INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2018

Public sitting

held on Thursday, 13 September 2018, at 10 a.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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as Agent;

and

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as Legal Assistants.

THE PRESIDENT: Good morning. We will continue today the first round of oral argument by Italy in the Tribunal's hearing on the merits of the *M/V "Norstar"* Case.

I give the floor to Mr Tanzi to make a statement.

MR TANZI: Mr President, Members of the Tribunal, my second speech will address Panama's claim based on alleged violations of human rights law by Italy. Yesterday I already illustrated that this Tribunal has no jurisdiction over Panama's claims additional to those under articles 87 and 300 of the Convention and that such claims are, in any case, inadmissible.

Despite such jurisdictional and admissibility limitations, on which I will briefly elaborate, Italy is pleased to address this claim also on its merits, for two reasons: first, because Italy takes matters of human rights extremely seriously, including in the context of the law of the sea; second, because rebutting Panama's arguments on the alleged violations of human rights provides me with the opportunity to recall, if need be, once more, that the Italian criminal proceedings complained of – from the investigations which led to the Decree, to the Decree itself, and to the Judgments of the Tribunal of Savona and the Genoa Appellate Court – fully respected the principles of due process.

Mr President, my speech is organised in three parts. First, I will briefly revert to the jurisdictional and admissibility bars which apply with specific regard to Panama's human-rights-based claims. Second, I will address Panama's claim that Italy has breached the right to property of the persons involved in the operation of the *M/V "Norstar"*. Third, I will deal with Panama's claim that Italy has breached the principle of due process.

Mr President, Members of the Tribunal, in its first submission in its written pleadings Panama asks the Tribunal to

> [F]ind, declare and adjudge ... that [next to article 87 of the Convention] Italy has breached ... other rules of international law, such as those that protect the human rights and fundamental freedoms of the persons involved in the operation of the *M/V "Norstar"*.[1]

Panama reiterated this request in its Reply, as recalled by the Registrar at the outset of this hearing.[2] Also on Monday, Mr Carreyó announced that Dr Cohen would address the Tribunal on "human rights violations".[3]

However, Mr President, neither Dr Cohen nor anyone else on Panama's side addressed these "human right violations". So Panama, having made in its written pleadings a number of offensive allegations that Italy had breached its human rights obligations, has not had the courage to follow through with them before the Tribunal in this hearing.

This is not the first time, Mr President, that Panama has blown hot and cold on

[1] *Memorial of the Republic of Panama*, 11 April 2017, para. 260.
[2] *Reply of the Republic of Panama*, 28 February 2018, para. 593.
[3] ITLOS/PV.18/C25/1, page 4, lines 47-48.

issues relating to human rights. Let me recall, Mr President, that Panama had once alleged in the "Legal Grounds" section of its Application that "[a]fter imprisoning members of the crew of the *M/V 'Norstar'*, the Italian Republic has (up until this date) evaded to account for this event".[4]

Except that, Mr President, this event never occurred. Panama had to concede in its Reply that "there were no restrictions of movement of any individual interested in the operations of the *M/V 'Norstar'*".[5] You may find the relevant passage of Panama's Reply at tab 3 of your Judges' folder.

Nonetheless, Mr President, it is important that I rebut the offensive allegations concerning human rights contained in Panama's written pleadings. I will confine myself to emphasizing the heart of Panama's flaw in its submission: namely, that Panama is oblivious to the fundamental distinction between the scope of the jurisdiction under article 288, paragraph 1, and the law to be applied by the Tribunal under article 293 of the Convention.

Italy fully acknowledges that pursuant to article 293, as observed by the Arbitral Tribunal in the *"Arctic Sunrise"*:

> [T]he Tribunal may … have regard to the extent necessary to rules of customary international law, including … human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorize the arrest or detention of a vessel and persons.[6]

But, Mr President, Panama is not invoking human rights rules in order "to assist in the interpretation and application of the Convention's provisions". Panama unequivocally places a number of distinct human rights rules, even though vaguely indicated, as the grounds for claims which are separate from those based on articles 87 and 300.

In so doing, Panama yet again tries to extend the jurisdiction of the Tribunal over a dispute other than the one over the interpretation and application of the Convention. Namely, Panama seeks to extend this dispute so that it becomes one over the interpretation and application of rules other than those of the Convention, such as articles 17 and 54 of the Charter of Fundamental Rights of the European Union;[7] articles 1 and 2 of Protocol No 1 of the European Convention on Human Rights;[8] and article 1 of Protocol No 2 of the same Convention.[9]

However, as the Arbitral Tribunal made clear in the *"Arctic Sunrise"*,

> Article 293 is not … a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source

[4] *Application of the Republic of Panama*, 15 November 2015, para. 10.
[5] *Reply* (see footnote 0), para. 21.
[6] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia*), *PCA Case No. 2014-02, Award on the Merits, 14 August 2015*, p. 46, para. 198.
[7] *Memorial* (see footnote 1), paras 140-141.
[8] *Ibid.*, paras 142-143.
[9] *Ibid.*, para. 148.

> of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention.

Finally on this point, Mr President, it is important to recall the observation by the Annex VII Tribunal in the *Duzgit Integrity* Arbitration, which is most germane to the point at issue. Building on the *"Saiga" No. 1* and *"Arctic Sunrise"* case law (which you may find reproduced at paragraph 148 of Italy's Rejoinder at tab 4 of your folder, the Tribunal rejected Malta's claims grounded on breaches of human rights standards as follows:

> The combined effect of [articles 288, paragraph 1, and 293, paragraph 1] is that the Tribunal does not have jurisdiction to determine breaches of obligations not having their source in the Convention (including human rights obligations) as such, but that the Tribunal "may have regard to the extent necessary to rules of customary international law (including human rights standards) not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions …".[10]

I may recall that, nowhere in its communications to Italy prior to the filing of the case nor in its Application has Panama advanced claims which were based on human rights rules and principles – with the exception of the aborted claim based on the alleged imprisonment of individuals interested in the *"Norstar"*, which I have just recalled.

I may also briefly recall that in the *M/V "Louisa"* Case, the Tribunal determined that it would not hear certain claims based on human rights rules because such claims were presented "after submitting the application".[11] The Tribunal should determine likewise here, given Panama's only remote reference to human rights in its Application concerning its abandoned imprisonment allegation.

Mr President, Members of the Tribunal, Panama maintains in its Memorial that, by issuing the Decree of Seizure, Italy has breached the right to property of the owner of the *M/V "Norstar"*. Panama has referred to a number of international human rights instruments including those I just referred to, with special regard to article 1 of Protocol No 1 of the European Convention on Human Rights.

Mr President, Members of the Tribunal, even, *arguendo*, if Panama's additional claim on the right to property fell within the jurisdiction of this Tribunal and that it were admissible, Italy could still not be found to have breached any right to property.

This is first because the seizure, contrary to Mr Carreyó's false assertions that it was a *sine die* confiscation, was only a temporary measure introduced for the purposes of further investigation and therefore did not permanently deprive anyone of their property. Second, and in any event, the persons involved in the operation of the *M/V "Norstar"* were not deprived of their property in either a disproportionate or arbitrary way, as I will now discuss.

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[10] *The Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe), PCA Case No. 2014-07, Award, 5 September 2016*, paras 207-208.

[11] *Reply* (see footnote 2), para. 393.

As observed by the European Court of Human Rights in applying article 1 of Protocol No 1 to the Convention, which uses a language similar to the one provided for under article 21 of the Inter-American Convention on Human Rights (tab 28):

> [A]n interference with property rights must be prescribed by law and pursue one or more legitimate aims. In addition, there must be a reasonable relationship of proportionality between the means employed and the aims sought to be realised. … [T]he State has a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.[12]

As to proportionality, you may recall that Professor Emily Crawford has expressed that:

> [A]s a general principle, proportionality means that a State's acts must be a rational and reasonable exercise of means towards achieving a permissible goal, without unduly encroaching on protected rights of either the individual or another State.[13]

Mr President, Members of the Tribunal, I recalled yesterday that the Decree of Seizure, which was adopted for a legitimate investigatory aim, was in full conformity with the law. Such temporary seizures of property are perfectly in line with generally recognized criminal law standards. The Panamanian legal order makes no exception and I may refer you to article 259 of the Procedural Criminal Code, which you find at tab 9 of your folder, Mr President.

