: see PV2, p. 3, l. 39 – p. 4, l. 4.

"The preponderance of the indirect character of the injury invoked by Panama, not only emerges from the claims for damages in question, but is also corroborated by the manifest irrelevance of the random UNCLOS provisions relied upon in the Application as the basis for the putative direct violation of Panama's rights" (Reply, para. 111).

"Panama has explicitly recognised the espousal character of its Claim in its Observations …" (Reply, para. 110).

With reference to the M/V "SAIGA" case: "Italy fully acknowledges the principle authoritatively stated by this Tribunal" (Reply, para. 96).

On case law concerning direct / indirect injury and "preponderance test": see Reply, paras 99 to 106;

On M/V "Virginia": see PV2, p. 1, l. 24–31 and PV5, p. 8, l. 45 – p. 9, l. 4;

On M/V "SAIGA": see PV2, p. 2, l. 20–28 and PV5, p. 8, ll. 10–43.

On nationality of the vessel and persons associated with the vessel: "… neither the *M/V Norstar* was owned, fitted out, or rented, by a natural or legal person of Panamanian nationality, nor the accused in the Italian criminal proceedings were Panamanian nationals, and since the victims of the alleged Italian internationally wrongful conduct have not exhausted the local remedies available under the Italian legal system with regard to the claim for compensation, Italy respectfully maintains that this Tribunal should declare the claim by Panama inadmissible" (Preliminary Objections, para. 29; see also PV2, p. 2, l. 33 – p. 3, l. 13 on a letter from the owner of the M/V Norstar of 2 February 1999).

Panama

– "[T]his case is admissible … because it [Panama] has the right to protect its national subjects by diplomatic action or through the institution of international judicial proceedings …" (Observations, para. 5).

"[T]his claim is not one of diplomatic protection, nor is it espousal or based on indirect violations. Rather, Panama contends that the present case is one involving a direct violation of its rights accorded by the Convention and, as a consequence of those violations, damages inflicted must be compensated" (PV4, p. 3, ll. 36–39).

"Panama has the right and duty to protect its registered vessels and use the peaceful means to assure that other members of the international community respect its rights. There should not be any question that without this claim by Panama, the owner would not have access to this Tribunal" (Observations, para. 58; PV3, p. 29, ll. 13–20).

"[W]hen States bring cases either 'by resorting to diplomatic action or to international judicial proceedings', in reality they are asserting their own rights" (PV3, p. 28, ll. 48–50; see also PV3, p. 29, ll. 31–33).

On diplomatic protection:

"… the exertion of diplomatic protection and the institution of judicial proceedings on behalf of non-nationals are discretionary rights of any State. Panama submits that it is entitled to exercise diplomatic protection by diplomatic action or by international judicial proceedings not limited to formal presentation before international tribunals" (Observations, para. 54, see para. 80; PV3, p. 9, l. 39–42; see also PV6, p. 9, ll. 29–34).

"[T]he Rules of the Tribunal do not prohibit a party being represented by a 'private lawyer'" (PV6, p. 2, ll. 22–23; on the use of a personal letterhead: see PV6, p. 2, ll. 23–26; on the apostille under the 1961 Hague Convention: see PV6, p. 3, ll. 12–23).

On nationality of the vessel and persons associated with the vessel:

"The fact that the victims of the wrongful conduct of Italy are not nationals of Panama does not disqualify this claim because it is based on the deprivation of the property of a juridical person having a vessel registered in Panama" (Observations, para. 58).

"[I]f Italy had taken into account the nationality of the *M/V Norstar*, the essence of what this claim is about, it would unconditionally have to accept that she holds Panamanian nationality. Even its own competent authorities have granted this. The fact that the *M/V Norstar* is a national subject of Panama is precisely the reason that Panama has brought this case to this Tribunal" (Observations, para. 56; PV3, p. 9, l. 44 – p. 10, l. 4).

With reference to the *M/V "SAIGA" Case*: "the Convention considers a ship as a unit … The nationalities of these persons [persons involved or interested in the vessels' operation] are not relevant…. a flag State is entitled to present claims for damages on behalf of natural and juridical

persons who are not its own nationals if the above conditions apply" (Observations, para. 58).

On M/V "SAIGA": see also PV3, p. 10, ll. 6–11; PV4, p. 2, l. 19 – p. 3, l. 27; PV6, p. 9, ll. 18–23.

On the M/V "Virginia G" case: see PV4, p. 3, l. 46 – p. 4, l. 45.

On fees and taxes: " … due to the wrongful act of Italy, Panama has not received the vessel registration fees, taxes, and duties owed by the *M/V Norstar* since its improper seizure. Therefore, Panama is obligated to act on the *M/V Norstar*'s behalf" (Observations, para. 57).

According to Italy:

"neither the M/V Norstar was owned, fitted out, or rented, by a natural or legal person of Panamanian nationality".

This leads us to believe that the Application has an espousal nature and should be declared inadmissible.

Panama submits that it has a right to protect vessels flying its flag, either by taking diplomatic action or by instituting or opening international judicial proceedings.

