INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2018

Public sitting

held on Wednesday, 12 September 2018, at 3 p.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President Jin-Hyun Paik presiding

THE M/V "NORSTAR" CASE

(Panama *v*. Italy)

Verbatim Record

Uncorrected

Present:	President	Jin-Hyun Paik
	Judges	Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Boualem Bouguetaia
		Elsa Kelly
		Markiyan Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
		Óscar Cabello Sarubbi
		Neeru Chadha
		Kriangsak Kittichaisaree
		Roman Kolodkin
		Liesbeth Lijnzaad
	Judges *ad hoc*	Tullio Treves
		Gudmundur Eiriksson
	Registrar	Philippe Gautier

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Mr Paolo Busco, Member of the Rome Bar, European Registered Lawyer with the Bar of England and Wales, 20 Essex Street Chambers, London, United Kingdom,

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THE PRESIDENT: Good afternoon everyone. Before the lunch break Ms Caracciolo was speaking. I now give the floor again to you, Ms Caracciolo, to continue your statement.

MS CARACCIOLO: Mr President, Members of the Tribunal, I shall resume my presentation where I left off before the lunch break, namely the *locus* of application of the freedom of navigation under article 87, paragraph 1.

Just as freedom of navigation is not applicable to internal waters, it also cannot be interpreted as an absolute right for a ship to gain access to the high seas, outside the high seas. This is the case also when a ship is not in internal waters but, say, in the territorial sea of a coastal State. This is particularly the case for vessels detained in the context of legal proceedings.

In its pleadings, Italy has in particular referred to the *M/V "Louisa"* Case, where the Tribunal ruled that "article 87 cannot be interpreted in such a way as to grant the *M/V 'Louisa'* a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it."[1]

In the same case, Judge Paik declared that:

> [w]hile the content of the freedom of the high seas is subject to change, and indeed has evolved over time, it has been long established that this freedom is one which all States enjoy "in the high seas". ... To extend the freedom of the high seas to include a right of the State to have access to the high seas to enjoy that freedom is warranted neither by the text of the relevant provisions or the context of the Convention, nor by established State practice on this matter.[2]

On the same vein, it is also worth mentioning the Dissenting Opinions of Judge Cot and Judge Wolfrum, again in the *M/V "Louisa"* Case. Judge Cot observed that:

> Article 87 covers freedom of the high seas and, in particular, freedom of navigation. But the existence of a basic freedom does not prohibit the coastal State from exercising the powers of its police and judiciary in its own territory.[3]

Equally Judge Wolfrum commented that:

> It is hard to imagine how the arrest of a vessel in port in the course of national criminal proceedings can be construed as violating the freedom of navigation on the high seas. To take this argument to the extreme it would, in fact, mean that the principle of the freedom of navigation would render vessels immune from criminal prosecution since any arrest of a vessel, under which ground whatsoever, would violate the flag State's right to enjoy the freedom of navigation.[4]

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[1] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, pp. 36-37, para. 109.
[2] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Declaration of Judge Paik, ITLOS Reports 2013*, p. 49, p. 56, paras. 28-29.
[3] *Rejoinder of Italy*, 13 June 2018, para. 56.
[4] *Ibid.*, para. 57.

In conclusion, Mr President, Members of the Tribunal, the *M/V "Norstar"* was not at all entitled to any right of navigation at the time when the Decree of Seizure and the request for its execution were issued since she was in Spanish internal waters where the Convention does not admit any freedom of navigation, not even to gain the high seas.

Mr President, Members of the Tribunal, I shall now turn my attention to the question as to whether a breach of article 87, paragraph 1, can occur as a consequence of a mere extraterritorial exercise of jurisdiction. I do this for two reasons: (a) because the Tribunal, in its Judgment of 4 November, has spoken of the Decree of Seizure and request for its execution with regard to activities carried out by the *M/V "Norstar"* on the high seas; and (b) because Panama's entire pleadings are based on the assumption that article 87, paragraph 1, prohibits the extraterritorial exercise by a coastal State of its jurisdiction, including its prescriptive jurisdiction as such, and without any other condition or consideration.

Evidence of this can be found all across Panama's Memorial.

In the Memorial, Panama asserts that "article 87 of the Convention precludes Italy from extending the application of its customs laws and regulations to high seas"[5] and that "Italy's customs laws cannot be applied to ships flying the flag of Panama or of any other State on the high seas."[6] In the Reply, Panama maintains that:

> Therefore the application of its internal laws by Italy to the activities and conduct performed by the *M/V "Norstar"* and all the persons involved in its operation constitutes a clear breach of article 87 of the Convention. If Italy had rightfully interpreted this provision it would have also concluded this.[7]

Also during these hearings the same argument has been often proposed by Panama more or less in the same terms used in the written phase.

I reserve for later the question as to whether Italy actually exercised its jurisdiction extraterritorially. I limit myself here to recalling what Professor Tanzi has said earlier on: that Italy prosecuted territorial, domestic crimes, and that it exercised its jurisdiction on a strictly territorial basis. However, just for the sake of the argument here, I will assume that Italy did exercise some form of extraterritorial jurisdiction by the Decree of Seizure and the request for its execution.

Now I come to the core of Panama's claim that article 87 prohibits the extraterritorial exercise of jurisdiction as such.

Mr President, Members of the Tribunal, I have previously referred to the relevant case law that shows that a breach of article 87 can only be envisaged when some sort of interference with freedom of navigation occurs.

Now, not all extraterritorial exercises of jurisdiction necessarily determine interference with freedom of navigation. In fact, most do not.

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[5] *Memorial of the Republic of Panama*, 11 April 2017, para. 87.
[6] *Ibid.*, para. 87.
[7] *Reply of the Republic of Panama*, 28 February 2018, para. 106.

Extraterritorial exercise of prescriptive jurisdiction, for instance, to which Panama refers when it speaks, wrongly, of the circumstance of the extension of Italy's legislation to the high seas, does not, as such, determine any interference with freedom of navigation. Extending prescriptive jurisdiction extraterritorially may be banned under other provisions of the Convention, for instance article 89, which reads: "No State may validly purport to subject any part of the high seas to its sovereignty" – certainly, not from the perspective of article 87. Even assuming that Italy had extended the reach of its prescriptive jurisdiction extraterritorially, without a concrete interference with freedom of navigation, this conduct would not be in breach of article 87.

Other provisions of UNCLOS similarly protect ships on the high seas from extraterritorial exercise of jurisdiction by a coastal State, without the need for such exercise to determine interference with freedom of navigation. Article 92 of the Convention, on which Mr Busco will address you later on, is a case in point.

Now, there may be cases in which the same sets of facts can determine a breach of multiple UNCLOS provisions. For instance, a coastal State that, in the exercise of its extraterritorial jurisdiction, interfered with the movement of a ship on the high seas would be breaching at the same time article 92 and article 87; but this is not the case here.

Certainly, for the reasons explained above, the Decree of Seizure and the request for its execution did not determine any interference with the *M/V "Norstar"*'s ability to navigate. Even assuming, strictly for the sake of argument, that these acts were adopted in pursuance of some sort of extraterritorial jurisdiction, therefore, they would still fail the test for a breach of article 87.

One last word on this: article 87 is not concerned with territoriality or extraterritoriality, and these are not the elements to consider when assessing a possible breach. It is concerned with interference with navigation, as simple as that; and none happened here, in any, including the slightest, form.

Mr President, Members of the Tribunal, without prejudice to all of the above, I now turn to demonstrating that the Decree of Seizure and the request for its execution do not constitute an extraterritorial exercise of jurisdiction on Italy's part. First of all, for the sake of clarity, unlike what Mr Carreyó said on Monday, Italy did not concede at paragraph 7 of its Counter-Memorial and paragraph 3 of its Rejoinder that it exercised jurisdiction extraterritorially. Italy was arguing another point, namely that extraterritoriality is not the test to assess a breach of article 87.

Indeed, I confirm that the question as to whether a State has exercised its jurisdiction territorially or extraterritorially is entirely irrelevant as to the autonomous question of whether a breach of article 87 has occurred. However, since a large part of Panama's pleadings revolves around this matter, and for this reason alone, I feel it should not be left unanswered.

Let me recall some of the arguments of Panama, that I summarize in the following four items. First, in the Reply, Panama retains that: "... the activities for which the

M/V 'Norstar' was detained took place in international, not Spanish waters ...".[8] Second, in the Memorial, Panama argues that Italy has extended "... the application of its customs laws and regulations to the high seas. ...".[9] Third, even more strongly, again in the Memorial, Panama affirms that Italy has exercised "... its criminal jurisdiction beyond its territorial waters".[10] Finally, Panama stubbornly, over and over, insists that the reason for the Decree of Seizure was bunkering on the high seas. In the Memorial, Panama alleges that "in arresting a vessel for carrying out bunkering ... on the high seas, Italy violated the principle of the freedom of the high seas ... , contravening article 87 of the Convention".[11]

Also in the Reply and in the hearings, Panama engages at length in redundant and pressing attempts to demonstrate that the crime allegedly targeted by the Savona Public Prosecutor was only that of bunkering. [12]

According to Panama true and founding evidence is given by expressions and phrases picked here and there in the Decree of Seizure, in the decree refusing the release of the *M/V "Norstar"*, in the letter rogatory, and in the judgments from the Tribunal of Savona and the Court of Appeal of Genoa. Expressions and phrases such as "off-shore bunkering", "international waters", "stationed outside the territorial waters", "traded the oil in international waters", "beyond the territorial sea" and similar should, for Panama, substantiate the very objective of the investigations by the Savona Public Prosecutor.[13]

Mr President, Members of the Tribunal, the defence strategy of Panama is fully misconceived. This morning, Professor Tanzi has described the investigations that led to the Decree of Seizure and the request for its execution as well as other judicial elements relevant to the present dispute, so I shall not repeat what he has already illustrated.