The Decree, Mr President, was also plainly proportionate. It was proportionate to its investigatory aims. This was confirmed by its temporary nature, which only prevented the owner's access to the ship for about five months – five months since the enforcement of the Decree, until the necessary investigation was completed, following which an order for conditional release was granted in February 1999; and the release of the vessel was confirmed by the final and unconditional release in 2003.

Mr President, as to the alleged "arbitrariness" of the Decree, I must first recall the high threshold of wrongdoing that this term entails – arbitrariness. As famously stated by the ICJ in the *ELSI* Case: "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law." The Court explained: "It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[14] The same facts that I have just recalled with regard to the proportionality, and which I illustrated more extensively yesterday, Mr President, also clearly demonstrate its complete lack of any arbitrariness.

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[12] European Court of Human Rights, *Case of Silickienė* v. *Lithuania* (Application no. 20496/02), Judgment, 10 April 2012, para. 63.
[13] E. Crawford, 'Proportionality', *Max Planck Encyclopedia of Public International Law* (May 2011) <http://opil.ouplaw.com.ezproxy.unibo.it/view/10.1093/law:epil/9780199231690/law-9780199231690-e1459?rskey=k05RpO&result=1&prd=EPIL>, para. 1.
[14] *Case Concerning Elettronica Sicula S.p.A. (ELSI) United States of America* v. *Italy, Judgment, ICJ Reports 1989*, p. 15., para. 128.

Mr President, Members of the Tribunal, Panama's contention that Italy "could … have waited to definitively determine the validity of the charges submitting the persons involved in the operation of the *M/V 'Norstar'* to its criminal proceedings" before seizing the *"Norstar"* is simply untenable.[15]

More than that, this would defeat the entire point of a probationary seizure of property for the purposes of investigation, and unduly infringe each State's sovereign right to investigate crime. The absurd consequence of this reasoning is that a probationary seizure of property would be internationally lawful only when the accused involved are ultimately convicted. Yet that is what we heard time and again from Mr Carreyó.

In light of what I have just said, Mr President, the claim that Italy has disproportionately and/or arbitrarily deprived Mr Morch and the other persons involved in the use of the *"Norstar"* of their right to property must be rejected.

I should also respond briefly to a number of further allegations that Panama asserts but does not develop in its written pleadings. Panama contends that Italy breached its human rights obligations by not "trying to communicate with Panama or with persons involved in the operation of the *M/V 'Norstar'* to achieve its aims in the least onerous manner".[16] But, as you have already heard from me yesterday, that ignores the facts. The *"Norstar"* had already been abandoned by the time of the arrest, so it is not clear how Italy could have effectively communicated with the persons involved in the operation of the vessel.

I should also add that Panama's allegation that Italy has breached the right to property by not taking positive measures to maintain property that has been seized[17] again simply ignores the facts, of which you are also now well aware.

First, the *"Norstar"* was not a seaworthy vessel at the time of its arrest, and so Panama cannot attempt to use these proceedings to shift the blame for that onto Italy. Second, the owner of the *"Norstar"* had the opportunity to retrieve the vessel in February 1999 upon the payment of a minimal security, but it declined to take up that opportunity. Again, it failed to take up the opportunity to retrieve the vessel upon its unconditional release in 2003. If the owner was so concerned with exercising its right to property, it would have taken up those opportunities or at least have pursued a claim for compensation at that time. I may recall here the available remedies under Italian law which I illustrated yesterday morning.

Mr President, Members of the Tribunal, Panama has repeatedly and loudly complained about various alleged due process failures.[18]

This is all the more remarkable given that, as I mentioned earlier, this complaint was originally built on the false premise that the individuals involved in the *"Norstar"* had been imprisoned.

[15] *Reply* (see footnote 2), para. 270.
[16] *Ibid.*, para. 145.
[17] *Ibid.*, para. 146.
[18] *Memorial* (see footnote 1), para. 133.

If we look for guidance in order to identify the contents of the international standards of due process in the specific context of the law of the sea, the *Duzgit Integrity* Case is of particular relevance. There, the Tribunal observed that the exercise of enforcement powers by a coastal State is governed by the principle of reasonableness. The Tribunal specified that "[t]his principle encompasses the principles of necessity and proportionality."[19]

Mr President, in line with what I said yesterday, the way in which the investigations were conducted, in which the Decree was adopted, and lifted, and the accused were tried and acquitted – that is, in full conformity with the Italian Criminal Code and Code of Criminal Procedure – presents nothing unreasonable or disproportionate.

Panama's complaint about the overall conduct of Italy's judiciary is essentially an allegation of denial of justice. This inevitably brings us back again to the issue of Panama's failure to resort to the remedies that were available under Italian law. It is not by accident that in *"Tomimaru"* the notion of due process of law in relation to measures restricting the right to property in a vessel was given substance by the Tribunal explaining that such measures

> [S]hould not be taken in such a way as to prevent the ship owner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention.[20]

Mr President, the owner of the *M/V "Norstar"* has certainly not been prevented from resorting to available domestic remedies, and, equally, so Panama has not been prevented from lodging a prompt-release procedure under article 292 of the Convention and for which Mr Carreyó had received full powers of attorney.

The tribunal in *Pantechniki* v. *Albania* stated that: "[d]enial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole."[21] Mr President, if the persons involved in the *M/V "Norstar"* proceedings in Italy were truly believed that such proceedings represented "aberrant judicial conduct", which Italy has demonstrated is obviously not the case, such persons did not give the system the opportunity to correct such conduct.

Italy has already explained at length the multiple domestic and international remedies that were available Mr Morch and the other persons involved in the operation of the *"Norstar"*. I also addressed this point yesterday and I kindly refer you to those pleadings.

Mr Morch on Monday afternoon freely accepted that he and his associates did not pursue the local remedies and he did not suggest that they were impeded in any way by the Italian authorities from doing so, even though it turns out that Mr Morch was assisted by attorneys in Italy, for which he paid their fees.[22] It was shown that such remedies were partially used for those remedies and obtained the conditional lifting

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[19] *The Duzgit Integrity Arbitration* (see footnote 10), p. 54, para. 209.
[20] *Ibid.*
[21] *Pantechniki S.A. Contractors and Engineers (Greece)* v. *The Republic of Albania, ICSID Case No. ARB/07/21, Award (30 July 2009)*, para. 96.
[22] ITLOS/PV.18/C25/2, p. 14, lines 34-44.

in February 1999. As I have clearly indicated, the individuals in question thereafter remained inactive until this case was filed in 2015.

Mr President, I now come to a close on my speech. The simplest answer for the Tribunal regarding Panama's human rights claims is that they are beyond its jurisdiction and inadmissible. The inquiry can, and should, end there.

But even if, *arguendo*, Panama could bring the claims in question, the factual record provides that the Tribunal may find an equally clear answer: the Italian authorities investigated the vessel according to the law; released the vessel according to the law; acquitted the accused according to the law; and promptly notified the interested individuals of all of this.

Mr President, this ends my speech, and I may kindly ask you to call Ms Graziani to the podium, who will address you on the issue of compensation claimed by Panama. I thank you very much for your attention.

THE PRESIDENT: Thank you, Mr Tanzi. I then give the floor to Ms Graziani to make a statement.

MS GRAZIANI (*Interpretation from French*)**:** Mr President, honourable Judges, I am honoured and privileged to be able to speak before this distinguished Tribunal on behalf of Italy for the second time. I would also like to greet the members of the Panamanian delegation.

My task will be to address the compensation claimed by Panama in the present case.

At the outset, I must say that all my arguments will be put forward without prejudice to the position consistently taken by Italy throughout the written phase, and reiterated yesterday and again this morning, namely that no compensation should be due to Panama, as Italy is in breach of neither article 87 nor article 300 of the Convention.

Let me add that compensation for damage arising from an internationally "rightful" act can be considered *in abstracto*. This is the case, for instance, in article 110, paragraph 3, of the Convention concerning the "right of visit" in the high seas.

However, as Professor Caracciolo said yesterday, article 110 of the Convention plainly does not apply in this case.

Let me, however, dispel any impression that I am trying to evade my responsibility for giving detailed consideration to the subject of the compensation for damages claimed by the Republic of Panama. The purpose of my statement is to demonstrate how and to what extent Panama's claims are fallacious and mistaken.

Mr President, I shall be giving this speech in three parts: the first is of a general nature, summarizing why Panama's "adversarial theorem" has no plausible legal basis; the second part focuses on the "causal nexus" between the wrongful act for which Panama claims Italy is responsible and the resulting damage; and, lastly, the

third part concerns the quantification of damages claimed by Panama, which is, in Italy's view, entirely disproportionate.