Italy has indicated that Panama could validly submit its Application only if the wrongful act had affected its nationals. Italy is thus referring to the nationalities of the owner, the charterer, the captain and the crew, whereas what is essential here is the flag, that is, the *"Norstar"*, which is registered in Panama. It should be noted that the lack of a jurisdictional connection to Italy obliged Panama to choose international judicial procedure to protect the *"Norstar"*, flying its flag, and request reparation for the damage caused by third States.

Panama considers that the present case implies a direct violation of its rights under the Convention and that, owing to this violation, reparations must be made for the prejudice caused.

It should be recalled that, when States have recourse to diplomatic action or international judicial procedure to enforce their rights, they are in fact only ensuring that international law is being respected, through their nationals.

(2) Does the requirement of exhaustion of local remedies apply and has it been met (see article 295 of the Convention)?

Italy

– "While such a claim is preponderantly, if not exclusively, of a diplomatic protection character, the requirements for its exercise – i.e. … that of the exhaustion of local remedies – have not been met" (Preliminary Objections, para. 27(a), see also paras 5(a), 28 and 35(a); see Reply, para. 177(a); see PV 2, p. 18, ll. 32–34).

"Panama could validly bring the present claim only if the alleged internationally wrongful act complained of in the Application had affected its own nationals, and if they had exhausted the local remedies available in the legal order of the alleged wrongdoing State. The facts of the case plainly show that neither of the two requirements has been met" (Preliminary Objections, para. 28).

"Panama's Claim is clearly one predominantly, if not exclusively, of an espousal nature. Accordingly, the local remedies rule applies to the instant Claim" (Reply, para. 115; see PV 2, p. 8, ll. 29–31).

On the exhaustion of local remedies as a rule of international law: see Reply, para. 116; see also PV2, p. 15, l. 44 – p. 16, l. 9.

On article 295 of the Convention: see Reply, para. 117.

On exceptions to the rule of exhaustion of local remedies: With reference to article 15 of the ILC Draft Articles on Diplomatic Protection, "[n]one of these exceptions applies in the present case" (Reply, para. 120; see PV2, p. 15, l. 44 – p. 16, l. 9).

On proceedings before national courts: "… the Tribunal of Savona acquitted all the accused of all charges and ordered the lifting of the seizure of

the *M/V Norstar* on 13 March 2003 and transmitted this decision to the Spanish Authorities on 18 March 2003" (Reply, para. 120).

"[O]n 18 August 2003 the public prosecutor at the Court of Savona appealed against that judgment. However, on 25 October 2005 the Court of Appeal of Genoa upheld the judgment given by the court of first instance" (PV2, p. 12, ll.6–8). "[T]he appeal certainly did not concern the seizure of the M/V Norstar because the Italian public prosecutor did not request the Court of Appeal of Genoa to suspend the order to return the vessel" (PV2, p. 12, ll. 22–24; see also PV5, p. 7, ll. 30–35).

On legal remedies available to the ship-owner: "Those companies [involved in the use of the *M/V Norstar*] had a five-year time limit to file a claim for the damages allegedly caused by the order of seizure before Italian domestic courts. This time limit expired on 9 December 2010, no action on the part of the ship-owner having been instigated" (Reply, para. 121; see PV2, p. 9, ll. 8–13; PV2, p. 10, ll. 7–10; *on remedies available before the judgment of the Court of Savona of 18 March 2003*: PV2, p. 9, l. 26 – p. 11, l. 34; *on remedies available after that judgment*: PV2, p. 16, l. 16 – p. 18, l. 23).

Panama

"[T]his case is admissible … because it [Panama] is not prevented from doing so … by the requirement to exhaust local remedies.… the rule of exhaustion of local remedies is only applicable when the acts complained of are carried out within the territorial waters of a coastal State, and this was not the case in this instance" (Observations, para. 5; PV3, p. 14, ll. 36–41).

"[T]he exhaustion of local remedies rule does not apply in the present case since the actions of Italy against the *M/V Norstar*, a ship flying the Panamanian flag, violated the right of Panama, as a flag State under the Convention, to have its vessels enjoy the freedom of navigation and other internationally lawful uses of the sea related to that freedom, as set out in Articles 33, 58, 73(3) and (4), 87, 111, and 300 among others" (Observations, para. 71, see para. 80; PV3, p. 12, ll. 45–48; PV6, p. 7, l. 22 – p. 8, l. 5).

On rights claimed by Panama:

"[They] are not based on obligations concerning the treatment of aliens. Instead, they are based on the treatment of a Panamanian subject, whose rights … were violated" (Observations, para. 73; PV3, p. 13, ll. 24–28).

On exceptions to the rule of exhaustion of local remedies:

On the jurisdictional connection:

With reference to *M/V "SAIGA" Case*: "the exhaustion of local remedies rule does not apply in the absence of a 'jurisdictional connection'" (Observations, para. 72; see also para. 74). "Since the facts of the case show that the M/V Norstar was outside its territorial waters, Italy was not entitled to apply its customs rules to its operation because there was no jurisdictional connection …" (Observations, para. 74; PV3, p. 13, ll. 35–38).

"Whether local remedies apply to this case … depends on the locus where Italy determined the M/V Norstar was carrying out its bunkering activity" (Observations, para. 74; PV3, p. 13, ll. 30–33).