However, I shall focus on the legal grounds mentioned in the Decree of Seizure since, as it is the case for any judicial act, international or domestic, these are the most authoritative source in identifying the reasons for the arrest, and any alleged extraterritoriality of the crime pursued.

The Decree of Seizure and the request of its execution did not concern off-shore bunkering activities on the high seas. Quite on the contrary, what the public prosecutor was targeting were several conducts put in place in the territory of Italy, its internal waters, and/or its territorial sea. In particular, as expressly indicated in the Decree of Seizure and in the request of its execution, these conducts allegedly consisted of "fiscal evasion of excise duties for mineral oils";[14] "smuggling";[15] and

[8] *Ibid.*, para. 83.
[9] *Memorial* (see footnote 5), para. 87
[10] *Ibid.*, para. 80.
[11] *Ibid.*, para. 83.
[12] e.g. *Reply* (see footnote 7), para. 131.
[13] ITLOS/PV.18/C25/2, pp. 26-27.
[14] Legislative decree no. 504/95, Article 40(1)(b) (*Counter-Memorial of Italy*, 11 October 2017, Annex B).
[15] Decree of the President of the Republic no. 43/73, Articles 292-295 (*Counter-Memorial* (see footnote 14), Annex C).

"tax fraud with regard to the suspected violation of the custom duties on the imported fuels".[16]

I wish to make it clear that none of these crimes evidently criminalizes the bunkering off-shore of gasoil, which is a completely lawful activity under Italian law. Rather, these crimes criminalize the conduct of evading the payment of custom taxes and duties on the import or export of oil and, as smuggling is concerned, the clandestine movement of oil across the Italian borders.

Let me give an example. If a truck loads fuel in a country and then enters another country and then therein sells this fuel to some customers without having reported the import of the fuel at the border control, thus violating customs and fiscal legislation of that State, the question remains: where did the illegal conduct take place? In the country where the fuel was loaded or in the country where the fuel was illegally sold? The answer is obvious: in the latter country.

In the present case, the conducts under investigation by the Public Prosecutor were connected, on the one hand, to the fraudulent purchase of gasoil in Italy and, on the other, to the clandestine re-entering in Italy of gasoil and its illegal sale by evading Italian taxes.

As described in the Decree of Seizure and in the request for its execution, the gasoil was bought exempt from taxes (as ship's stores) from warehouses in Livorno, Italy, and in other EU Member States. The gasoil was smuggled in Italy and it was sold in Italy by evading custom duties.

Mr President, Members of the Tribunal, the criminalization of evading the payment of custom duties and taxes and of smuggling of goods is not peculiar only to the Italian legal order, but it is pursued nearly by all States to such an extent that a multilateral treaty has been adopted to promote the cooperation between States thereof; I refer to the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Suppression of Customs Offences adopted in Nairobi on 9 June 1977, that you can find in the judges folder at tab 19.[17]

Let me also read from this excerpt of the decision of the Tribunal in the case of *"Aramco"*:

> It is indisputable that every sovereign State has the right to control its ports, for they are part of its maritime communications. It has the international

[16] Law 516/82, Article 4(1)(f) (*Counter-Memorial* (see footnote 14), Annex D).

[17] This Convention even provides for a common definition of customs offence in Article 1 which reads as follows: "[f]or the purposes of this Convention: ... (b) the term "Customs offence" means any breach, or attempted breach, of Customs law; (c) the term "Customs fraud" means a Customs offence by which a person deceives the Customs and thus evades, wholly or partly, the payment of import or export duties and taxes or the application of prohibitions or restrictions laid down by Customs law or obtains any advantage contrary to Customs law; (d) the term "smuggling" means Customs fraud consisting in the movement of goods across a Customs frontier in any clandestine manner; (e) the term "import or export duties and taxes" means Customs duties and all other duties, taxes, fees or other charges which are collected on or in connection with the importation or exportation of goods but not including fees and charges which are limited in amount to the approximate cost of services rendered".

> competence ... to regulate as it deems best, transportation from its territory, whether by land or by sea. With regard to the development and safeguard of its economic and financial interests particularly, a State has undeniably the right to regulate and control importation to, and exportation from, its territory of articles of every description; this right of control embraces the right to prohibit the ingress or egress of certain goods, and to levy duties upon imports and exports.[18]

Thus, contrary to Panama's arguments, there was no need for Italy to apply extraterritorially its custom legislation and/or its penal jurisdiction vis-à-vis the customs crimes, since the conducts that allegedly amounted to fiscal crimes were most obviously committed in the Italian customs territory.

As Italy has already demonstrated in the written pleadings, neither the Tribunal of Savona nor the Court of Appeal of Genoa dismissed this reconstruction of facts as assessed by the fiscal police and the Public Prosecutor of Savona. On the contrary, what they did was to dismiss that the relevant conducts amounted to criminal offences, on the merits.[19]

Mr President, Members of the Tribunal, having mentioned the acquittal of those involved with the *M/V "Norstar"* also gives me the opportunity to make a critical remark concerning the relationship between such acquittal and the alleged international illegality of the Decree of Seizure. Panama's equation is as follows: since the Italian authorities acquitted those involved with the ship of the crimes of which they were accused, then the Decree of Seizure must have been in breach of article 87. This is a most evident logical fallacy, a *non sequitur*. The fact that people were acquitted on the merits of the crimes with which they were charged tells absolutely nothing about the legality of the Decree of Seizure; and indeed, *a contrario*, article 87 may well have been breached if those on board were convicted and the Italian judges had confirmed the position of the Prosecutor. More generally, let me say, disproving the merits of an indictment does not mean that the indictment was illegal, domestically or internationally. The yardsticks to assess the legality of criminal proceedings are others – not the question of whether proceedings ended with an acquittal or a finding of guilt. Or else, for every acquitted person we should have a trial against the State which acquitted.

Mr President, Members of the Tribunal, even if article 87 would have precluded Italy, as Panama sustains, from extending the application of its criminal laws to the high seas and from exercising extraterritorial jurisdiction, as is not, nonetheless Italy did not violate article 87. Indeed, Italy has neither applied its laws to the high seas nor prosecuted conducts performed by a foreign vessel on the high seas.

Mr President, Members of the Tribunal, I shall now rapidly go to the last part of my presentation, which addresses Panama's argument that Italy has violated article 87, paragraph 2, of the Convention. According to Panama's Memorial, "... the order and

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[18] *Saudi Arabia* v. *Arabian American Oil Company (Aramco*), *Award, 26 August 1958*, reproduced in L. B. Sohn, J. E. Noyes, E. Franckx, K. G. Juras (eds.), *Cases and materials on the law of the sea* (2nd edn; Brill-Nijhoff 2014) 350, pp. 350-351.

[19] *Judgment by the Tribunal of Savona, 13 March 2003*, at 9, para. 5 (*Counter-Memorial* (see footnote 14), Annex M).

request of arrest made by Italy adversely affected the use of the high seas by the Panamanian vessel and all persons involved in its operation".[20]

Under article 87, paragraph 2, the freedoms of the high seas

> shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

The well-known scope of this provision is that of safeguarding the interests of States other than those exercising the freedoms of the high seas. In other words, article 87, paragraph 2, relativizes these freedoms in the sense that a State should not cause or permit ships flying its flag to do things on the high seas that somehow interfere with the interests of other users.

It is Panama uniquely which invokes the freedom of navigation under article 87, paragraph 1. Italy was not exercising any freedom of the high seas nor claiming any such freedom. Thus, it is on Panama, not Italy, that article 87, paragraph 2, imposes obligations.

Therefore, Mr President, Members of the Tribunal, Italy did not violate article 87, paragraph 2, of the Convention, simply because the provision does not apply to Italy in this case.

Mr President, Members of the Tribunal, I have finished my presentation. Then I would request that you invite my colleague, Paolo Busco, to the podium. He will show that article 300 of the Convention was not violated by Italy, and that the alleged violations of articles 92 and 97 of the Convention fall outside the *petitum*.

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

THE PRESIDENT: Thank you, Ms Caracciolo. I now give the floor to Mr Busco to make a statement.

MR BUSCO: Thank you, Mr President. Mr President, Members of the Tribunal, it is an honour to appear before you again, and to do so on behalf of my country, Italy.

My arguments will demonstrate that Italy has not breached article 300 of the Convention with respect to the obligations set out by article 87. I will also explain why Panama's claims concerning a breach of articles 92 and 97 should fail.

Before I do this, I would like to wrap up the arguments just presented by Ms Caracciolo on freedom of navigation.