Mr President, honourable Judges, the first part of my statement is linked to what Mr Tanzi said yesterday about the "burden of proof" because, even in terms of compensation, Panama's claims are a long way from the principle that the burden of proof lies with the person making the complaint.

Reading the pages of Panama's Memorial and Reply and listening to its oral pleadings, the question that immediately springs to mind is: where is the proof, where is the proof of what Panama is claiming? I say this respectfully but in the strongest terms. Panama's claims are, legal speaking, evasive, partial and incomplete. The scanty evidence provided by Panama cannot be considered as even remotely equivalent to a demonstration either of the existence of proof or of the existence of precise and consistent evidence, as the evidence itself is misleading and must in turn be proven in the course of the proceedings.

To take just one example: the economic value of the *"Norstar".* From the beginning of these proceedings, Panama has stated and restated that the *"Norstar"* was a vessel in excellent condition, whose flourishing business activities, significant assets and well-established reputation were annihilated following the Decree of Seizure issued by the Prosecutor at the Tribunal of Savona. Panama claims that the evidence of the value of the vessel is clear, inter alia, from a document drawn up on 4 April 2001 by Mr Olsen.[23] I cannot say anything about Mr Olsen's professional competence, except that, surprisingly, he was, firstly, never able to carry out a physical inspection of the *"Norstar"*, and, secondly, Panama never deemed it necessary to provide us with evidence that Mr Olsen knew the *"Norstar"* well, considering that he had inspected the vessel in May 1998. So, is it really possible to make do with the "Olsen document" as the basis for a realistic and plausible estimate of the value of the *"Norstar"* or – as I believe – would it be possible to respond to Panama with the well-known adage that "what can be asserted without evidence can be dismissed without evidence"?

Furthermore, let us take a closer look at Panama's attitude to the "burden of proof" relating to compensation. In the written phase, and even in the course of the oral proceedings, Panama has adopted an argumentative strategy which is roughly as follows.

Most often, Panama has reiterated the same argument with different words. I will grant that. However, it forgets that repeating a refrain a thousand times does not make it more plausible.

Sometimes Panama has relied on evidence apparently considered sufficiently decisive to dispel any doubt, but that has not been the case. For example, the photographs of the *"Norstar"* in Annex 4 of Panama's Reply. In paragraph 435 of its Reply, Panama says: *(Continued in English)* "The photos of the *M/V 'Norstar'* will show the standard of the vessel as presented for serious clients during offshore

[23] *Memorial of the Republic of Panama*, 11 April 2017, Annex 5.

activities."[24] *(Interpretation from French)* It is also from those photos that we are apparently supposed to be able to infer the value of the *"Norstar"* in 1998, except that these photographs are not dated and that affords them a degree of authenticity similar to that of photos received from a stranger showing you a "chateau in the Loire", presenting it as his own house. In fact, these photographs merely show us the image of a brand new vessel and not a vessel more than 30 years' old.[25]

On occasion, where it is incapable of providing evidence, Panama has hidden behind the maxim *res ipsa loquitur*, in particular "the thing speaks for itself". But Panama's reference to this maxim simply shows that Panama is attempting to evade the burden of proof. Panama pretends to be unaware that this maxim responds for specific needs, in other words to smooth out evidentiary difficulties where proof of fault is difficult to adduce, as is the case, for instance, in medical liability or air or maritime accidents. Take, for example, paragraph 454 of the Reply of Panama. In that paragraph, to justify the fact that from the time of the detention of the "*Norstar*" the owner, deprived of all its revenue, was unable to pay the security that was set in 1999, Panama simply says: "It is unnecessary to show that a ship under arrest could not continue being a productive business entity. It is an established fact ... ."[26]

But can it really be claimed that where there is a decree of seizure there must necessarily, unfailingly and inevitably be an immediate loss of all revenue for the owners of the seized property, such that they are precluded from paying a security and recovering the property? To rebut Panama's statement, we need only look at *"Spiro F"*, the case that was cited by Panama, where the security was paid and the vessel released.

On other occasions, Panama, having difficulty justifying its claims, refers to the "calculus of probabilities". Thus, with regard to the payment of the security for the release of the *"Norstar"* in 1999, Panama says in its Reply that even if the owner of the *"Norstar"* had had the money to pay that security, the vessel *(Continued in English)* "would probably have been arrested again at the next opportunity doing its business."[27] *(Interpretation from French)* I do not doubt Panama's gift of clairvoyance or divination, but we are not in Delphi.

Lastly, as Mr Tanzi stated yesterday, whenever Panama is aware of the weakness of its arguments, surprisingly, it manages to turn the situation round to its own advantage by reversing the burden of proof. In other words, it is Panama that asks Italy to prove what Italy has asked Panama to prove. One clear and striking example is, once again, the value of the "*Norstar*". After reiterating that the "Olsen" document and the *"Norstar"* photographs have indisputable probative value, in its Reply Panama then hides behind the following surprising statement: *(Continued in English)* "By providing such a standard of evidence, the burden of proof now shifts to the respondent to prove that this assessment was wrong."[28]

[24] *Reply of the Republic of Panama*, 28 February 2018, para. 435.
[25] *Ibid.*, Annex 4.
[26] *Ibid.*, para. 454.
[27] *Ibid.*, para. 457.
[28] *Ibid.*, para. 533.

(Interpretation from French) Could I reassure Panama that I shall do my utmost to convince the Tribunal that Italy's arguments are indeed all well founded; but let me draw the Tribunal's attention to a point that I think is more important. After the countless words contained in the Memorial and in the Reply and heard in the course of the hearing, Italy sees nothing but assertions.

Mr President, honourable Judges, the second part of my presentation concerns the causal nexus between the allegedly wrongful act attributable to Italy and the damage claimed by Panama.

We should begin by picking up where we left off on 4 November 2016, when the Tribunal clarified the scope of the dispute between Panama and Italy. As my colleagues noted yesterday, the crux of the present case is limited to the question whether the "Decree of Seizure" and the "request for its enforcement" per se determined the damages claimed by Panama.[29]

It is on the basis of the Tribunal's Judgment of November 2016 that I will deal with the arguments in defence put forward by Italy regarding the "causal nexus" – three alternative arguments in defence that I shall present in order of importance, that is, in decreasing hierarchical order.

Mr President, honourable Judges, with regard to the first argument, Italy maintains that even assuming that the "Decree of Seizure" and the "request for its enforcement" to the Spanish authorities were in breach of the Convention, the damage claimed by Panama does not have any causal link with the allegedly wrongful act attributed to Italy.

According to Panama, the question of the "causal nexus" is very simple, indeed trivial. Since Italy ordered the seizure of the *"Norstar"*, it is therefore up to Italy to compensate for "all" – I underscore the word "all" – the damage claimed by Panama, whether or not it is linked to the wrongful act attributable to Italy.

This reasoning is presented to us as mathematically impeccable, like an Aristotelian syllogism. According to Panama, the Decree of Seizure led to a "domino effect", a "snowball effect" – in other words, a "cascade" of additional events, each of which gives rise to further damage and, therefore, to further claims.

In particular, Panama's system of argumentation is based on the "but-for" test, which can be summarized perfectly by this sentence in paragraph 168 of its Memorial: *(Continued in English)* "Would damages have occurred if Italy had not ordered and requested the arrest of the *M/V 'Norstar'*?"[30] *(Interpretation from French)* In exactly the same manner, Panama's Reply often resorts to the rhetoric of "if it were not for": *(Continued in English)* "If it were not for its wrongful prosecution of the

[29] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Order of 15 March 2016, ITLOS Reports 2016,* p. 31, para. 122.
[30] *Memorial* (see footnote 23), para. 168.

M/V 'Norstar'";[31] "if the *M/V 'Norstar'* had not been arrested";[32] "if it were not for the unlawful arrest of this vessel by Italy."[33]

(Interpretation from French) Although Panama's emphatic tone may seem to come to its aid, let me say that Panama's arguments are untenable both logically and legally.

Panama's claims rely on a misinterpretation of three expressions contained in the Judgment of 4 November 2016, namely "Decree of Seizure and request for its enforcement", "execution of the arrest" and "legal control" of the *"Norstar"* during detention. Panama puts them all in the same basket, mixes them all up and makes no distinction between "damage" and "damage" – in other words, it does not indicate the precise origin of the damage claimed. Panama fudges the issue and leaves it to the goodwill of this Tribunal, in other words, to you, honourable Judges, to unravel the knots in its chaotic and muddled story.