On proceedings before national courts:

"[T]he public prosecutor appealed the first-instance decision of the Savona Court, which made impossible the compliance of the Savona Court's ruling on the return of the vessel" (PV4, p. 11, ll. 5–7).

"Italy's compliance with the judgment by its own authorities is still unrealized" (PV4, p. 11, ll. 35–36).

"In any event, the conclusion of the court case in Italy has exhausted the local remedies, so this is no longer an issue. Thus, the 'exhaustion of local remedies' argument is moot" (Observations, para. 74).

According to Italy:

"While such a claim is preponderantly, if not exclusively, of a diplomatic protection character, the requirements for its exercise – i.e.… that of the exhaustion of local remedies – have not been met".

> "Panama could validly bring the present claim only if the alleged internationally wrongful act complained of in the Application had affected its own nationals, and if they had exhausted the local remedies available in the legal order of the alleged wrongdoing State. The facts of the case plainly show that neither of the two requirements has been met".
>
> "Panama's Claim is clearly one predominantly, if not exclusively, of an espousal nature. Accordingly, the local remedies rule applies to the instant Claim".

For Panama:

> "the rule of exhaustion of local remedies is only applicable when the acts complained of are carried out within the territorial waters of a coastal State, and this was not the case in this instance".

The rule does not apply in this case because Italy's actions against the *"Norstar"*, a vessel flying the Panamanian flag, violated the right of Panama, the flag State in the sense of the Convention, to see its vessels enjoy the freedom to navigate and use the sea for other internationally legal acts associated with the exercise of these freedoms.

The rights claimed by Panama are based on the "treatment of a Panamanian subject whose rights … have been violated".

Let us remember that the Tribunal has already determined that the exhaustion of local remedies rule does not apply when the respondent State has been directly harmed by the wrongful act of the other State (*"Virginia G" Case*). In that case, the Tribunal recalled the rights of the applicant State, deriving from the Convention, and declared that violating them thus amounted to direct prejudice to the applicant State. In the present case, Panama is objecting, *inter alia*, to the violation of its freedom to navigate, and its Application concerns prejudice caused directly to it. Consequently, this is not a case of diplomatic protection and, thus, the exhaustion of local remedies rule does not apply here.

Italy has, moreover, maintained that Panama has not established *prima facie* a sufficient link between the facts of the present case and the provisions of the Convention to which reference is made as concerns the seizure of the *"Norstar"*

in the Bay of Palma de Mallorca, that is, in Spanish internal waters. However, the location where the vessel was seized is less decisive than the motivation of Italy, which accused Panama of infringing its tax laws by bunkering mega yachts on the high seas. It is on that basis which Italy proceeded to have the vessel seized, as a sanction, and for Panama, Italy has thus violated its rights and, in particular, its freedom to navigate on the high seas, in application of its customs legislation. This seizure hardly affects the exhaustion of local remedies rule, of which the prior condition for implementation is that a *judicial connection* be established between the person suffering the damage and the State responsible for the alleged wrongful act. In the present case, as the Genoa Appeal Court noted, Italy did not apply its customs law or its criminal law in its territorial waters but on the high seas. In *the M/V "SAIGA" (No. 2) Case*, the Tribunal considered that this did not constitute a judicial connection and that the exhaustion of local remedies rule did not apply: that is, the Application is admissible in the present case.

(3) Is Panama precluded from bringing its claim before the Tribunal in light of the principles of acquiescence, extinctive prescription and estoppel?

Italy

- "Panama is time-barred and estopped from validly bringing this case before this Tribunal due to the lapse of eighteen years since the seizure of the Vessel and Panama's contradictory attitude throughout that time" (Preliminary Objections, para. 27(b), see also para. 5(b); see Reply, para. 177(b)).
- "[T]he Claim brought by Panama is … inadmissible due to the operation of the principles of acquiescence, extinctive prescription and estoppel" (Reply, para. 123, see para. 175).

"[T]he purpose of extinctive prescription in international law is not just about avoiding prejudice to a respondent State.… the purpose of extinctive prescription and acquiescence is also providing certainty" (PV5, p. 10, ll. 10–13).

Panama

- "Panama contests that the objections by Italy on the basis of extinctive prescription, acquiescence and *estoppel* do not constitute a prima

facie defence" (PV6, p. 16, ll. 47–49). "Panama argues that the examination of this principle is a matter of the merits only. Thus, the fact that we are discussing these objections must not be deemed as prejudicial to the question of whether the principles are a matter of admissibility or of the merits" (PV6, p. 10, ll. 29–32).

– "[T]his case is admissible … [Panama] is not prevented from doing so by a time bar, by an *estoppel* … Panama is not time barred, because its communications with Italy have extended the time limit for bringing this case and, thus, voided any prescription regarding it. Since Italy has not relied on any pertinent statement of Panama, the requirement of estoppel has not been met" (Observations, para. 5).

"[T]he applicability of these principles [time bar, acquiescence, and estoppel] is dependent on the particular circumstances of this case" (PV6, p. 15, ll. 12–13).