First of all, I would like to note that the purpose of these proceedings is not to review in theoretical terms the compatibility with international law of the texts of judicial acts by the Italian authorities. The purpose of these proceedings is to assess whether the Decree of Seizure and the request for execution, regardless of their enforcement,

[20] *Memorial* (see footnote 5), para. 98.

were capable of interfering, and whether they actually interfered, with the *"Norstar"*s ability to navigate on the high seas, thus breaching Panama's rights under article 87 of the Convention.

Framing this dispute correctly is crucial. It is true, in fact, that the Decree of Seizure mentioned the possibility of arresting the *"Norstar"* on the high seas. It did not do so in an unqualified manner, in fairness, but in the context of article 111. Regardless, mentioning the possibility of an arrest on the high seas does not mean that the Decree of Seizure as such interfered or even had the power to interfere with the ability of the *"Norstar"* to navigate freely.

Interference with freedom of navigation is constituted, first and foremost, by physical interference with the ability of a ship to move and navigate unimpeded on the high seas. Interdicting, stopping, arresting, boarding, diverting, directing, escorting ships on the high seas, and threatening to do so, are the sorts of conduct that article 87 ordinarily prohibits. A decree of seizure and a request for execution, before being enforced, are not capable to determine any physical interference of the type just described. As such, they are not acts ordinarily capable of breaching article 87 of the Convention; and indeed these acts, before enforcement, did not determine any physical interference with the *"Norstar"*s ability to navigate.

There may be exceptional circumstances in which action by a coastal State that falls short of physical interference or threat of physical interference with the movement of a ship on the high seas nevertheless becomes relevant under article 87 of the Convention. For instance, a measure that falls short of enforcement action may exceptionally determine a chilling effect on a ship's ability to navigate. By chilling effect I mean some sort of restraint, some inhibition to navigate freely while on the high seas that the ship would not have but for the measure adopted by the coastal State.

However, as my colleague Ms Caracciolo has said, chilling effect presupposes knowledge of the measure: a ship cannot claim to have been inhibited in exercising its freedom of navigation if it is not actually aware of the existence of the act that it proclaims to have been the source of the inhibition. This means that not all acts that fall below the threshold of enforcement action have the ability to produce a chilling effect in the abstract. Only acts whose existence is known, or knowable – and I would like to focus strongly on the word knowable – can determine a chilling effect.

Mr President, Members of the Tribunal, I would like to give an example. In the *"Arrest Warrant"* Case, the International Court of Justice confirmed the chilling effect of an arrest warrant issued by a Belgian prosecutor against Mr Yerodia, a Congolese minister. The Court found that the mere issuance and the regime of international circulation of the arrest warrant determined a chilling effect on the ability of Mr Yerodia to travel freely. The arrest warrant in the Yerodia case was an act knowable by Mr Yerodia, given its regime of publicity, including within the Government of the Congo to which Mr Yerodia belonged. It is precisely the

knowability by Mr Yerodia of the arrest warrant that rendered the measure capable of producing a chilling effect on Mr Yerodia's freedom to travel.[21]

In the Yerodia case, then, the abstract knowability of the arrest warrant had become actual knowledge and determined that the minister was in concrete inhibited from moving freely. Could you please turn to tab 21, page 3, of your Judges' folder? In the judgment, the Court explained that, on applying for a visa go to two countries, the Minister "[apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium".[22]

Also, the Court recalled that in order to avoid arrest pursuant to the warrant, Mr Yerodia was at times forced to travel by roundabout routes. At other times, he did not travel at all. The Congo had explained in its pleadings that

> the disputed arrest warrant effectively bars the Minister for Foreign Affairs of the Democratic Republic of the Congo from leaving that State in order to go to any other State which his duties require him to visit and, hence, from carrying out those duties. [23]

The Decree of Seizure and the request for execution issued against the *"Norstar"* were entirely different from the arrest warrant issued against Mr Yerodia.

These acts were ontologically incapable of producing any chilling effect because they were designed not to be knowable by the *"Norstar"* until their concrete enforcement. They were subject to a regime of strict and absolute investigative secrecy. Such secrecy was necessary to allow an execution "by surprise" and the same can be said with regard to the request for execution.

In line with this, and as it has emerged from cross-examination of Panama's witnesses, the *"Norstar"* did not know about the existence of the Decree of Seizure and the request for execution before the actual execution. Mr President, Members of the Tribunal, it remains largely unproven that the *"Norstar"* was actually on the high seas at the time of the Decree of Seizure and the request for execution. However, let us assume, for the sake of the argument only, that it was actually on the high seas.

Did the Decree of Seizure and the request for execution as such determine any physical interference with the vessel's ability to navigate? No, they did not, because they fell short of enforcement action. Did the Decree of Seizure and the request for execution as such determine any chilling effect with regard to the vessel's ability to navigate? Again, no, they did not, because they were unknown. Mr President, could the Decree of Seizure and the request for execution have determined any chilling effect with regard to the vessel's ability to navigate? No, they could not, because they were not knowable.

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[21] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, p. 9, para. 14.
[22] *Arrest Warrant* (see footnote 21), p. 30, para. 71.
[23] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 182, p. 201, para. 71.

Did the enforcement of the Decree of Seizure and the request for execution determine any interference with the vessel's ability to navigate? Yes, it did determine an interference, but it happened when the ship was in port and its freedom of navigation was not protected under article 87 of the Convention.

I now turn briefly, with your permission, to the fact that the Decree of Seizure concerned activities that the *"Norstar"* carried out in part on the high seas. Ms Caracciolo has already argued that the Decree concerned crimes committed on Italian territory and that Italy did not exercise its jurisdiction extraterritorially with regard to those crimes. I therefore refer to her explanation and to Mr Tanzi's explanation this morning.

However, again let me assume, for the sake of the argument only, that Italy actually exercised its jurisdiction over the *"Norstar"* extraterritorially.

Mr President, Members of the Tribunal, there are provisions of the Convention that protect ships and their activities on the high seas from extraterritorial intrusions by the jurisdiction of a coastal State even when these intrusions do not result in interference with freedom of navigation. I do not intend to list them exhaustively. However, article 89, for example, may be seen as prohibiting the territorialization, so to speak, of the high seas by the exercise on the high seas of a State's prescriptive jurisdiction. Provisions that subject ships to the exclusive jurisdiction of their flag State while on the high seas, like article 92, are another case in point. There are these provisions.

Then there is article 87, a provision that has a different aim, that of protecting ships on the high seas from interference with freedom of navigation, whether this interference comes from an extraterritorial exercise of jurisdiction or otherwise.

To interpret article 87 as a provision that protects ships on the high seas from the exercise of jurisdiction even when there is no interference with navigation would deprive article 87 of its characterizing purpose. This would run contrary to a fundamental principle of treaty interpretation – *effet utile* – which Panama holds so dear. What conduct would article 87 prohibit, for example, that articles 92 or 89 would not already prohibit, if article 87 were a provision simply protecting from extraterritorial exercise of jurisdiction?

The *condicio sine qua non* for a breach of article 87 is interference with freedom of navigation of ships on the high seas. Therefore, even assuming, for the sake of the argument only, that Italy had exercised some form of jurisdiction over the *"Norstar"* extraterritorially, this would not result in an automatic breach of article 87, if such extraterritorial exercise of jurisdiction had occurred – as it would have been in this case – through acts entirely unable to interfere with the ship's ability to navigate freely on the high seas.

In placing so much emphasis on the fact that the activities for which the *"Norstar"* was prosecuted occurred on the high seas, Panama has entirely missed the test for a breach of article 87 to occur. By Panama's reasoning, one would have to conclude that exercise of jurisdiction on the high seas with regard to crimes committed in the territory of the State is not extraterritorial but compatible with article 87; and yet this

is not the case. Also, the exercise of jurisdiction with regard to crimes committed entirely in the territorial sea of the coastal State can result in a breach of article 87, if it determines an interference with freedom of navigation on the high seas not otherwise allowed by the Convention, for instance because the State is acting in hot pursuit under article 111 of the Convention

I will conclude on this recapitulation: breach of article 87 requires at least some form of interference with freedom of navigation, and exercise of jurisdiction not resulting in interference with freedom of navigation, regardless of whether it has a territorial or extraterritorial basis, is not conduct in breach of article 87. The Decree of Seizure and the request for execution, given their features, were unable to produce any interference with the ship ability's to navigate on the high seas, including in the very tenuous form of a chilling effect. In fact, they did not produce any such effect in concrete. Interference with the *"Norstar"*s ability to navigate only occurred in port, an area of the sea where article 87, simply put, does not apply. Up until that moment, the ship, according to Panama, was navigating free and unimpeded, carrying out its normal activities – that is, of course, if it was navigating at all, which has not been proven in this case.

With this, I now turn my attention to article 300 of the Convention. We heard a great deal of arguments from Panama yesterday about article 300. Italy remains of the opinion that Panama has not understood the purpose and the functioning of article 300 within UNCLOS.