Italy says "no". "No", it is not tenable to consider the "Decree of Seizure and the request for its enforcement" on the one hand and the "execution of the arrest" on the other as "synonyms", as is done in the written and oral claims of Panama, in which it is extremely difficult to determine where one, the Decree of Seizure, stops and where the other, the execution of the arrest, begins. Neither semantically nor legally is it possible to conflate the "Decree" of Seizure and the "request for its enforcement" with the actual, effective "execution" of the arrest.

Without prejudice to what I have just said, let me add that, "no", it is not tenable either to claim that the damage arising from the detention of the vessel must be compensated by Italy because Spain merely gave aid and assistance to Italy. Let us be clear. If Italy exercised any control over the *"Norstar"* during its detention, that form of legal control implies that it was for the Italian judicial authorities to adopt the decision on whether or not to continue the detention of the *"Norstar"*. On the contrary, the Italian judicial authorities had no jurisdiction over the manner in which the seizure measure was actually implemented.

Let me add that it seems quite surprising that today we should see such confusion from Panama, when it was Panama itself that, during the Preliminary Objections phase, recognized what I have just said. Let me refer you to paragraph 150 of the Judgment of November 2016, where the Tribunal affirmed: *(Continued in English)* "Panama points out that 'Spain was … responsible for the manner and methods of the seizure'."[34]

(Interpretation from French) The conclusion is clear. The "Decree of Seizure" and the "request for its enforcement" to the Spanish authorities did not, in and of themselves, that is, independently of their actual execution, determine the damage claimed by Panama. So, if you really wanted to use the "but-for" test proposed by Panama, then the question that should be asked is: "ignoring the execution of the seizure measure, did the Decree of Seizure, in itself, give rise to the damage claimed by Panama in the present case, or not? The answer is obviously "no".

[31] *Reply* (see footnote 244), para. 413.
[32] *Ibid.*, para. 414.
[33] *Ibid.*, para. 415.
[34] *M/V "Norstar"* (see footnote 29), para. 150.

Furthermore, Panama seems well aware that the long list of damage allegedly suffered originates not from the "Decree of Seizure" per se but from the "execution" of the measure and from the actual "detention" of the *"Norstar"*. Thus, from the Application instituting proceedings onwards, Panama has stressed that *(Continued in English)* "through the long arrest the market for such business had been destroyed."[35] *(Interpretation from French)* In its Memorial, Panama stated *(Continued in English)* "The huge economic loss … has resulted from its arrest and prolonged confinement infringing on its freedom to navigate freely."[36] *(Interpretation from French)* Even more clearly, in the Reply, Panama stated that *(Continued in English)* "all damages caused have directly resulted from the enforcement of the arrest of the *M/V 'Norstar'* by Italy."[37]

(Interpretation from French) In conclusion, if Panama claims that the "Decree of Seizure" and the "request for its enforcement" breached article 87 of the Convention, Panama should have reconsidered its claims before this Tribunal and merely requested a declaratory judgment by way of "appropriate satisfaction".

Mr President, honourable Judges, Italy's second argument is put forward in case this Tribunal should find a causal nexus between the "Decree of Seizure" and the "damage" suffered by Panama. This second argument focuses on the fact that virtually all the damages claimed by Panama do not have a natural and direct causal link with the violation of the Convention for which Panama claims Italy is responsible.

In the written and in oral stage, Panama has barely troubled to show "why" and "how" the Decree of Seizure in 1998 "triggered" all the damage claimed by Panama in the present case.[38] What Panama has simply done, I repeat, is invoke the "but-for" test.

I think that it is important to draw your attention to the fact that the "but-for" test only appears to be logical and that its application, in fact, risks leading us astray onto slippery ground. For example, what would have happened if, during the execution of the arrest, a member of the *"Norstar"*'s crew had lost his balance, fallen into the harbour waters and broken his leg? Would we see Panama today in this Tribunal claiming compensation for the medical expenses incurred as a result of that unfortunate accident? What I have said may seem absurd, but in many respects most of the damage claimed by Panama is not that far removed from the example that I have just given.

The allocation of injury or loss to an internationally wrongly act is a legal and not only a historical process. As the International Law Commission has made very clear in its Draft articles on responsibility of States for internationally wrongful acts, reparation will compensate only for damage that is really the "normal", "natural", "necessary or inevitable" or "foreseeable" consequence of the act for which a State is held

[35] *Application initiating proceedings by the Republic of Panama*, 16 November 2015, para. 7.
[36] *Memorial* (see footnote 23), para. 170.
[37] *Reply* (see footnote 244), para. 405. See also para. 410.
[38] *Memorial* (see footnote 23), para. 181.

responsible and, consequently, reparation will not compensate for damage that is "too indirect", "too remote" or "too uncertain" to be appraised.[39]

These principles were applied by this Tribunal in the *"Virginia G"* Case, where the Tribunal concluded that many of the claims made by Panama had not met the criterion of having a "causal nexus" between the confiscation of the *"Virginia G"* and the claims that had been made.[40] These principles were reaffirmed again on 2 February 2018 by the International Court of Justice in the *Certain Activities carried out by Nicaragua in the Border Area* Case, where the Court stated,

> In order to award compensation, the Court will ascertain whether, and to what extent, each of the various heads of damage claimed by the Applicant can be established and whether they are the consequence of wrongful conduct by the Respondent, by determining "whether there is a sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered by the Applicant.[41]

According to Italy, if the Tribunal were to find that there is a causal nexus between the "Decree of Seizure" and the "damage" suffered by Panama, the only compensatory damages that could *in abstracto* correspond to the "causal nexus" with the "Decree of Seizure" are those relating to the fact that the *"Norstar"* was out of use while it was being detained and the loss of cargo which the charterer allegedly suffered.

Despite Panama's rhetorical emphasis, none of the other damage has a direct, natural causal link with the allegedly wrongful act by Italy, that is to say, Panama has not provided the slightest evidence that the "Decree of Seizure" for the *"Norstar"* was the "effective" and "immediate" cause and the "source" of those losses.

In conclusion, the "but-for" test used by Panama is certainly suggestive because it brings to mind the "Cleopatra effect" which Blaise Pascal talked about when he said "Cleopatra's nose, had it been shorter, the whole face of the world would have been changed". In general, abstract terms, it may not be wrong to say that a single cause, "Cleopatra's nose", can give rise to unexpected consequences extending right to international level, but here we are before a Tribunal and the question facing us is quite different. Where is the evidence of the causal nexus to justify all the damages claimed by Panama?

Mr President, honourable Judges, lastly, I will now come to Italy's third argument in defence regarding the causal nexus. Assuming that there is a causal link between the violation of the Convention and the damage claimed by Panama, Italy asserts that the behaviour of the *"Norstar"*s owner, before or at least after the judgment of the Tribunal of Savona in 2003, broke the "causal nexus" between the act for which Panama holds Italy responsible and the damage claimed by Panama.

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[39] International Law Commission, *Draft articles on responsibility of States for internationally wrongful acts*, A/56/10, 2001, Commentary to article 31, para. 10.
[40] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, paras 435-439.
[41] ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation*, para. 32.

From the beginning of these proceedings, and all the way through the oral phase, Panama has attempted to portray the *"Norstar"*'s owner as a victim at the mercy of the Italian judicial system. That is exactly why Panama has certainly not skimped in its vigorous criticism of the justice system. That is also why Panama has repeatedly stressed the intentional and deliberate fault of the Prosecutor at the Tribunal of Savona, as if he made his decisions knowingly with the intention of inflicting severe losses on Mr Morch.

In many respects, however, we can see that the story in this case is very different from what Panama has always told us.

As Mr Tanzi stated yesterday, the *"Norstar"*'s owner displayed deliberate inaction and manifest negligence in protecting its own interests; and the wrongful omission on the part of Mr Morch, as *novus actus interveniens*, broke the "causal nexus" we are considering now.

International case law and practice are unanimous in recognizing that compensation is not due where, in the course of events, an extraneous, preponderant act has broken the causal link between the initial harmful act and the final loss or damage. In the written phase, Italy quoted, by way of example, the Second report on State responsibility in which Professor Arangio-Ruiz referred to the existence of a *(Continued in English)* "clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed".[42]

(Interpretation from French) It is therefore in the light of what I have just said that we should look more closely at the behaviour of the *"Norstar"'s* owner before and after the judgment of the Tribunal of Savona in 2003.