"Even though the application of the above principles in international law might be accepted generally, which, however, is not the case, just to mention the European Convention on Human Rights, it is important to point out that since there are no fixed rules based on prerequisites, the criteria given by Italy as to 'the guarantee, the certainty of rights and the predictability of their exercise' are of no relevance on a stand-alone basis" (PV6, p. 14, ll. 28–33).

"There is no procedural limitation of action under international law. Nor is a claim barred or estopped after a particular lapse of time, say 20 or 30 years" (PV6, p. 14, ll. 40–41).

"[C]ontrary to Italy's allegations, Panama's conduct and activities cannot be considered as waiving its rights. Even more, Italy could not reasonably rely on that conduct and conclude that Panama would not pursue its claims any more" (PV6, p. 16, ll. 24–27).

On circumstances extending Panama's efforts to litigate:
PV6, p. 15, l. 26 – p. 16, l. 22.

Did Panama acquiesce to not pursuing its claim?

Italy

– "A State's failure to act to pursue a claim, after having indicated in clear and unequivocal terms its intention to pursue the claim judicially within a reasonable time, is, for the purposes of acquiescence, a situation in which the claimant has failed to assert claims in circumstances that would have required action" (Reply, para. 132; see PV5, p. 10, ll. 32–41).

"[T]he various communications sent by Mr Carreyó were not capable of asserting Panama's Claim vis à vis Italy. Italy wishes to refer the Tribunal to those paragraphs … to demonstrate the acquiescence of Panama with respect to the Claim that it has now brought against Italy before this Tribunal" (Reply, para. 126).

"Panama has not validly asserted its claim" (PV2, p. 20, l. 16). "[T]he consequence of this is that Panama is making its claim for the first time before this Tribunal and is doing so more than 18 years from the date when the event complained of by Panama allegedly occurred.… [I]t takes much less than 18 years of inactivity to bar a State from bringing a claim due to acquiescence or extinctive prescription" (PV2, p. 20, ll. 21–28).

On note verbale AJ 97 of 7 January 2005:

"[T]his is the last formal communication sent by Panama to Italy on 7 January 2005. If this Tribunal should disagree with Italy and hold that Panama's claim has been validly asserted by Panama, but should still agree with Italy that the last communication from Mr Carreyó does not validly make Panama's claim, then 7 January 2005 is the date from which Panama's inactivity as regards the pursuit of its claim starts. Under this scenario Panama would have remained silent for ten years and 11 months before bringing its claim before this Tribunal" (PV2, p. 20, l. 42 – p. 21, l. 5).
On the communication of 17 April 2010 and institution of proceedings before the Tribunal:

"[A]fter the communication of 17 April 2010, … Panama stopped communicating with Italy for 5 years and 7 months, before bringing a claim against Italy *ex abrupto*" (Reply, para. 128; see PV2, p. 21, ll. 7–12: "five years and eight months").

"Panama failed to assert its claim *for a long period of time* … 5 years and 7 months is a very long period of time to assert a claim for compensation of damages …" (Reply, para. 129; see PV2, p. 21, l. 23 – p. 22, l. 4).

"Panama's failure to do so, for an unreasonably long period of time, means that after 5 years and 7 months, 'the respondent State could legitimately expect that the claim would no longer be asserted'" (Reply, para. 131; see PV2, p. 22, ll. 16–22; PV5, p. 10, ll. 39–41).

On the doctrine of acquiescence: see Reply, para. 124; PV2, p. 19, l. 46 – p. 20, l. 3;

On the requirements for the application of acquiescence: see Reply, para. 125; PV2, p. 20, ll. 5–11.

Panama

– "Acquiescence requires the claimant to have failed to assert its claims in circumstances that would have required action. This includes circumstances where the respondent State could legitimately expect that the claim would no longer be asserted. Whether this requirement has been met in this case must be established by the Tribunal based on the specific circumstances of the case" (PV6, p. 11, ll. 12–18).

"[T]he present case does not meet the requirements for acquiescence" (PV6, p. 12, ll. 13–14).

"Panama has sent Italy numerous letters claiming the existence of a wrongful act. Panama further made it clear in its communication that it had suffered substantial damages and that Italy is obligated to pay damages. Panama further announced that proceedings would be initiated

before the Tribunal if the parties were unable to reach a settlement" (PV6, p. 11, ll. 20–24).

"During all of this time, Italy did not return the vessel to the owner" (PV6, p. 11, ll. 29–30).

"Italy itself delayed the settlement of the dispute by failing to respond to Panama's letter while promising a response which was never fulfilled" (PV6, p. 12, ll. 11–12).

Is Panama time-barred from submitting the case before the Tribunal?

Italy

– "Eighteen years have lapsed from the date of the seizure by Spanish Authorities of the M/V Norstar and Panama is therefore time-barred from bringing a claim for damages before this Tribunal. … even if Italy were to be found to be a debtor towards the *M/V Norstar*, the principle of extinctive prescription would apply to render the claim by Panama inadmissible" (Preliminary Objections, para. 30; see PV2, p. 23, ll. 36–43).

On extinctive prescription as a general principle:

"[A] claim that is made, but that is not pursued, and that gives the impression to the respondent of having been abandoned, is not admissible" (PV5, p. 9, ll. 43–45).