Article 300 of the Convention reads as follows:

> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

We have already mentioned many times paragraph 122 of the Judgment. I will also mention paragraph 132. According to paragraph 132 of the Judgment, the relevance of article 300 to the present case is limited to article 87. In particular, the Tribunal held that it considered article 300 relevant with respect to the question "as to whether Italy has fulfilled in good faith the obligations assumed by it under … the Convention".[24]

Paragraphs 122 and 132, read together, determine that the question now before the Tribunal is the following: has Italy, in adopting the Decree of Seizure and the request for its execution, fulfilled in good faith its obligation to respect Panama's freedom of navigation with respect to the *"Norstar"*, while the ship was on the high seas?
Mr President, Members of the Tribunal, as I will show, most of Panama's arguments under article 300 go far, far beyond this question and try to extend unduly the relevance of article 300. Panama essentially does this in two ways.

First, it tries to bring into article 300 also the question of abuse of rights, even if it is clear, from the mere and plain language of the Judgment, that the Tribunal only intends to investigate the question of good faith. Good faith and abuse of rights are

[24] *M/V "Norstar" (Panama* v. *Italy)*, *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44 ff., para. 132.

closely related but they are not one and the same and, as I will explain, it is logic, even before law, that requires to keep the notions separate.

Second, Panama attempts to link article 300 to provisions other than article 87, and at times even to treat article 300 as a stand-alone provision. However, no other provision but article 87, and its specific focus on interference with freedom of navigation on the high seas, is relevant to the present case. Also, as is well known, a breach of article 300 cannot occur on its own.

In presenting on article 300, I will follow this order. First, I will address Panama's arguments on abuse of rights. Then I will address Panama's arguments on good faith.

Panama has made a number of claims that Italy has breached article 300 with regard to its abuse of rights component.

All these arguments either fall outside the jurisdiction of the Tribunal, are inadmissible, or are in any event unfounded on the merits.

As I said, article 300 is comprised of two parts: one concerns good faith, the other concerns abuse of rights. Panama itself agrees with this proposition. Abuse of rights refers to the exercise of the rights, jurisdictions and freedoms recognized by the Convention. Good faith refers to the obligations assumed by States under the Convention – obligations. In the present case, the Tribunal has limited its jurisdiction to one specific matter: whether Italy has fulfilled in good faith its obligations under article 87. No reference is made to rights exercised by Italy, nor to their abuse; only to obligations, and to the question as to whether they have been fulfilled in good faith.

The language used by the Tribunal is neither random, nor accidental. Tribunals ordinarily specify which of the two components of article 300 – between abuse of rights and good faith – is relevant in each case. I would ask you kindly to turn to tab 21, page 5, of your Judges' folder. There you can see that the Annex VII Tribunal in the *Chagos Marine Protected Area Arbitration* Case, for instance, found that article 300 was relevant to the dispute, and that the Tribunal's jurisdiction encompassed article 300 "insofar as it relate[d] to the abuse of rights".[25] Similarly, in this case, the Tribunal qualified the relevance of article 300 to good faith. For these reasons, Panama's claim with regard to abuse of rights simply does not fall within the jurisdiction of the Tribunal as determined by its Judgment.

Without prejudice to this perhaps formal jurisdictional argument, it is clear that Panama's position on abuse of rights cannot succeed on the merits, simply because an abuse of rights by Italy with regard to article 87 cannot logically have occurred in the present case. The *"Norstar"* case revolves around article 87. Article 87, paragraph 1, bestows rights of freedom of navigation on Panama and obligations to respect that freedom on Italy.

[25] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Final Award, 18 March 2015, p. 215, para. 547.

According to a recent commentary to the UNCLOS, that you find at tab 21, page 6:

> [I]t becomes evident that the prohibition against the abuse of rights becomes relevant in situations where international legal norms provide the actors with a broad, perhaps almost unlimited, discretionary power to exercise a right.[26]

It is plain logic that, in order to abuse a right, one must have a right to exercise in the first place. Indeed, when claimants and tribunals have meant to bring under the lens of investigation the question of whether a State had abused a right under article 300, they have very clearly identified the right allegedly abused. At tab 21, pages 7-8, you will see that in *Barbados* v. *Trinidad and Tobago*, an Annex VII Tribunal assessed abuse of rights under article 300 with reference to article 286 and the right enshrined therein for a State to commence international arbitration. In *Chagos Marine Protected Area Arbitration*, Mauritius, the claimant, invoked abuse of rights with regard to the UK's right "to take measures "for the protection and preservation of the marine environment" in the waters around the Archipelago"[27] under article 56(1)(b)(iii) of the Convention, a provision, again, conferring rights on the United Kingdom.

Yet, there is no right, let alone a broad discretion to exercise a right, that Italy possesses under article 87, paragraph 1. Article 87, paragraph 2, on its part, imposes obligations on Panama, as the holder of the right of freedom of navigation under article 87, paragraph 1, not on Italy.

As a last point on article 300, I would like to also note that the modality in which Panama has invoked article 300 in its abuse of rights component is contrary to the established case law of this Tribunal. Even assuming that article 300 were relevant beyond article 87 – which it is not – Panama has for the most part not linked article 300 to any other provision of UNCLOS. It has spoken generally of the fact that the Public Prosecutor in Savona "abuse[d] the rights of the *M/V 'Norstar'"*[28] and that "the rights of the people involved in the *M/V 'Norstar'* have been abused". Panama's language is remarkably similar to the language already used by Panama itself in the *"Virginia G"* Case against Guinea Bissau, in which Panama complained of an abuse of its rights "in all aspects of the arrest and detention the *'Virginia G'"*.

The response of the Tribunal in *"Virginia G"* is at tab 21, page 10, of your folder:

> It is not sufficient for an applicant to make a general statement that a respondent by undertaking certain actions … acted in a manner which constitutes an abuse of rights without invoking particular provisions of the Convention that were violated in this respect … It is the duty of an applicant when invoking article 300 of the Convention to specify the concrete … rights under the Convention, with reference to a particular article, that … were exercised in a manner which constituted an abuse of right.[29]

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[26] A. Proelss, *United Nations Convention on the Law of the Sea. A Commentary* (Beck-Hart-Nomos 2017), p. 1942, para. 13.
[27] *Chagos Marine Protected Area* (see footnote 25), p. 193, para. 491.
[28] *Reply of the Republic of Panama*, 28 February 2018, para. 269.
[29] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, p. 109, para. 398-399.

So, again, even if article 300 were relevant beyond article 87, Panama has not done what it should have. The only exception is Panama's argument that Italy, as a coastal State, abused "its right enshrined in article 21 of the Convention to legally prevent the infringement of its customs or fiscal regulations by foreign ships which enter its territorial sea".[30]

This is a quote from Panama. I do not intend to address, though, this argument on the merits, because article 21 of the Convention is not part of the present dispute.

Mr President, Members of the Tribunal, I shall now, finally, turn to article 300, as far as its good faith component is concerned. I will not repeat all the arguments already made in our written pleadings. I will rather concentrate on the most salient points that I think have to be addressed and I will elaborate further on some issues aspects. In so doing, I will rearrange Panama's arguments in a manner that is more comfortable for the purposes of my presentation. In particular, I will address, in this order: the argument that Italy breached article 300 due to its conduct prior to these proceedings, and during these proceedings; then the argument that article 300 is a provision that authorizes a broad and liberal interpretation of the Convention; the argument that Italy breached article 300 for having adopted the Decree of Seizure hastily; the argument that Italy breached article 300 for having waited until 1998 before arresting the *"Norstar"*; the argument that Italy breached article 300 for having waited to arrest the *"Norstar"* until the vessel put into port in Spain; and then the argument that Italy has breached article 300 due to the excessive length of the Italian domestic proceedings.

I will start with the argument that Italy breached article 300 due to its conduct. In particular, according to the first argument of Panama, Italy has breached good faith because it has failed to engage with Panama before the commencement of these proceedings, and because it has not acted cooperatively with Panama throughout these proceedings.

However, how Italy conducted itself in its exchanges with Panama prior to the commencement of these proceedings, and during these proceedings, is a matter that is not related to the question as to whether Italy has fulfilled in good faith the duty to respect Panama's freedom of navigation under article 87 of the Convention.

The fact that Panama's communications concerned the detention of the *M/V "Norstar"*, and that these proceedings are centred on freedom of navigation under article 87, does not allow one to conclude that a link exists for the purposes of article 300 between Italy's conduct prior to and during these proceedings, on the one hand, and Italy's obligations under article 87, on the other.

The link between article 300 and other provisions of the Convention must be assessed with regard to the typical conduct that the concerned substantive provision prohibits or prescribes. With respect to the good faith component of article 300, therefore, the relevant question is: what are the obligations imposed by the substantive Convention provision to which article 300 is linked and that must be fulfilled in good faith? Article 87 is concerned with freedom of navigation of vessels

[30] *Reply* (see footnote 7), para. 356.

on the high seas. The obligations that article 87 imposes concern the duty not to interfere with such freedom. This is the prescriptive nucleus of article 87 and respecting freedom of navigation constitutes the heart of the obligations enshrined therein.

Modalities of engagement with the other party prior to the commencement of ITLOS proceedings, and modalities of conduct during ITLOS proceedings, do not fall within the scope of the obligations imposed by article 87. They fall, on the other hand, within the scope of the obligations set out by other UNCLOS provisions. With respect to engagement prior to the commencement of the proceedings, for instance, the relevant provision is article 283. The rubric to the article reads indeed "obligation to exchange views" and the text of the article confirms that "the Parties to the dispute shall proceed expeditiously to an exchange of views".