Mr President, Members of the Tribunal, the first key event in this case which, Italy believes, breaks the "causal nexus" concerns the behaviour of the owner of the *"Norstar"* in 1999, when Mr Morch failed to recover the vessel against payment of a security.

Yesterday, Mr Tanzi stated that the security required from the owner of the *"Norstar"* was perfectly legitimate in the light of Italian legislation and international law. I will not repeat what he said.

However, I think we should look in detail at the "reason", according to Panama, justifying why the *"Norstar"*'s owner did not pay the security. Panama sticks to a story that it has been telling since the Application initiating proceedings, that is to say, that the owner of the *"Norstar"* could not pay the security because it was an amount *(Continued in English)* "which the owner of the *M/V 'Norstar'* could not provide as through the long arrest the market for such business had been destroyed with no further income".[43]

(Interpretation from French) Let us now have a good look at this hobbyhorse of the Republic of Panama, because, in Italy's view, Panama has taken two wrong steps.

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[42] G. Arangio-Ruiz, 'Second Report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur (UN Doc. A/CN.4/425)' [1989-II(1)] YbILC 2, pp. 12-13, para. 37.
[43] *Application initiating proceedings* (see footnote 35), para. 7.

The first wrong step: in its Memorial the fundamental reason which had allegedly destroyed the revenue of the owner of the *"Norstar"* and thus prevented the payment of the security was the "long detainment" of the *"Norstar"*.[44] However, in its Reply, and indeed during its oral pleadings, Panama has said that the owner of the *"Norstar"* was in economic crisis "from the very moment that" the vessel was detained in the port of Palma de Mallorca.[45] The difference I have just highlighted is no accident. On the contrary, Panama has tried to run with a specific objection put forward by Italy in the written phase, namely that "five months" passed between the *"Norstar"*s detention and the decision made by the Prosecutor at the Tribunal of Savona regarding the security. Five months! Five months cannot be considered such a long or unreasonable time. That is why Panama changed its version of the facts, claiming that the owner of the *"Norstar"* lost his entire fortune at the "very moment" when the Decree of Seizure was executed by the Spanish authorities. But, to be quite honest, it seems improper to make such an unannounced and sudden about-turn.

The second wrong step: Panama says that the owner of the *"Norstar"* tried to secure a bank loan but this was refused. The fax from Sparenbanken NOR, which you will find in Annex 2 of Panama's Reply, is very interesting because it helps us understand why the bank refused Mr Morch a bank loan.[46] The fax reveals that on 16 September 1998, a few days before the *"Norstar"* was seized, the owner of the *"Norstar"* was already in a far from rosy and sound financial position; it was characterized by *(Continued in English)* "poor liquidity and a high level of short-term debt".[47] *(Interpretation from French)* More generally, the fax shows us clearly that there are some gaps in Panama's story, a story Panama has been telling us so far, that is to say, and I quote from paragraph 23 of the Memorial: *(Continued in English)* "This vessel and its ship owner had a well-established reputation as an ongoing business with important assets on board".[48]

(Interpretation from French) In conclusion, even assuming the "Decree of Seizure" did breach article 87 of the Convention, the wrongful act allegedly attributed to Italy had been concluded in February 1999. That is because the *"Norstar"*s owner had not recovered the vessel by paying a "legitimate" security and it had not even brought proceedings in the Italian courts to challenge the decision of the Prosecutor at the Tribunal of Savona.

Mr President, Members of the Tribunal, without prejudice to what I have just said, there is a second key event in this case which has in any event broken the "causal nexus", and that is the inaction of the owner of the *"Norstar"* after the judgment of 13 March 2003 by which the Tribunal of Savona decided on the release the *"Norstar"* and the immediate restitution of the *"Norstar"* to Inter Marine SPA.

If I may, I would like to remind you that the judgment of the Tribunal of Savona was final. Thus, from 13 March 2003 the owner of the *"Norstar"* could have recovered the vessel.

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[44] *Memorial* (see footnote 23), para. 28.
[45] *Reply* (see footnote 244), para. 452.
[46] *Ibid.*, Annex 2.
[47] *Ibid.*, Annex 2.
[48] *Memorial* (see footnote 23), para. 23.

In the Reply and also in its oral pleadings, Panama has alleged that the *"Norstar"*'s owner did not recover the vessel because the communication concerning the release of the *"Norstar"* was never notified either to the owner of the vessel or to Panama, as the flag State.[49] Panama has dealt at length with this subject throughout its oral pleadings, claiming loudly that Italy demonstrated a lack of cooperation, bad faith and a complete disinterest in the fate of the *"Norstar"*.

But does Panama's version actually tally with what happened in reality? As Mr Tanzi made clear yesterday and this morning, the reply is "no".

The *"Norstar"*'s owner received from Italy not one, but three communications regarding the release: the first through the Spanish judicial authorities and the custodian of the *"Norstar"* on 18 March 2003, that is to say, just five days after the judgment of the Tribunal of Savona; the second directly by registered letter dated 21 March 2003, sent by the Italian judicial authorities to Mr Morch, who confirmed receipt of the communication on 26 March 2003, as Panama acknowledges in its Reply; finally, the third communication was received by Mr Morch on 2 July 2003, through the Norwegian Ministry of Justice, which Italy contacted on 21 March 2003, as Panama tells us in its Reply.[50]

So, where exactly is the lack of communication by Italy? The manifestly unfounded accusation by Panama shows once again that Panama is doing its best to muddy the waters and confuse us.

Finally, I would like to come to one very important aspect of this case. Right from the Preliminary Objections stage, and very clearly in paragraph 36 of the Memorial, Panama has asserted that, after the decision of the Tribunal of Savona, it was "materially impossible" for the owner of the *"Norstar"* to take possession of the vessel. The reason was the long period of detention of the vessel and the damage suffered as a result of that detention, during which *(Continued in English)* "the vessel had already experienced such physical decay that it could only be considered as wreckage".[51]

(Interpretation from French) Aside from the fact that Panama claims not to know that the *"Norstar"* was anything but a "strong" and "sound" vessel as early as 1998, the sentence I have just read out is very interesting. That is because in that sentence Panama emphasizes that the damage to the *"Norstar"* stems from the fact that during the detention the vessel did not undergo regular maintenance work.

I would invite you to note that statement. Damage to seized property obviously does not arise from the "Decree of Seizure" as such. Damage arises from the detention of the property and the way in which it has been treated during that detention, that is to say, the conditions in which the seized property was actually treated.

This brings us back to the start, Members of the Tribunal.

[49] *Reply* (see footnote 244), paras 462-468.
[50] *Ibid.*, para. 467.
[51] *Memorial* (see footnote 23), para. 36.

Mr Carreyó told us on Tuesday that Italy exercised "absolute control" and "absolute jurisdiction" over the *"Norstar"* during the detention and that as a result it is Italy that was responsible for the maintenance work on the *"Norstar"* throughout the detention in order to keep the vessel operative and to permit it to leave the port of Palma de Mallorca in 2003.[52]

This assertion does not hold water. I would simply repeat what I have already said: Italy is not responsible for the way in which the seizure was carried out, as during its detention the *"Norstar"* was placed under the supervision of Spain. Italy could not therefore assess the state of the vessel during its detention.

Furthermore, I would say it is important to note that when an arrest order has been handed down, the judiciary must nominate a custodian and in particular should specify the powers of that custodian vis-à-vis the object that has been seized. The custodian basically is an assistant to the judge, entrusted with ensuring that the object that has been seized is duly maintained and preserved. The facts in this case tell us that when the *"Norstar"* was released, custody of the vessel was in the charge of the Port Authority of Palma de Mallorca.[53]

On the other hand, the facts in this case do not tell us that the owner of the *"Norstar"* ever asked the Spanish or the Italian authorities to grant him the possibility of carrying out work to ensure that the vessel was maintained in the normal manner.

The facts in this case do not even tell us that the owner of the *"Norstar"* ever filed an appeal before the Italian judicial authorities to request reparations for any alleged injury. On Tuesday, Mr Carreyó told us that in 2003, after the judgment of the Tribunal of Savona, Mr Morch was expecting Italy to make an immediate, decisive and conclusive gesture. But – I am sorry – what exactly should Italy have done? Give Mr Morch on 15 March 2003 a cheque to buy a new ship? Why - I repeat, why - did Mr Morch's lawyers not inform their client that he could have filed an appeal in Italy in order to be fully compensated for the losses suffered?