"Extinctive prescription is common to virtually all jurisdictions and the principle serves the fundamental purpose of guaranteeing the certainty of rights and the predictability of their exercise. A debtor cannot be held liable indefinitely, and creditors have to claim their rights within a reasonable time" (Preliminary Objections, para. 30).

"[T]he passage of time is a bar to the admissibility of a claim, and … this constitutes a general principle of international law … The legal systems of Panama and Italy are no exception in this regard. That prescription is a general principle of law is also not contested by Panama" (Reply, para. 141; see also PV2, p. 23, ll. 17–18).

"[I]n accordance with article 293, paragraph 1, [of the Convention], extinctive prescription is a rule of international law that the Tribunal must apply if its conditions are met" (PV5, p. 9, ll. 31–32).

On case law: see Reply, paras 135 to 140.

On the resolution of the Institut de Droit International of 1925: PV2, p. 23, ll. 20–27.

On circumstances of the case:

With reference to *Certain Phosphate Lands in Nauru*, "[t]he decision on whether Panama's Claim is extinct by prescription as a matter of international law is therefore a matter for the assessment of this Tribunal, in light of the circumstances of the case" (Reply, para. 143).

On the conduct of the Parties:

"[I]n order to be able to interrupt prescription, a claim must be validly asserted by an individual duly authorised to do so.... Mr Carreyó did not possess authority in this regard" (Reply, para. 144).

"[T]he communications from Mr Carreyó were not able to assert Panama's claim, let alone 'stop the clock ...' [I]n any event, the last communication received from Mr Carreyó dates back to 17 April 2010, and the last note verbale from Panama to 7 January 2005" (PV2, p. 25, ll. 32–35).

With reference to the Commentary to the ILC Articles on State Responsibility, "the conduct of a claimant State resulting in unreasonable delay could determine the extinction of the claim" (Reply, para. 147). "[T]here have been no acts by the Italian Government that admit the existence of a dispute with Panama, no negotiations have occurred between the two States with respect to the dispute, and no agreement to submit the dispute to any judicial forum has ever been discussed, much less concluded, between the Parties" (Reply, para. 153).

On Italy's and Panama's laws on extinctive prescription:

"[R]eference to domestic statutes of limitation is a method routinely employed by international tribunals in deciding on the international prescription of claims" (PV2, p. 25, ll. 8–10).

"Panama's right to claim any damage … is prescribed as a matter of Italian law" (Reply, para. 154; see PV2, p. 24, ll. 20–22).

"The law of Panama provides even stricter terms of extinctive prescription" (Reply, para. 156; see PV2, p. 24, ll. 22–27).

"[T]he *specific circumstances* of this case require that the Panamanian and Italian domestic statutes of limitation should apply in the present case and bar it internationally; in the alternative … the time prescribed under the domestic statutes of limitation of Italy and Panama show that Panama has acted with unreasonable delay in pursuing its claim, and that its claim is hence barred" (Reply, para. 157).

"Panama's claim would be extinct not just as a matter of the laws of Panama and Italy, but also as a matter of the laws of the vast majority of other jurisdictions" (PV2, p. 25, ll. 16–19).

On the alleged prejudice to Italy:

"[D]amages suffered as a consequence of the allegedly illegal conduct of Italy have been accruing due to the lapse of time. However, had Panama pursued its claim diligently, including by means of the domestic mechanisms of redress available to Panama in Italy, the prejudice that derives to Italy from Panama's pursuit of the claim would have been significantly less" (Reply, para. 167; see PV2, p. 27, ll. 3–9).

Panama

– "… since 15 August 2001 … Panama has been requesting a response from Italy regarding the release of the vessel and the payment for damages caused by the arrest" (Observations, para. 60). "This first request, as well as subsequent ones, from Panama for dialogue with Italy stopped the clock as far as a time bar was concerned" (Observations, para. 61; see PV3, p. 11, ll. 5–8; PV4, p. 5, ll. 42–43).

"[I]f a claim is made, there is no reason to argue validly that delay is affecting the claim" (PV4, p. 5, ll. 50–51).

On extinctive prescription:

"Although many jurisdictions have established fixed rules regarding the implementation of prescription, this is not the case with international public law. Specifically, there is no article in the UNCLOS regulations that delineates a time restriction regarding the bringing of cases. Thus … in the absence of a clearly stated definition of legal deadlines, the Time Bar objection does not hold" (Observations, para. 80; PV3, p. 14, ll. 19–23).

"Under the heading 'Extinctive Prescription', Italy has included new objections related to 'acquiescent conduct of the claimant'" (Request for ruling, para. 28). " … since Italy did not include any of the above identified issues in its Preliminary Objections, all of them must be rejected due to its failure to timely address these concerns" (Request for ruling, para. 30).

On case law:

With reference to *Certain Phosphate Lands in Nauru*, "the International Court of Justice rejected the objection of Australia that Nauru had made the claim 20 years after having become independent" (Observations, para. 61).

On conduct of the Parties:

"The fact that Italy now admits that, as early as 2001, Panama sought redress and the prompt release of the M/V Norstar, signifies that the Italian Government took notice of the claim and has had ample opportunity to prepare its defence" (Observations, para. 62; PV3, p. 11, ll. 16–20).