The obligation to exchange views under article 283 may be breached; or, if not breached, it may not be discharged in good faith.

In the Judgment of 4 November, the Tribunal agreed with Panama that the various letters sent by Panama to Italy prior to the commencement of these proceedings constitute an exchange of views under article 283 of the Convention. Indeed, in the very first letter sent to Italy, Mr Carreyó was already making settlement proposals, failing which, he said, Panama would turn to ITLOS. Discussing modalities on how to settle a dispute is exactly how an exchange of views works.

As a consequence, had Panama wanted to argue that Italy has acted in bad faith by not replying to Panama's communications, it should have done so by linking article 300 of the Convention to the obligations set out by article 283 of the Convention. However, it has not done so, and it is too late to do so now. Therefore, assessing whether Italy has discharged in good faith its obligations under article 283 is not a matter that falls within the jurisdiction of the Tribunal in the present case.

Other provisions of the UNCLOS deal with the conduct of the Parties, including as regards their cooperation, during ITLOS proceedings. Such provisions, similarly to article 283, are not part of the present dispute.

Mr President, Members of the Tribunal, in light of what I have just said, it is apparent that Panama's claims that Italy acted in bad faith in the exchanges that preceded these proceedings, and in the course of these proceedings, fall outside the jurisdiction of the Tribunal because they are not related to article 87 of the Convention.

However, I do need to spend a few words on the merits of Panama's contentions. Italy cannot let it go that accusations of bad faith be so lightly and gratuitously made against a fellow party to UNCLOS. According to Panama, there is no reason other than bad faith why Italy has not replied to Panama's communications. These trenchant comments are not acceptable. Italy has not replied because it believed, in 1998 and up until 2010, that Mr Carreyó was not duly authorized to represent Panama in negotiations concerning the *"Norstar"*. As established by the Tribunal, Italy has committed a legal mistake in not considering Mr Carreyó a duly authorized representative of Panama after the note verbale of 31 August 2004. This

misunderstanding of the law has been sanctioned by the Tribunal with the rejection of Italy's arguments in this regard during Preliminary Objections. Contrary to Panama's position, therefore, there is an explanation to Italy's silence, other than bad faith; and that explanation is error on the law.

However, there is something else. Apart from the explanation that I have just given, the fact remains that Italy's silence was an entirely legitimate position in the context of negotiations under article 283 of the Convention.

Mr President, Members of the Tribunal, in order to prove this point, I need first to distinguish situations in which the parties are under a duty to negotiate, from situations in which no such duty exists. Then, I need to take you through Panama's specific exchanges with Italy.

UNCLOS, at times – at times – provides for a duty to negotiate. Annex V to the Convention, for example, disciplines a conciliation procedure. With regard to this procedure, Professor Beckman notes, in a passage that is at tab 21, page 11, of your folder:

> The report [of the conciliation commission] is not legally binding on the parties, but the parties would be under an obligation to negotiate in good faith on the basis of the conciliation report. … Although the parties are not required to reach an agreement, they are legally obligated to negotiate in good faith to try for such an end.[31]

Article 283 of the Convention, within whose framework Panama's communications were sent, does not set out a duty to negotiate, let alone to reach a settlement of a dispute by negotiation or any other peaceful means.

As noted by a former distinguished colleague of yours, Judge Anderson, in a passage that is at tab 21, page 12 of your folder:

> While the word negotiation appears in article 283, it does so as an example of a means of settlement. Negotiation as a means of settlement is subject to some doctrine: e.g. in the judgment in the *North Sea Continental Shelf* case. However, this doctrine does not apply to exchange of views, even in the sense of consultation: there is no requirement to seek to reach agreement.[32]

What this means, in a nutshell, is that under article 283 Italy did not have a duty to try and reach a settlement with Panama. It did not have an obligation to enter into negotiations with a view to arriving at an agreement, as the ICJ case referred to by Judge Anderson indicated in the *North Sea Continental Shelf* Case. "[i]t did not have to pursue [negotiations] as far as possible with a view to concluding agreements",[33]

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[31] R. Beckman, 'UNCLOS Part XV and the South China Sea', in S. Jayakumar, T. Koh, R. Beckman (eds.), *The South China Sea Disputes and Law of the Sea* (Edward Elgar 2014) 229, 246.
[32] D. Anderson, 'Article 283 of the United Nations Convention on the Law of the Sea', in T. M. Ndiaye, R. Wolfrum, C. Kojima (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Nijhoff 2007) 847, 853.
[33] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, p. 47, para. 85.

as the PCIJ said in *Railway Traffic between Lithuania and Poland*.[34] It could simply have rejected Panama's settlement proposals, and it would have been well within its right to do so. Mr President, Members of the Tribunal, this is the crucial point: Italy did reject those proposals.

The ICJ has explained that rejecting a certain position does not need to be done expressly. The case law here is rather abundant, and I will limit myself to pointing to *Land and Maritime Boundary between Cameroon and Nigeria*, at tab 21, page 15 of your folder. The Court held that "the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis.*"[35]

The question therefore is: was Italy's silence a form of opposition to Panama's settlement proposals in this case? The answer is: yes, it was.

I now need to take you through Panama's exchanges.

These exchanges were not a general request to exchange views or information over the *"Norstar"*. They were clear and concrete settlement proposals, essentially framed in this way: either Italy releases the vessel or it will be sued. Either Italy pays damages or it will be sued. These settlement proposals were oftentimes subject to a time limit. Panama framed its own notes verbales in a manner that attributed a specific value to Italy's failure to respond within the specified time limit. From this silence, Panama itself was ready to draw consequences. Could you please turn to tab 22 of your folder?

Let me go through the letter dated 15 August 2001 by Mr Carreyó that reads:

> The undersigned therefore respectfully requests that the Italian State within reasonable time decides if it wants to release the vessel and pay the damages caused by the illegal procedure. Were [the] above-mentioned not to happen, Panama … will apply to the Hamburg Tribunal.[36]

Let us now take the letter from Mr Carreyó dated 3 August 2004. It reads:

> The Government of Italy will understand that failing to respond to the demand of the Government of Panama by August 30th 2004, Panama will have no other choice than to submit the dispute to arbitration in accordance with Annex VII.[37]

[34] *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 42 (Oct. 15)*, p. 12.
[35] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, p. 315, para. 89.
[36] *Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs*, 15 August 2001 (Written Preliminary Objections under article 294, paragraph 3, of the United Nations Convention on the Law of the Sea by the Italian Republic, 10 March 2016, Annex F).
[37] *Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs*, 3 August 2004 (Observations and submissions of the Republic of Panama to the Preliminary Objections of the Italian Republic, 5 May 2016, Annex 3)

All Panama's communications essentially follow this pattern and structure. In this context, Italy's silence and failure to respond had a very clear meaning. Panama itself gave that meaning to its notes verbales and to Italy's silence.

Mr President, Members of the Tribunal, for the sake of clarity, I am not saying that the duty to exchange views with regard to a dispute does not apply equally to both parties to the dispute. We know that it does, and the Tribunal has said so many times, including in this case. What I am saying is that in this case Italy fulfilled its part of the obligation to exchange views by remaining silent when confronted with Panama's settlement proposals. Silence was not a "non-view". It was a view, and it meant, in the particulars of this case, disagreement.

Panama's claim of Italy's bad faith due to lack of engagement is therefore ill founded, also on its merits. I do not deny, for the sake of clarity, that bad faith may occur also in the context of an exchange of views under article 283. It may occur if a party tries to deceive the other, for instance; if it pretends to agree to a settlement, only to backtrack at the last minute with the purpose of avoiding or deliberately delaying international proceedings. This would very likely be bad faith under article 283. However, none of this has happened in this case. Italy has behaved consistently, has never given to Panama the impression that an agreement was within reach. By remaining silent, Italy has rejected Panama's settlement proposals, and it has done so throughout. I do not think this is bad faith.

As to the merits of Panama's claim that Italy has acted in bad faith because it has been uncooperative in the context of these proceedings, once again I need to register Italy's disbelief for Panama's allegations. Italy has acted cooperatively with Panama. It has even taken the initiative of proposing that the Parties could share a list of the documents in their respective files. This is in circumstances in which the Tribunal had already denied Panama's requests for an unqualified disclosure of documents and in circumstances in which international law does not require, to use Professor Kolb's words, that the parties "share information or … compromise their 'egoistic' interests as opposing parties".[38]

In all these circumstances, Italy was very forthcoming to Panama and offered a list of the documents in its file because Panama could not prove its case otherwise.

Mr President, perhaps as I am about to start another argument of Panama's, we may, with your permission break now, and I may continue after the break.

THE PRESIDENT: Thank you, Mr Busco. Indeed, we have reached 4.30. The Tribunal will withdraw for a break of 30 minutes. You may continue your statement when we resume at five o'clock.

MR BUSCO: Thank you, Mr President.

(*Break*)

[38] R. Kolb, 'General Principles of Procedural Law', in A. Zimmermann, K. Oellers-Frahm, C. Tomuschat (eds.), *The Statute of the International Court of Justice. A Commentary* (OUP 2006, 1st ed.) 871, para. 60

THE PRESIDENT: I give the floor to Mr Busco to continue his statement.