In conclusion, the conduct of the owner of the *"Norstar"* with respect to the judgment of the Tribunal of Savona in 2003 basically broke the causal link between the alleged unlawful act attributed to Italy and the damages claimed by Panama. This needs to be repeated, and very clearly: when the Tribunal of Savona gave its judgment on the return of the vessel to the owner of the *"Norstar"*, and once that decision had been communicated to Spain, the Italian judiciary had exhausted all its jurisdiction in the matter.

As concerns the real "reason" for this deliberate negligence on the part of the owner of the *"Norstar"*, before and after the judgment of the Tribunal of Savona, let me say as clearly and convincingly as possible that, if the owner of the *"Norstar"* had not removed his vessel either in 1999 or in 2003, it is because the owner had no interest in recovering his vessel. Contrary to what Panama claims, the *"Norstar"* was an old vessel which, well before it was detained in the port of Palma de Mallorca, was incurring considerable expenditure for Mr Morch.

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[52] *Memorial* (see footnote 23), para. 31; *Reply* (see footnote 244), paras 469-470 and 473.
[53] *Counter-Memorial of Italy*, 11 October 2017, Annex O.

In the third part of my pleadings I will provide support for this statement.

Mr President, Members of the Tribunal, my final task is to dispute the legitimacy and the quantum of the damages claimed by Panama in this case.

First of all, allow me to say that when evaluating the damages claimed by the Republic of Panama, the Tribunal should take into account the inaction and the negligence shown by the owner of the *"Norstar"* in defending his interests when he did not recover his vessel either in 1999 or in 2003. During the written pleadings phase, Italy examined at length the obligations incumbent upon the injured party not to contribute to the losses and to minimize the damage. The International Law Commission clearly states in its comments on article 39 of the Draft articles on State responsibility that the victim of a wrongful act is expected to act reasonably in the face of injury, such that his negligent conduct or lack of action may constitute a mitigating circumstance with respect to the matter of responsibility and could affect the extent of reparations. According to Italy, Panama is trying to hold Italy fully responsible for the injury suffered, whereas it would have been perfectly possible for the owner of the *"Norstar"* to act so as to limit the extent of the damages he suffered by using all the possible remedies open to him under Italian law to dispute the decision of the Public Prosecutor of the Court of Savona in 1999 and to request, in 2003, reparations for any alleged unfair injury suffered because of the Decree of Seizure.

Having said that, and without prejudice to the arguments put forward by Italy in its Counter-Memorial and Rejoinder, I would like to make four comments.

First comment: the amount claimed by Panama has gone up over the years. Setting aside the Application, the Memorial, the Economic Report of October 2017 and the Reply, in the so-called Economic Report of 13 June 2018, to everybody's surprise – to Italy's surprise in particular – the total amount claimed by Panama is twice that indicated in the Reply, which means that the amount hit a peak of about US$ 52 million, to which we need to add €197,000 more or less.

Faced with amounts which keep on changing and keep on going up, all Italy can say is that it feels like we have just got into a taxi whose meter does not seem to be working properly. I can hardly put it more clearly. Not only are we astonished but we are further stupefied because not only has the total amount claimed by Panama kept on going up but Panama has never felt it necessary to give a rational explanation or even a remotely satisfactory reason for justifying their disproportionate claims.

Let us look at the document dated 13 June 2018. Is this a convincing, thorough, carefully drafted economic report? The economic report does not give us the key for interpreting or understanding what lies behind all these numbers and figures, which seem to have been thrown in haphazard fashion onto the paper. According to Panama, the key actually comes from a scientific article attached to the economic report and entitled *Systematic Risk and the Cost of Equity Capital in the Shipping Industry*. But is Panama's attitude credible? They are asking us to take note of a scientific article to find reasons justifying the increase in their claims, reasons, however, which Panama does not deem fit to disclose. I should add that the explanations provided on Tuesday by Mr Estribí are far from being satisfactory since

the economic expert from the Ministry of Economy in the Republic of Panama simply repeated what is already to be found in Chapter 4 of the Reply drafted by the Republic of Panama.

Second comment: the economic report wildly overestimates the potential use of the *"Norstar"*. The total amount indicated in the economic report dated 13 June 2018 is based on a false premise, namely, that in 1998 the *"Norstar"* was a vessel in excellent condition, which, were it not for the arrest, would certainly have continued in unimpeded fashion to do business "right until the end of December 2018". Since the very beginning of these proceedings, Panama has sought to establish its story about a vessel which could resist the test of time, whose owner and whose charterer as well as whose crew would have profited from its use 24 hours a day, 365 days a year, for an indefinite period. It is on the basis of this story that the economic report with respect to the Application clearly inflates all the figures, particularly with respect to the value of the vessel, which has doubled; the loss of revenue for the owner of the *"Norstar"*, which has trebled; and finally the loss of revenue for the charterer, which is - incredibly - five or six times greater.

Are we meant to believe in this rather surprising story told by Panama? Panama has done its best to mislead, conceal and confuse but the facts before us call into question the idea that the *"Norstar"* is something like a Ferrari of the seas and that Mr Morch is an owner who found the goose that lays the golden eggs.

Mr Tanzi and my colleagues have already addressed the actual condition of the *"Norstar"* when it was arrested so I will not try your patience further and repeat what has already been said.

That leaves me with one last thing, namely to look at the *"Norstar"* in detail. The *"Norstar"* was built in 1966, which means that, when it was detained it was 32 years old. The average working life of a vessel is not unlimited, as Panama would have you believe. Vessels similar to the *"Norstar"* all have a useful life of 20-25 years. Furthermore, all vessels during their lifetime are naturally amortized and their original value depreciates. The economic report omits to deduct from the revenue generated by the *"Norstar"*, the expenditure that the owner would have incurred, inter alia, to pay duties and taxes and to ensure the regular maintenance of the vessel and its compliance with the standards of the International Maritime Organization.

Third comment: the economic report is not based on evidence which meets the minimum standards required of objectivity, neutrality and equity.

I have already commented on the so-called Olsen document and the photos of the *"Norstar"* which are attached to the Reply of Panama so I will not go over that again. On the other hand, we do need to look at the damages relating to the loss of the cargo, and in particular we need to look at quantification of the fuel on board the *"Norstar"* when arrested. Panama has said and written a lot about this.[54] However, the only evidence that has been provided consists of just one email sent by Mr Emil Petter Vadis, described by Panama as being the director general of Inter Marine SPA. Let us examine this document in detail. It is in Annex 1 of the Reply. According

[54] *Reply* (see footnote 24), para. 562.

to Panama, this should dispel any doubt.[55] In his email, Mr Vadis simply gives us a list of probable buyers and the total number of litres of fuel allegedly loaded in Algeria and allegedly on board the *"Norstar"* when it was detained. There is nothing else: no receipt, no invoice, nothing – *nada*. Let me add that the email is dated 27 May 2001 - three years after the arrest of the *"Norstar"* - and it has never been explained by Panama why it was only in 2001 (not, for example, in 1998) that all of a sudden the director general of the Inter Marine company felt it necessary to bring this information to the attention of the owner of the *"Norstar".* If I were more malicious, I would say that Mr Vadis's email is simply contrived *ex post* evidence in order to somehow support Panama's claims. Allow me to add that Mr Vadis is somebody for whom Panama is claiming reparations for material and non-material injury in this case, which I think removes any objectivity or credibility from Mr Vadis's email.

There is more, because, to justify their claims about the fuel, Panama in its Reply relies on a "calculation of probabilities" when it states: *(Continued in English)* "If the vessel arrived in Palma, it is highly unlikely that it did not have any fuel on board".

(Interpretation from French)

Furthermore, it places upon Italy the burden of proof when it says *(Continued in English)*: "it is up to the arrestor State to provide evidence by means of an inventory of all goods on board, including fuel, at the moment of the arrest".[56]

(Interpretation from French)

What can we say about this? This is all smoke and mirrors on the part of Panama in order to divert attention from its own responsibility. However, the more Panama seeks to avoid the issue, the more obvious it becomes that Italy has touched a raw nerve and Panama is trying to ignore it.