"The judicial proceedings in Italy also negate its Time Bar claim" (Observations, para. 63; PV3, p. 11, ll. 22–32).

"The fact that the *M/V Norstar*, the object of these proceedings, has not been returned to its owner despite the order issued by the Italian jurisdictional authorities signifies that Italy's compliance with the judgment of its own authorities is still unrealized" (Observations, para. 65; PV3, p. 11, ll. 34–45).

"To argue now that this claim is Time Barred denies all of Panama´s efforts to obtain redress" (Observations, para. 66; PV3, p. 11, l. 47–50).

On alleged prejudice to Italy:

"Italy itself is responsible for the accrual of damages that have increased over time" (PV6, p. 12, l. 30–31).

"Italy has been aware of the fact that the damages have been continually increasing. However, since Italy has preferred not to respond to Panama's compensation claims, it can no longer maintain that it is now suffering from unjust prejudice" (PV6, p. 12, ll. 39–42).

Is Panama estopped from submitting the case before the Tribunal?

Italy

– "… the inconsistent attitude by Panama over the facts now complained of over a significant lapse of time estops the Applicant from validly applying to this Tribunal in the instant case" (Preliminary Objections, para. 31).

On estoppel in international law: see Reply, paras 169 and 170.

On elements of estoppel:

"Italy has indeed relied on certain unequivocal representations previously made by Panama, and would be prejudiced if Panama were now authorised to rely on those representations against Italy" (Reply, para.171).

"Between 2001 and 2004, Mr Carreyó, had expressed his intention to apply for the prompt release of *M/V Norstar* under Article 292 UNCLOS. However, no procedural action was eventually taken by Panama to that

effect, while the *M/V Norstar* had remained seized in Spain" (Preliminary Objections, para. 32).

"The communication by Mr Carreyó laid out a very precise and unequivocal timeframe with respect to Panama's intentions. Italy contends that such a clear declaration by Panama comports with the features of declarations that are relevant for estoppel …" (Reply, para. 172).

"After 31 August 2004, Italy has relied in good faith on the representation made in the two communications indicated above and in particular that Panama was supposed to bring prompt release proceedings within a very specific time frame" (Reply, para. 173).

Panama

– "Panama should not be estopped on the basis of its decision not to make use of such accessory or incidental proceedings, since this is a right and, as such, is not mandatory" (Observations, para. 70). "The States Parties to the Convention may use the legal instruments given by the Convention to resolve their disputes as they see fit" (Observations, para. 68, see para. 80).

On estoppel in international law: see Observations, para. 67; PV6, p. 13, ll. 2–7.

On elements of estoppel:

"Although Panama did not bring a petition to the Tribunal for the prompt release of *M/V Norstar* under Article 292, it was not obligated to do so according to the rights that any State has when it decides whether to bring a case" (Observations, para. 68; PV3, p. 12, ll. 20–21).

"Panama has never stated that it would not bring a claim for damages before this Tribunal.… Italy … has not relied on nor reacted to any statement made by Panama" (Observations, para. 69; PV3, p. 12, ll. 21–25).

"… Italy has failed to present any statement in which Panama declared that it would never bring a claim for damages before this Tribunal. Italy also failed to explain in what way it has relied on any statement of

> Panama or in what way it has changed its position as a consequence. In light of this omission, the objection of Italy regarding estoppel should be rejected" (Observations, para. 69; PV3, p. 14, ll. 29–34).
> "If, between 2000 and 2004, Panama only raised the possibility of bringing a petition for Prompt Release to this Tribunal, this was because the Italian judicial authorities had not yet issued a final judgment and, therefore, Panama did not consider local remedies to have been exhausted.... Panama also declined to bring a Prompt Release petition because the economic situation of the shipowner did not allow him to post the bond to release the vessel from arrest" (Observations, para. 70; PV3, p. 12, ll. 27–35).
> "Taking the entire correspondence from Panama to Italy into consideration, it is clear that Panama has in no way given the impression that it would waive its compensation claim for damages or neglect to initiate proceedings before the Tribunal concerning this matter" (PV6, p. 13, ll. 30–33).

These principles are not a means of defence which can be dealt with in the preliminary phase. These questions are covered only by the merits and, pursuant to article 97, paragraph 6, of the Rules of the Tribunal stipulating that "it shall ... declare that the objection does not possess, in the circumstances, an exclusively preliminary character", the Tribunal should have joined them to the merits of the case, that is, to the next part of the proceedings.

The implementation of article 97, paragraph 6, may make it possible to adjudicate on objections or join them to the merits, the reasons for the latter being many.

(1) In the *Pajzs, Csáky, Esterhazy Case* (*Hungary* v. *Yugoslavia*), on 23 May 1936, the Permanent Court issued an Order, joining the Yugoslav objections to the merits, considering that

> "the questions raised by the first of these objections and those arising out of the appeal as set forth in the Hungarian Government's submissions on the merits are too intimately related and too closely interconnected for the Court to be able to adjudicate upon the former without prejudging the latter" and because "the further proceedings on the merits ... will

place the Court in a better position to adjudicate with a full knowledge of the facts upon the second objection" (*P.C.I.J., Series A/B, No. 66,* p. 9).