MR BUSCO: Thank you, Mr President and Members of the Tribunal.

I shall resume my presentation concerning article 300 in its good faith component.

Panama also advances another line of reasoning to claim that Italy has breached article 300. In Panama's Reply, the argument is presented under the rubric *effet utile*. I do not need to assess here whether this expression is accurately used. Essentially, however, Panama's argument is as follows: good faith is an interpretative canon; article 300 and the principle of good faith enshrined therein must be used to draw links between article 300 and article 87. Article 87, in light of the principle of good faith, must be interpreted in a broad manner and the Tribunal can therefore conclude that a breach of article 87, liberally and broadly interpreted, has occurred. Mr President, Members of the Tribunal, if I can kindly ask you to turn to tab 3 of your Judges' folder, you will be able to read Panama's argument in its own words: Panama claims that "it is crucial to use the concept of good faith to interpret article 87 and link it with article 300 of the Convention".[39]

Also, Panama asks the Tribunal "to interpret article 87 in a broad manner ... so as to recognize a material breach of article 87 in light of the concept of good faith".[40]

There are several critical flaws with Panama's reasoning.

The first flaw is that good faith as enshrined in article 300 of the Convention is not an interpretative canon, and especially it cannot be used to either draw links between article 300 and article 87 when none exists or to justify a broad interpretation of article 87. In its pleadings Panama refers to a decision by the International Court of Justice, the Territorial Dispute between Chad and Libya, in which the Court explained that, in accordance with article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Sure, there is no doubt about this.

Article 300, however, is not the UNCLOS equivalent of article 31 of the Vienna Convention. As I said, it is not an interpretative canon but a substantive yardstick against which to measure the modalities in which obligations under UNCLOS are fulfilled and rights exercised. In other words, article 300 is about performance, not interpretation. In this sense, it finds a corresponding provision not in article 31 of the Vienna Convention but in article 26. As noted by Professor Nordquist in his commentary to the Convention, whose passage you can find at tab 21, page 16 of your folder,

> [T]he reference to "good faith" in article 300 reflects article 2(2) of the UN Charter and the fundamental rule *pacta sunt servanda*. Article 26 of the Vienna Conventions of 1969 and 1986 formulate this rule in relation to a treaty in

[39] *Reply* (see footnote 7), para. 215.
[40] *Ibid.*, para. 214.

> lapidary form: "Every treaty in force is binding on the parties to it and must be performed by them in good faith."[41]

Therefore, Panama cannot resort to article 300 to request a broad interpretation of article 87 simply because that is not the purpose of article 300.

Mr President, Members of the Tribunal, without prejudice to this, Panama is also again wrong in the way that it invoked article 300. The operation of article 300 requires verifying whether a State has performed in good faith the obligations prescribed by another provision of the Convention. In this sense, establishing what those obligations are is a logical precedent to the operation of article 300. By Panama's reasoning, on the other hand, article 300 comes first, and the substantive obligations of the Convention whose breach is discussed can only be ascertained later in the light of article 300, but this is wrong. This argument was already advanced by Saint Vincent and the Grenadines in the *M/V "Louisa"* Case. In that case, the claimant held that article 300

> can be accurately characterized as inviting a broad interpretation and a liberal application. While the determinations are up to this Tribunal, the Applicant urges the Tribunal to accept the responsibilities entailed in article 300.[42]

This responsibility would be that article 300 invites a broad interpretation.

However, the Tribunal rejected this reading, explaining that it would have entailed considering article 300 as a stand-alone, autonomous provision contrary to established principles.

The second flaw is that even if article 300 were an interpretative canon and could be used in the manner that Panama attempts to use it, Panama's reliance on the principle of *effet utile* to invoke a broad interpretation of the UNCLOS is entirely misconceived.

Effet utile, assuming for the sake of argument that the notion is actually relevant here, does not authorize broad interpretations of the Convention. I would ask you kindly to turn to tab 21, page 18, of your Judges' folder. There you will find a passage by the International Law Commission in which the Commission said:

> The maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation .... Properly limited and applied, the maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty.[43]

Mr President, Members of the Tribunal, I will now turn my attention to claims that I would like to address more in depth on their merits. These claims are: a) that Italy breached good faith in allegedly issuing the Decree of Seizure prematurely; b); that

[41] M. H. Nordquist, S. Rosenne, L. B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Volume V (Brill-Nijhoff 1989), p. 152, para. 300.4.
[42] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, p. 41, para. 130.
[43] ILC, 'Draft Articles on the Law of Treaties, with Commentaries', [1966-II] YbILC 187, p. 219, para. 6.

Italy breached good faith because it only ordered the arrest of the *M/V "Norstar"* in 1998, even if it had been aware of the *"Norstar"*'s activities before that date; c) that Italy breached good faith because it waited until the *M/V "Norstar"* was in port before ordering the arrest of the ship; and d) that Italy breached good faith because it kept the *M/V "Norstar"* in detention for an inordinate period of time.

Before I start to address these arguments, I would like to make two general considerations.

The first is a banal consideration perhaps, but necessary in the light of Panama's tendency to presume bad faith in each and every action on the part of Italy. Good faith is to be presumed; bad faith has to be proven. Apart from any other consideration, Panama's arguments are nothing but unsubstantiated allegations of bad faith that do not go even close to rebutting the presumption of good faith that Italy, as well as Panama and any other State, is entitled to in international law. Mr President, Members of the Tribunal, I refer you to Italy's pleadings for case law on this aspect.

For the second consideration, I would like you to please open tab 21, page 19, of your Judges' folder, where you can read a passage from the Duzgit Integrity Arbitration, a decision rendered in 2016. In that passage the tribunal held:

> The Tribunal is not aware of any prior instance in which another tribunal or court has found a breach of article 300 of the Convention. There is, therefore, little guidance as to the legal test to be satisfied to establish such a breach.[44]

This is very much the case. However, the vast majority of Panama's arguments on alleged breach of good faith by Italy point towards the alleged lack of reasonableness on the part of the Italian authorities when adopting the Decree of Seizure and the request for its execution. Italy does not have to find in theoretical terms what legal test has to be satisfied to establish that no breach of good faith has occurred. It simply has to answer Panama's allegations.

Let me therefore paraphrase a famous quote: the arc of good faith is long, but in this case it bends towards the question of reasonableness.

In addressing the arguments on Italy's alleged breach of good faith, I will therefore keep a focus on this dimension: whether Italy's conduct was reasonable, that is to say, if it had a legal basis, if it was in accordance with the law or practice, if it was proportionate, if it pursued legitimate aims or if, on the other hand, it constituted a departure from established principles and practice that could somehow signal bad faith or improper motives on the part of the Italian authorities.

This much specified, I will first address Panama's argument that Italy breached good faith because it issued the Decree of Seizure prematurely. This argument is in turn composed of two sub-arguments. first, that the Decree of Seizure was issued prematurely because when the Italian authorities adopted the act, the fiscal police, competent for the investigation, had not yet transmitted a formal report on the

[44] *The Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe), PCA Case No. 2014-07, Award, 5 September 2016*, para. 262.

outcome of the investigative activities to the prosecuting magistrate; second, that the Decree of Seizure was issued in the absence of clear evidence that the *"Norstar"* and those on board were actually guilty of the crime of which they were accused – in other words, that the Decree was issued without the required *fumus*.

The first point is a matter of judicial practice for the most part. Tomorrow our Agent, Giacomo Aiello, will examine Dr Esposito, a previous Chief Prosecutor at the Italian Supreme Court with more than 30 years of experience of judicial practice and we will hear from him on this aspect.

However, I would now ask you kindly to turn to tab 9 of your folder. I limit myself to noting that under article 109 of the Italian Constitution the Public Prosecutor has full control of the judicial police. According to article 327 of the Code of Criminal Procedure, which you will also find at tab 9 of your folder, "the Public Prosecutor has the direction of the investigative activities and full control of the judicial police." In the circumstances, a Public Prosecutor does not need to wait for the final report of the investigators before adopting a Decree of Seizure. The Public Prosecutor is constantly exchanging information with the investigators on the ground, of which he or she has the direction, and can decide when there is enough information and evidence to adopt a measure like a Decree of Seizure, and when it is time to do so, in light of the needs of the investigation. Indeed, in the *"Norstar"* case investigations had been going on for several months when the Decree of Seizure was adopted and the act, as indicated in Italy's Memorial, explained fully the reasons and the evidence that justified its adoption. In the circumstances, therefore, the adoption of a very well-motivated decree can hardly be considered premature, illegal, unwarranted or in bad faith.

On the second question, I would like to bring to the Tribunal's attention from now that under Italian law, the adoption of a Decree of Seizure for probative purposes under article 253 does not require that there be clear and unequivocal evidence of the guilt of those accused of a crime. Again, on this I refer to what Dr Esposito, examined by Avvocato Aiello, will say tomorrow, but I would like to mention that if the guilt of the accused were already established for certain, then a Decree of Seizure for probative purposes, namely for gathering evidence as to the guilt of the accused, simply would have no reason to exist.

Mr President, Members of the Tribunal, I would like to ask you to turn your Judges' folder to tab 23, where you can find the translations of some judgments from the Supreme Court of Italy, which explain much more authoritatively what I have just stated. I do not propose to go through all the judgments now, but I find that the first one and the last one are particularly significant, and therefore, with your permission, I would like to read them to you.