Finally, where quantification of damages is concerned for the loss of revenue for the owner of the *"Norstar"*, Panama relies solely on one document, which is in Annex 18 of its Memorial, and on the so-called Charter Party Agreement. Annex 18 is merely a list of figures and diagrams, with no explanation whatsoever. With such carelessness and negligence, we are astonished that, in its Reply, Panama continues to stoutly defend its Annex 18 and to say that it is Italy's objections which are not well founded.[57] Where the Charter Party Agreement is concerned, in Panama's Memorial (and Mr Morch repeated this on Monday), they contend that the expiry date for this contract was not the one indicated in the contract but - note! - actually one that must have been deduced from a conversation between Mr Morch, Mr Vadis and the charterer, Mr Valestrand.[58] I am sorry, but this is such an outlandish claim that it does not deserve a reply.

Fourth comment …

[55] *Ibid.*, Annex 1.
[56] *Ibid.*, para. 561.
[57] *Ibid.,* para. 546; Memorial, Annex 18.
[58] *Memorial* (see footnote 23), para. 205; Annex 2.

THE PRESIDENT: Ms Graziani, I am sorry to interrupt you but we have reached 11.30 and the Tribunal will now withdraw for a break of 30 minutes. You may continue your statement when the hearing is resumed at noon. The sitting is now adjourned.

(*Break*)

THE PRESIDENT: Before the break Ms Graziani was speaking. I now give the floor again to Ms Graziani to continue her statement.

MS GRAZIANI (*Interpretation from French*)**:** Mr President, Members of the Tribunal, I shall resume at the point at which I left earlier. I was talking about the third part of my pleadings and I was making four comments to dispute the legitimacy and the quantum of the damages claimed by Panama in this case. I am now at the final and fourth observation.

In many instances Panama does not feel it necessary to produce any evidence whatsoever to support its claims. Panama simply says what it should actually be demonstrating.

This is the case, for example, with the material and non-material injury suffered by natural persons subsequent to the criminal proceedings; and, again, with respect to the damages regarding the payment of wages to the members of the crew, since, in its Reply, Panama simply states that: *(Continued in English*) "no vessel is allowed to sail without a crew";[59] *(Interpretation from French)* but at the same time Panama refrains from producing any labour contracts, any invoices or any document showing who did what on the *"Norstar"*.

Similarly, in order to support the idea that the *"Norstar"* was a "fantastic" ship, Panama emphasizes the maintenance work carried out by the owner of the *"Norstar"* before its arrest as well as the inspections carried out on the *"Norstar"*.[60] Here, again, we are meant to rely on the good faith of the owner of the *"Norstar"* because Panama has not shown us any evidence whatsoever.

To justify this lack of documents, Panama comes up with all sorts of excuses. Sometimes it is because of the passage of time; for example, when it comes to damages for loss of revenue for the charterer, Panama contends openly that it is not in a position to give a precise estimate of the total amount of these damages because – and here I am referring to paragraph 566 of its Reply: *(Continued in English)* "due to the long time lapsed, the documents are no longer available."[61] *(Interpretation from French)* Let me just say this: it is up to the Defendant Party to prepare a credible dossier, particularly since Mr Carreyó has threatened to bring this case before this Tribunal for some time now.

There is a second excuse that Panama puts forward, and it is rather paradoxical that, in paragraph 535 of its Reply, Panama claims that it is Italy which had access to all the documents relating to the *"Norstar"*, which Italy could have produced

[59] *Reply* (see footnote 24), para. 550.
[60] *Ibid.*, paras 469-471.
[61] *Ibid.,* para. 566.

(Continued in English) "as suits its interests."[62] *(Interpretation from French)* This is an inelegant and clumsy statement, but Panama insists on this point in the following paragraphs in its Reply. Panama says that, at the time of the arrest, Italy should have drawn up an inventory of all the items on board the *"Norstar"*.[63]

Panama keeps on making the same mistake: it was not up to Italy to draw up an inventory of the items on board the *"Norstar"*. *S*ince it was Spain that enforced the arrest order, it was up to Spain to draw up such an inventory. Instead of insisting on such a clearly insignificant point, Panama should have told us, once and for all, why the owner of the *"Norstar"*, or his lawyer, did not have a copy of this inventory, or why they never judged it appropriate to request such a copy in 1998 or later. If the inventory of goods and items, including the fuel on board the *"Norstar"* all of a sudden mysteriously disappeared, this is something that cannot be laid at Italy's door.

Mr President, Members of the Tribunal, I come now to my conclusions.

Panama's story abounds in words, both written and spoken; but if we are looking for conclusive and credible proof to support Panama's claims with respect to compensation in any respect or form, we have to make do with very little – indeed, virtually nothing.

So Panama's real intentions in the present case are revealed: namely to obtain unjustified, unfair economic advantages.

Italy is confident that this Tribunal will not indulge in such manoeuvring.

Mr President, Members of the Tribunal, thank you for being so patient. Mr President, I would now request that you give the floor to the Agent Giacomo Aiello for his examination of the Italian expert, Mr Vitaliano Esposito.

THE PRESIDENT: Before I give the floor to the Co-Agent of Italy, Mr Aiello, I understand that two experts will give their testimony in the Italian language. In this respect, I would like to draw the attention of the delegations of both Parties to the arrangement made for the interpretation of those testimonies. Our interpreters will first interpret the respective testimony from Italian into English. It will be further interpreted from English into French after that. As a consequence, there will be a delay between the English and the French interpretation. Therefore, I would like to ask the Agents and Counsel of both Parties, when examining the experts, to wait until the translation into French of the expert's answer to a question has been completed before putting the next question. This will ensure that the answer is properly interpreted into both official languages and properly recorded by our verbatim reporters.

May I then ask the Co-Agent of Italy, Mr Aiello, once again to confirm that Italy now wishes to examine an expert? Thank you, Mr Aiello. The Tribunal will then proceed to hear the expert, Mr Esposito. He may now be brought into the courtroom.

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[62] *Ibid.*, para. 535.
[63] *Ibid.*, paras 536-537.

I call upon the Registrar to administer the solemn declaration to be made by the expert.

(*The witness made the solemn declaration*)

THE PRESIDENT: Thank you, Mr Registrar.

Mr Esposito, good afternoon. Before we proceed to your testimony, let me briefly explain the arrangements we have made for interpretation. The Tribunal's official languages are English and French. Therefore, when you make your statement in Italian, this will have to be interpreted by our interpreters, first into English and then from English into French. As you can imagine, this is a complex task. You can help our interpreters by speaking slowly so that they can follow you. Also, you should know that there will be a pause after each of your answers before the next question is put to you so that the interpretation can be completed. I hope this is clear. Thank you.

I understand that the examination of the expert will be conducted by Mr Aiello. Mr Aiello, you have the floor.

Examined by MR AIELLO

MR AIELLO: Mr Esposito, could you please explain your qualifications and judicial experience to the Tribunal?

MR ESPOSITO (*Interpretation from Italian*)**:** During my career as a magistrate I was Attorney General, in other words Prosecutor for the Supreme Court. I am now a judge at San Marino and member of the European Commission Against Racism and Intolerance. I was judge *ad hoc* at the European Court of Human Rights and I have been following all the work done by the International Court of Justice. I was also given an honorary award by the Council of Europe. Thank you.

MR AIELLO: Mr Esposito, could you explain for us what a probative seizure is and how it works according to article 253 of the Code of Criminal Procedure?

MR ESPOSITO (*Interpretation from Italian*)**:** Probative seizure is one of the three forms of seizure that is enforced in our criminal procedure code. It is a method that is implemented to search for proof. It is similar to searching activities, wire-tapping of telephone calls. The purpose of probative seizure is to ensure that *corpus delicti* can be acquired and that all the elements relating to the offence can also be gathered.

Under *corpus delicti* we understand the things that were used to commit an offence, or the profit or the price thereof. *Corpora delicti* or *delicta celeri* were the words used in the Middle Ages. So the Decree of Seizure is issued by the Public Prosecutor, and this is what happened in the instant case with the Decree dated 11 August 1998, which is then the object of the letter rogatory.

MR AIELLO: Mr Esposito, is the guilt of the accused person necessary for the adoption of a probative seizure?

MR ESPOSITO (*Interpretation from Italian*)**:** No, absolutely not. What is necessary is that based on the reasons for the order, there is an explanation of an immediate link between the thing that is the object of the seizure and the offence while this Decree has to be executed. The *fumus* is not requested for this type of measure, while it is requested for the other two forms of seizure – preventive seizure and conservative seizure. For these two forms of seizures, it is necessary to have the proof of the wrongdoing when the acts were committed. So probative seizure is completely different from conservative and preventive seizure.