(2) In the *Losinger* case, the Court stated that the objection to jurisdiction submitted

"may be regarded … as a … defence on the merits, or at any rate as being founded on arguments which might be employed for the purposes of that defence". Consequently, "the Court might be in danger, were it to adjudicate now upon the plea to the jurisdiction, of passing upon questions which appertain to the merits of the case, or of prejudging their solution."

"The Court will give its decision upon it, and if need be, on the merits, in one and the same judgment".

The Court added, as a further objection, concerning the admissibility of the Application that

"the facts and arguments adduced for or against the two objections are largely interconnected and even, in some respects, indistinguishable" (*P.C.I.J., Series A/B no. 67*, pp. 23–24).

Consequently, this objection was also joined to the merits.

(3) In the *Panevezys-Saldutiskis Railway* case, joining two preliminary objections to the merits by order of 30 June 1938, the Court declared

"at the present stage of the proceedings, a decision cannot be taken either as to the preliminary character of the objections or on the question whether they are well-founded; any such decision would raise questions of fact and law in regard to which the Parties are In several respects in disagreement and which are too closely linked to the merits for the Court to adjudicate upon them at the present stage".

It gave two further reasons, that is:

"if it were now to pass upon these objections, the Court would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution" and "the Court may order the joinder of

> preliminary objections to the merits, whenever the interests of the good administration of justice require it" (*P.C.I.J. Series A/B no. 75*, pp. 55–56).

(4) The ICJ took inspiration from similar considerations in the cases of *Certain Norwegian Loans* and *Right of passage over Indian Territory.* In the former case, the Court, basing itself on an agreement reached between the Parties on this point, joined the preliminary objections to the merits "in order that it may adjudicate in one and the same judgment upon these Objections and, if need be, on the merits" (*I.C.J. Reports 1956*, p. 74).

(5) In the case of the *Right of passage over Indian Territory,* the Court considered that, in order to adjudicate on one of the preliminary objections, it would have had both to clarify the facts and examine the scope or legal consequences of certain practices and certain circumstances; it was thus impossible for it to make a pronouncement on this objection "without prejudice to the merits". As concerns a further objection, the Court stated that, having "heard the presentation of the opposing allegations" it was not able "to pronounce" at this stage on some of the questions raised. It also observed that it was not "in possession of sufficient evidence [to adjudicate] on these questions" and any attempt to evaluate certain relevant factors which "although limited to the purposes of the Sixth Preliminary Objection, [might] entail the risk of prejudging some of the issues closely connected with the merits" (*I.C.J. Reports 1957*, pp. 150–152).

(6) In the *Barcelona Traction, Light and Power Company, Limited case*, the Court joined to the merits certain objections which, in the circumstances, it did not appear possible to deal with in the preliminary phase. It stated:

> "The third Objection involves a number of closely interwoven strands of mixed law, fact and status, to a degree such that the Court could not pronounce upon it at this stage in full confidence that it was in possession of all the elements that might have a bearing on its decision. The existence of this situation received an implicit recognition from the Parties, by the extent to which, even at this stage, they went into questions of merits, in the course of their written and oral pleadings."

The Court continued:

> "As regards the fourth Preliminary Objection, the foregoing considerations apply *a fortiori* for the purpose of requiring it to be joined to the merits; for this is not a case where the allegation of failure to exhaust

> local remedies stands out as a clear-cut issue of a preliminary character that can be determined on its own. It is inextricably interwoven with the issues of denial of justice which constitute the major part of the merits … Accordingly, the Court decides to join the third and fourth Preliminary Objections to the merits." (*I.C.J. Reports 1964*, p. 46).

(7) The rule concerning the absence of an exclusively preliminary nature was also applied in *Military and paramilitary activities in and against Nicaragua* (*I.C.J. Reports 1986*, pp 323–325, paras 115 *et seq*.) and in *Application of the Convention for the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*) (*I.C.J. Reports 2008*, paras 131 *et seq*.).

The PCIJ has drawn attention to an important aspect of the problem, stating that "the Court may order the joinder of preliminary objections to the merits, whenever the interests of the good administration of justice require it". But the safeguarding of the rights of respondent States is equally an essential part of "the good administration of justice" and it is in the respondent's interests that the Rules of the Court contains its article 62, which authorizes the submission of preliminary objections. It should be recalled that this provision gives the respondent extended powers, since the mere submission by the respondent of a document entitled "preliminary objections" automatically suspends the proceedings on the merits (article 62, paragraph 3).

In order to reach a decision, the Court may determine that the objection is not in fact of a preliminary nature and, consequently, that, without prejudicing the right of the respondent State to raise the same question at a different stage of the proceedings, should there be one, the objection cannot be treated as a preliminary objection concerning, for example, its jurisdiction, and it may deal with it immediately, either by upholding it or by throwing it out. In other cases, the Court may decide that the objection is bound up with the merits to such an extent that it cannot be examined alone without dealing with the merits, something which the Court could not do as long as the proceedings on the merits had been suspended or without prejudging the merits before they had been debated exhaustively. In such cases, the Court joins the objection to the merits. It does so only for serious reasons, considering that the purpose of a preliminary objection is to avoid not only a decision but also any discussion on the merits. From another aspect, a joinder to the merits in no way indicates that the objection has been overlooked. For example, in the *Case concerning Certain Norwegian Loans*, in which the objections were joined to the merits,

the ICJ kept an objection for lack of jurisdiction at the merits stage and thus did not make any pronouncement on the merits of the dispute.