> The lawfulness of a probative seizure is not to be assessed on the basis of the merits of the claim. Rather, it is to be assessed by looking at the extent to which the constitutive elements of the *notitia criminis* reasonably require further investigation aimed at gathering further forms of evidence, which may not be obtained without either depriving the indicted person of the availability of the good, or making the latter available to Judicial Authority.[45]

[45] Italian Supreme Court, Criminal Section III, 24/09/2017, n. 15177.

If you look at the last excerpt in your tab, it reads – and this is another judgment:

> Given that probative seizure aims at gathering evidence in respect of facts which may constitute an offence, it cannot itself rely on the certainty of the relevance of the seized good as body of evidence. The existence of a *fumus*, that is the mere possibility of a relationship between the good and the offence, is sufficient for lawful seizing. Therefore, whenever the ongoing investigation substantiates a *fumus*, the seizure is lawful and appropriate, since it is aimed at establishing, in itself or through further investigation, whether a relationship exists between the good and the offence.[46]

I will move on now to the other argument that Panama makes, namely that Italy breached article 300 for having waited until 1998 before arresting the *"Norstar"*.

According to Panama, Italy knew that the *M/V "Norstar"* had been involved in the bunkering activities since 1994, and therefore it waited more than four years to arrest the ship. Italy does not understand how this would be suggestive of bad faith. Panama is, frankly, blowing hot and cold, first complaining that the Prosecutor acted hastily in adopting the Decree of Seizure, and then somehow lamenting that such Decree of Seizure was late, and that it should have been issued before.

Apart from the contradiction in Panama's arguments, there is a very easy explanation as to why Italy waited until 1998 before arresting the *"Norstar"*. The bunkering activities of the *"Norstar"* were never a concern for the Italian authorities. The Italian authorities became interested in the *"Norstar"* and commenced investigating it when they realized that the ship was carrying out activities rather different from bunkering, and potentially criminally relevant. At that point, the Prosecutor decided that a Decree of Seizure was necessary to gather more evidence about the crime that the *"Norstar"* was thought to have been instrumental in committing. If anything, this delay in arresting the ship confirms that the *"Norstar"* was not arrested for the bunkering activities, as Panama repeatedly claims.

The other argument that Panama makes is that Italy breached article 300 with regard to article 87 because it waited till the *"Norstar"* was in port in order to arrest it. According to Panama, in particular,

> if Italy admits that it cannot arrest the *M/V "Norstar"* on the high seas as that constitutes a violation of the freedom of navigation, Italy is clearly not acting in good faith when it decides to wait until that foreign vessel has left the high seas to arrest it.

Mr President, Members of the Tribunal, the *"Norstar"* went into Palma's port voluntarily, without deceit or coercion. Italy waited until the *M/V "Norstar"* put into port before arresting it because, absent one of the exceptional conditions that authorize a coastal State to exercise enforcement jurisdiction on the high seas, arresting a ship on the high seas is always illegal, regardless of whether the coastal State has a legitimate title to exercise jurisdiction.

Only exceptionally could a State arrest a foreign ship on the high seas without

[46] Italian Supreme Court, Criminal Section. II, 21/06/1999, n. 3273.

breaching article 87.

One exception is consent. For instance, speaking of activities that typically would constitute a breach of article 87, such as boarding a ship on the high seas, the Tribunal in the *"Arctic Sunrise"* Case held that "a coastal State may only exercise jurisdiction, involving law enforcement measures, over a ship, with the prior consent of the flag State".[47] The Tribunal was referring to a situation where a ship would be arrested on the high seas.

Other exceptions to the ban on enforcement measures on the high seas include articles 105 (piracy), 109, paragraph 4 (unauthorized broadcasting), 110 (right of visit, in respect of defined activities) and 111 (hot pursuit), and a few others. The Decree of Seizure mentioned the possibility of arresting the ship on the high seas, had the conditions for a hot pursuit been met. Since they were not met, the ship was rightly arrested in port.

In conclusion, given the circumstances of the case, the arrest of the *M/V "Norstar"* could only be legal in areas where article 87 did not apply or in areas where exceptions to article 87 applied. Far from being suggestive of bad faith, Italy's *modus operandi* only shows respect for the fundamental principles of the Convention.

The other argument that Panama makes to substantiate a breach of good faith, and the last I will address today, concerns the allegedly excessively long detention of the *M/V "Norstar"*. According to Panama, Italy has in particular also breached article 300 due to the duration of the Italian domestic proceedings. In Panama's Reply the position is that:

> [T]he M/V Norstar was detained for an inordinate period of time. ... [T]he detention was prolonged and the vessel was kept, in effect, incommunicado under Italy's control and authority over the years. This can only be considered as a betrayal of good faith. ... [I]t is the prolonged detention that brings the applicability of article 300 to this case.[48]

First of all, this argument does not bear a connection with article 87 and freedom of navigation, in the sense that freedom of navigation is relevant for the present case. Certainly, as a general principle, detention of a ship is relevant from the perspective of article 87. However, once again, this case is not about the detention; it is about the Decree of Seizure, and the request for its execution that came before. The compatibility of these acts with article 87 is what the Tribunal is investigating. The length of the detention, therefore, which is a matter that concerns the execution of the Decree of Seizure, and of the other measures against the *"Norstar"*, fall outside the limited question as to whether the Decree of Seizure and the request for execution as such are in breach of article 87.

In any event, Mr President and Members of the Tribunal, I would like to delve here on the merits of this allegation. Panama's allegations of impropriety on Italy's part are devoid of any ground on the merits. Italy simply has not detained the

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[47] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, *PCA Case No. 2014-02, Award on the Merits, 14 August 2015*, p. 55, para. 231.
[48] *Reply* (see footnote 7), para. 228.

M/V "Norstar" for an unreasonable period of time. The vessel was arrested on 25 September 1998. Its owner only filed a request for the release of the vessel on 12 January 1999, that is, three and a half months after the actual arrest of the ship. We know that at the latest on 11 March 1999, that is, two months after the request from the shipowner, the vessel was released and could have been collected, but it was not.

It took less for Italy to release the vessel pursuant to a request from the shipowner than to the shipowner to make such a request. One wonders why if two months is deemed by Panama too long a time to release a vessel, the shipowner took three and a half months to ask for the release of the ship. Panama also contends that

> if Italy had realized that the shipowner was not taking any steps to take the vessel back, it should have instituted proceedings and/or contacted the Government of Panama, which, in turn, would have taken the necessary measures.

Mr President, Members of the Tribunal, one can lead a horse to water, but one cannot make it drink! In its pleadings Panama says that Italy should repay several thousand euros in fees of lawyers that Mr Morch had to retain in Italy in the context of the domestic proceedings. We know for certain from those invoices that Mr Morch had counsel in 2003. Counsel could certainly have advised Mr Morch on the practical modalities of recovering his vessel after the release if he had any doubt. Italy should not bear the consequences of Mr Morch's lack of basic diligence in pursuing his interests.

Mr President, Members of the Tribunal, this concludes my presentation on article 300.

I would now like to continue by turning to Panama's attempt to enlarge the scope of the dispute beyond the dispute as originally identified by Panama in its Application of November 2015 and beyond what the Tribunal determined in its Judgment of 4 November 2016.

I quote directly from Panama's pleadings, a passage that you can find at tab 3 of your Judges' folder.

> The fact that only articles 87 and 300 have heretofore been considered relevant to the present dispute does not preclude the Tribunal from considering other violations of international law closely related to these provisions.

This is wrong. Certainly I agree with Mr Carreyó that under article 293, paragraph 1, of the Convention, the Tribunal has the power, and in fact the duty, in deciding a dispute, to apply in its entirety the Convention and also other rules of international law not incompatible with the Convention. Also, the full set of the UNCLOS provisions could become relevant from the perspective of systemic interpretation of the Convention.

In this sense, article 92 does become relevant but in a manner that assists Italy's argument on article 87, specifically, to support our position that article 87 must be interpreted in a way that preserves its utility under the Convention. If article 87

prohibited the extraterritorial exercise of jurisdiction as such, without interference on the movement of a vessel on the high seas, how would it differ from article 92 then? This is again *effet utile*.

This, however, is a matter of applicable law and interpretation. This is not one of the modalities in which other provisions of the Convention can become relevant to the present dispute as Panama suggests. This is the only modality. The relevance of this provision does not mean that the jurisdiction of the Tribunal can be extended to decide on violations of the Convention that are not part of a dispute brought before the Tribunal. Panama's reasoning means that a claimant could commence a case before the Tribunal over the interpretation and application of certain provisions of the Convention, and turn that dispute into a completely different one, potentially involving the entire set of norms of UNCLOS. This is certainly not how the Convention works, and not how international litigation more in general works. As explained by the ICJ in the *Oil Platform* Case, it is well established in the Court's jurisprudence that the parties to a case cannot in the course of proceedings "transform the dispute brought before the Court into a dispute that would be of a different nature".[49]

Italy's position is that in the present case Panama's claims concerning breach of articles 92 and 97 either fall outside the jurisdiction of the Tribunal or are, in the alternative, inadmissible.

First, in this case, Italy has raised Preliminary Objections to the jurisdiction of the Tribunal and the admissibility of Panama's case, as laid out by Panama in the Application. In its Application, Panama has listed a number of possible breaches of UNCLOS, of which only two have been found to be relevant to this case: article 87 and article 300. In deciding that it had jurisdiction over the dispute, the Tribunal also curtailed the scope of its jurisdiction. This is indeed one of the purposes of incidental proceedings: delimiting the jurisdiction of the Tribunal in the event of a dispute that involves multiple causes of action. This purpose of incidental proceedings would be frustrated if Panama were now allowed to extend the scope of the dispute beyond what the Tribunal has determined on 4 November 2016.

Also, Panama's attempts to claim a breach of articles 92 and 97 are directly in breach of paragraphs 122 and 132 of the Decision of the Tribunal of 4 November.

In light of these facts alone, and because the judgment of 4 November does not mention either article 92 or 97 as provisions that the Tribunal intends to investigate on the merits, Italy submits that the Tribunal does not have jurisdiction to address their alleged violation in the context of the *M/V "Norstar"* dispute.

Even leaving the question of preliminary proceedings aside, articles 92 and 97 were never included in Panama's original Application. According to the International Court of Justice in the *Fisheries* Case: "It is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it."[50] This case law was quoted with approval by the

[49] *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, *Judgment, I.C.J. Reports 2003*, p. 161, p. 213, para. 117.
[50] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, p. 447, para. 29.

ITLOS in the *M/V "Louisa"* Case. It is reflected at article 24 of the Statute of the Tribunal and article 54, paragraph 1, of its Rules of Procedure, which require the applicant, among other things, to "specify the precise nature of the claim". What this Tribunal means by setting out a claim in an application was determined by the Judgment of 4 November: "It is not sufficient for an applicant to make a general statement without invoking particular provisions of the Convention that allegedly have been violated."[51]

Against this background, Panama's claims on articles 92 and 97, which Panama never invoked in the Application, constitute new claims. Without prejudice to Italy's position on the lack of the jurisdiction of the Tribunal, as articulated just a few moments ago, these claims are subject to the rule posited by this Tribunal in the *"Louisa"* Case. According to this rule: "It is a legal requirement that any new claim to be admitted must arise directly out of the Application or be implicit in it" and "while the subsequent pleadings may elucidate the terms of the Application, they must not go beyond the limits of the claim as set out in the Application."[52]

The question before the Tribunal is therefore as follows: do Panama's claims under articles 92 and 97 arise directly out of the Application or are they implicit in the Application; or do they go beyond the limits of the original claims?

Panama's claims under articles 92 and 97 do not arise directly out of the Application. In the *Fishery* Case, the expression "directly out of the Application" was further developed as "directly out of the question which is the subject matter of that Application". This expression has become common in the case law of the Court. The focus has to be therefore on the subject-matter of the Application. The subject matter of the Application filed by Panama is limited and concerns only one question: freedom of navigation. I would like to quote directly from Panama's Application to show you how Panama describes the subject matter of the Application in its own words. If you could kindly to turn to tab 25 of your folder, according to Panama:

> The right of peaceful navigation of the Republic of Panama through the *M/V "Norstar"* was violated by the Italian Republic agents, the latter hindering the movements and activities of foreign vessels on the high seas.[53]

"The right of peaceful navigation … hindering the movements and activities of foreign vessels on the high seas." It could not be any clearer.

Allowing claims concerning articles 92 and 97 would change the subject matter from freedom of navigation to questions of exclusivity of the exercise of jurisdiction, including in the event of incident of navigation. This is tantamount to turning the *"Norstar"* case into a dispute "distinct from the subject of the dispute originally submitted in the Application".[54] In *Phosphate in Nauru*, in line with the case law of the PCIJ, the Court refused to entertain claims of this nature.

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[51] *M/V "Norstar"* (see footnote 24), pp. 28-29, para. 109.
[52] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, p. 44, paras. 142-143.
[53] *Application of the Republic of Panama*, 16 November 2015, para. 9.
[54] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240 ff., para. 68.

Mr President, Members of the Tribunal, if one looks at the case law in which a new claim has been found to arise directly out of an application, it will be evident that this expression is used essentially to bring into a dispute new factual circumstances that arose after the application – new factual circumstances, however, that do not change the question submitted to the Court.

In the *Arrest Warrant* Case, for instance, which I quoted previously for other purposes, for instance, the person who was Minister of Foreign Affairs at the time of the application ceased from that office in the course of the proceedings. Belgium claimed that this factual circumstance had changed the dispute before the Court. The ICJ, in a passage that is at tab 26, page 5 of your folder, ruled that:

> The facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it … The Congo's … submissions arise "directly out of the question which is the subject-matter of that Application".[55]

In the *Fisheries* Case, Germany raised for the first time in the Memorial the question of the harassment, on the part of Iceland, of German fishermen's boats. The Court, in a passage that you can find at tab 26, page 6 of your folder, held that the submission was "one based on facts subsequent to the filing of the application, but arising directly out of the question which is the subject-matter of that application".[56]

These scenarios are very different from the *M/V "Norstar"* Case, in which Panama is not advancing new factual elements, but entirely new and separate breaches and causes of actions that go beyond those originally envisaged, and that it could well have advanced in its original Application.

Nor can articles 92 and 97 be considered implicit in the Application. They do not arise out of the Application and they cannot be considered implicit in the Application.

In *Certain Phosphate Lands in Nauru*, quoting its previous case law, the International Court of Justice explained that "implicit" means more than "generally linked". It held that: "[I]t is not sufficient that there should be links … of a general nature. Additional claims must have been implicit in the Application."[57] Yet, Panama only says that articles 92 and 97 are "closely related" to article 87. By Panama's own qualification, therefore, articles 92 and 97 are closely related to article 87, but not implicit in article 87.

However, I would like to go a little further. Mr President, Members of the Tribunal, I would ask you kindly to turn to tab 26, pages 8 and 9 of your Judges' folder. According to Professor Robert Kolb:

> An additional claim is admissible if it is already implicit in the original case, or, in other words, if one of the elements of the initial claim is simply developed

[55] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, p. 16, para. 36.
[56] *Fisheries Jurisdiction (Federal Republic of Germany* v. *Zeeland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, p. 203, para. 72.
[57] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240 ff., para. 67.

> further – for example by drawing out the implications – so that it is not a raw new element of an enlargement of the case. … The links between the part and an element that was already present in the initial claim must be sufficiently strong to justify the conclusion that the new element is implicit in the old. The links can also be purely objective in nature: independently of the question whether the new material amounts to a claim additional to the one originally formulated, the new material will be admissible if the Court is in any event implicitly bound to take account of the "additional issue" because it is indissociable from the legal reasoning associated with the original claim.[58]

In *Temple of Preah Vihear,* also at tab 26, page 10 of your folder, the ICJ ruled that the new question of the withdrawal of the army of a State from a disputed territory was implicit in the question concerning the sovereignty over that territory. The Court explained that the claim was "implicit in, and consequential on, the claim of sovereignty itself".[59]

The test is therefore one of indissociability, or, as the ICJ has at times called it, one of consequentiality.

The relationship between articles 87, 92 and 97 is not one of consequentiality and indissociability, but one of independence and autonomy. An interference with freedom of navigation in breach of article 87 of UNCLOS could occur on the basis of facts that did not rise to the level of an exercise of jurisdiction in breach of article 92. Equally, a State could exercise jurisdiction in breach of article 92 without necessarily interfering with freedom of navigation contrary to article 87. Article 97, on its part, could obviously be breached independently of article 87, and vice versa. Ultimately, the Tribunal can decide whether any of these provisions have been breached without having to decide on the breaches of the others. Nor deciding that a breach of any of these provisions has occurred implies that, consequentially, any of the others has actually been violated.

Had Panama wanted to extend the dispute to breaches of articles 92 and 97, it could have done so by indicating them in the Application. Nothing prevented it from doing so back then. However, it is now too late to do so. As the Tribunal has stated in the *M/V "Louisa"* Case, in line with the established case law of the ICJ, these are not mere formalities, but matters that impinge on the legal security and the good administration of justice.[60] Nor is it a mere formality that Panama has failed to indicate, in its final submissions, that it is seeking from the Tribunal a declaration that either article 92 or article 97 have been breached.

For these reasons, Italy asks the Tribunal to declare that it does not have jurisdiction to adjudicate over violation of articles 92 and 97 or, in the alternative, that Panama's claims that articles 92 and 97 have been breached are inadmissible at this stage of the proceedings, being new claims that neither arise directly out of the Application, nor are implicit in it.

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[58] R. Kolb, *The International Court of Justice* (Hart 2014), pp. 183-184.

[59] *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, p. 36.

[60] See also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, *Merits, Judgment, I.C.J. Reports 2010*, p. 656, para. 38, citing *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69.

Mr President, Members of the Tribunal, this concludes my presentation and Italy's presentation for the day. I would like to thank you very much for your attention.

THE PRESIDENT: Thank you, Mr Busco.

We have reached the end of this afternoon's sitting. The hearing will be resumed tomorrow morning at 10 a.m. to continue the pleading of Italy.

I wish you a good evening. The sitting is now closed.

(*The sitting closed at 5.55 p.m.*)