In the present case, the Tribunal wished to address Panama's argument whereby Italy's contentions based on acquiescence, estoppel and extinctive prescription should be examined during the proceedings on the merits. Panama has already formulated this argument, without seeking to shore it up in the context of article 97, paragraph 6, of the Rules. The Tribunal notes that Italy has not replied. The Tribunal considers that Panama has adequately addressed Italy's arguments and that the Tribunal has all the information necessary in that respect. The Tribunal notes that neither the Convention nor the Rules set a time-limit for instigating proceedings. However, the matter of time bars on litigation before the Tribunal is dealt with by the well-established principles of international law concerning acquiescence, estoppel and extinctive prescription. These principles may be invoked in suitable cases, by virtue of article 293 of the Convention, insofar as they are not incompatible with the Convention. The Tribunal notes that the Parties are not contesting these principles, and that the two main elements of estoppel – renouncing of claims and incitement to act to one's detriment owing to the conduct – are lacking in the present case. Panama has striven to reach a settlement with Italy on many occasions by its various communications. The Italian courts have likewise rendered a decision in favour of the "*Norstar*"s release. Although Italy has remained passive in spite of everything, it cannot take any advantage from its own failure. On these grounds, the Tribunal considers that there is no estoppel situation. As concerns extinctive prescription, the Tribunal notes that it is Italy which seized the Panamanian vessel and that it was fully aware of the fact that questions concerning the vessel had not been settled. Moreover, Panama has not ceased to state its claim since the vessel was seized by Italy. Therefore, the Tribunal rejects the objection of extinctive prescription raised by Italy.

Finally, a word must be said about the singular provision which the Tribunal devised in the present case, and which is presented as a "jurisdiction / admissibility" combination. Having heard the Parties, the Tribunal decided on its judgment on the basis of such a provision. I have to say that I rather favour the conventional system for several reasons.

First, as article 97, paragraph 6, of the Rules confirms:

> The Tribunal shall give its decision in the form of a judgment, by which it shall uphold the objection or reject it or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Tribunal rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

It is that the judgment on the preliminary objections may, in general, comprise a number of variants. It may acknowledge the validity of a preliminary objection by setting a time-limit on the case in this way. This situation may avoid the court or tribunal examining all the other objections. As an example, let us recall that in *Obligations concerning Negotiations relating to the Nuclear Arms Race and Nuclear Disarmament* (*Marshall Islands* v. *United Kingdom*), *Preliminary Objections,* paragraph 58 of the judgment of 5 October 2016, which upholds the first objection raised by the United Kingdom on grounds of lack of jurisdiction, reads:

> The Court therefore concludes that the first preliminary objection made by the United Kingdom must be upheld. It follows that the Court does not have jurisdiction under Article 36, paragraph 2, of its Statute. Consequently, it is not necessary for the Court to deal with the other objections raised by the United Kingdom.

The judgment may also acknowledge the validity of one or more preliminary objections which restrict the scope of the case or limit the extent of the judges' competence.

The judgment may also accept preliminary objections which concern neither the Tribunal's jurisdiction nor the admissibility of the Application but which are more a matter of what the Rules consider "any other objection the decision upon which is requested before any further proceedings on the merits".

These objections, rather, concern the formal validity of submissions. This is the case of the procedural objection raised by Panama in the present case and which concerns what that State calls "the rule of due process of law". Dealing with this type of objection does not restrict the case or put an end to it. It is enough to correct the defective submission to render both its form and merits valid.

Finally, the judgment may reject all the preliminary objections, in which case the Tribunal fixes time-limits for the further proceedings. This is what is happening in the present case. Italy has raised three objections (existence of a dispute concerning the interpretation or application of the Convention; competence *ratione personae*; and exchange or views pursuant to article 283 of the Convention) and three objections on admissibility (nationality of claims; exhaustion of local remedies; and acquiescence, estoppel and extinctive prescription) and the Tribunal has rejected all of them, having examined them one by one in order to decide that it can uphold none of them. In this way, the Tribunal has clearly shown that the Italian objections are unfounded and they can thus be joined to the examination of the case on the merits.

We believe that the Tribunal should have adhered literally to the provisions of the Rules concerning the judgment on preliminary objections. Article 97, paragraph 6, talks of "objection" *in the singular* ("The Tribunal shall give its decision in the form of a judgment, by which it shall uphold the objection or reject it") and the provision should have established objections *seriatim*, one by one in order to reject them in turn. This would have not only followed the practice of all international courts and tribunals but would also have had transparency and predictability. The Rules, the Resolution on the Internal Judicial Practice of the Tribunal and the Guidelines govern all proceedings before the Tribunal.

(*Signed*) T.M. Ndiaye