I would like to add that in the instant case preventive seizure was the one adopted by the judge for the preliminary ruling on 24 February 1999.

Now, *fumus* is not requested. We are talking about fact-finding activities. Preventive and conservative seizures, on the other hand, are precautionary measures, so they have a completely different purpose – and this is not relevant for the instant case.

Preventive seizure was issued in this case, and a bond as a possibility was mentioned by the Public Prosecutor.

MR AIELLO: Mr Esposito, is it possible that the recipient of a probative seizure becomes aware of it before it has been executed?

MR ESPOSITO (*Interpretation from Italian*)**:** The problem is that probative seizure is characterized by the fact that the investigation has to be kept secret. Probative seizure is issued as a decree by the Public Prosecutor during the investigation. Investigations are kept secret, and investigations are carried out by the Public Prosecutor as part of what I would call the monolithic thing. I am talking about the group of the magistrate, of the judge that belongs to the judiciary in Italy, and then the judicial police, which in our legislation is separate from the general police – so the judicial police are directly dependent and report to the Public Prosecutor – within the *Carabinieri*, *Guardia di Finanza* and the police, the auxiliary officers, technical surveyors and consultants – all of this is what I called the monolithic block, and all of these people work and carry out investigations by keeping the investigations secret. Violating the secrecy constitutes an offence.

Then, as I said, probative seizure is a means that is used to search for proof. It is not proof itself; it is a means that is used to look for proof. It is not to be confused with testimony, while probative seizure is a means to provide proof that cannot be repeated and that has a function to take the people involved back.

MR AIELLO: Is seizure a surprise action?

MR ESPOSITO (*Interpretation from Italian*)**:** Probative seizure, when it comes to the means used to find proof, the equality of arms principle does not apply. Let me repeat this. The quality of arms principle applies to testimony and similar, but when it comes to activities aimed at finding proof, then you need to act swiftly and you need to carry out something that cannot be repeated.

MR AIELLO: Does secrecy also apply to the request for execution forwarded to foreign authorities?

MR ESPOSITO (*Interpretation from Italian*)**:** The enforcement takes place through a rogatory committee, so this probative seizure, so once you asked a foreign authority to enforce a seizure decree, then the enforcement of this seizure decree will be taking place pursuant to the rights of the requesting party and of the applicable conventions. A seizure enforcement has to comply with all these rules. Please let me add that in the instant case we had more guarantees than necessary. According to the Italian legislation, a probative seizure is a fact-finding activity, and under article 5 of the European Convention it was necessary to have proof of the *fumus*, so the Public Prosecutor in his letter rogatory also provided a *fumus*, which, as I said, under Italian legislation was not requested.

MR AIELLO: Mr Esposito, are seizure and confiscation equivalent in the negative? What are the differences?

MR ESPOSITO (*Interpretation from Italian*)**:** The difference is substantial. It is structural in its form. Seizure is a measure that is taken through the procedure. It may be adopted by the Public Prosecutor; it may be adopted by the judge sustaining the case; but it is always a temporary measure aimed at fulfilling the needs of the seizure. Confiscation can only take place once the result of the proceedings is clear when the judge declares that there are reasons enough to perform the confiscation. Under Italian legislation, and taking into consideration the case law of the Court of Strasbourg, in Italy it is not possible to have a confiscation without a conviction.

MR AIELLO: What were the remedies available against the probative seizure?

MR ESPOSITO (*Interpretation from Italian*)**:** The re-examination by a court was a possibility, and a claim could be filed with the Court of Cassation.

MR AIELLO: Mr Esposito, were the remedies available against the denial of a revocation of the probative seizure?

MR ESPOSITO (*Interpretation from Italian*)**:** If I have correctly understood, against a denial of the probative seizure, this is a measure which I recall correctly. This measure was taken on 18 January by the Public Prosecutor. The Public Prosecutor revoked the seizure request by the involved party, and Italian law sets out to lodge an opposition and then a claim may be filed with the judge of first instance, who is the judge that takes care of the investigation phase under the Italian legislation; and it is always possible under such circumstances to lodge opposition in the Court of Cassation. In the instant case, no opposition was lodged and no other claims were filed.

MR AIELLO: Mr Esposito, is it possible during the period of the seizure to ask the judge for permission to do maintenance work?

MR ESPOSITO (*Interpretation from Italian*)**:** It is clear that with the seizure decree there is no possibility to have access to the goods. The goods are immobilized. At the same time, pursuant to Italian law, a custodian has to be appointed, a custodian for the seized ship, so the seized goods have to be entrusted to an individual who may also be the captain of the ship, so for maintenance purposes a request might have been filed with the Spanish authorities or with the Public Prosecutor in Savona.

As regards the denial of the Public Prosecutor of Savona, then opposition or a Court of Cassation claim or other remedies could also be used.

MR AIELLO: Mr Esposito, had the shipowner decided to seek compensation for the damages allegedly caused by the behaviour of the Italian judiciary, would a remedy have been available in the Italian legal order?

MR ESPOSITO (*Interpretation from Italian*)**:** Law no. 117 of 13 April 1998 sets out the responsibility of the State concerning injuries that have been caused by them, so by the State, or for not respecting any special acts like, for example, upkeep. The State is responsible and the State can actually require compensation to another subject, so there is an action by the State. The judiciary can actually intervene and can work together with a State. There is also another possibility, which is direct action towards the judiciary in case of, for example, important crimes. In any case, I would like to remind you that, as you know, Italy has subscribed to the European Convention on Human Rights, so within 180 days it was possible, it would have been eligible, to have actually a remedy vis-à-vis the European Court of Human Rights according to article 8 of the Convention, because actually the seizure is nothing other than an intermission in the life of people working on this boat. So if then the goods have been completely lost because they have been confiscated or for another undue act, there is article 1 of the European Convention on Human Rights, and together with this action it is also possible that there is a responsibility action which is actually cited in article 2043 of the Civil Code and the State can be requested to entertain this. This was only started in 2005. After 2005, the Italian State could actually have been cited, so it should have been necessary. This was independent from the responsibility of judges, and Italy actually could have been considered responsible for the damages and the injuries that it had caused to this vessel.

MR AIELLO: Mr Esposito, did a court ascertain the legitimacy of the probative seizure?

MR ESPOSITO (*Interpretation from Italian*)**:** Legitimacy of the seizure must be evaluated and it must be started based on the situation and based on the procedure. Of course, in order to decide if the probative seizure was legitimate, it depends on what I think is important to evaluate, the relation of the goods that have been seized and the seizure itself. So for this situation I think it is not necessary that there is one guilty person. There is a crime hypothesis and there are goods that belong to this crime, to this situation. In this case the judge has to order the seizure and this is where his action ends, but if we are speaking of a preventative seizure, if we speak of this preventative seizure, then we need the *fumus*, the guilty *fumus*, which means that the Public Prosecutor must show that in that situation there are elements for which probably the person is guilty, the person to whom the crime is attributed. In order to be able to affirm the criminal responsibility of a person, it is necessary that proof of guilt exists beyond every reasonable doubt. This is the Italian formula that we adopt – beyond any reasonable doubt – and it is clear that, depending on the different steps of the procedure, the legitimacy can change. If at the end a person is acquitted, this does not mean that the acts were not right because, of course, the logic and the examination of the situation was being conducted, so it was important to do this.

MR AIELLO: Mr President, we have finished.

THE PRESIDENT: Thank you, Mr Aiello. Pursuant to article 80 of the Rules of the Tribunal, an expert called by one Party may also be examined by the other Party. Therefore, I ask the Agent of Panama whether Panama wishes to cross-examine the expert and, if yes, who will conduct the cross-examination.

MR CARREYÓ: Mr President, we will share the cross-examination. I will start first and Ms Cohen will follow with some other questions.

THE PRESIDENT: Thank you. Before I give the floor to Mr Carreyó, I once again remind you that the expert should speak slowly and that the Agent of Panama should pause after the expert answers so that the interpretation is complete.

I now give the floor to Mr Carreyó to cross-examine the expert.

Cross-examined by MR CARREYÓ

MR CARREYÓ: Good morning, Mr Esposito. I understand that you were during four years the chief Public Prosecutor at the Court of Cassation, which is the highest tribunal in the Italian State. Is that correct?

MR ESPOSITO (*Interpretation from Italian*)**:** Yes. Not only for four years have I been a Public Prosecutor but actually for 13 years of my life I have been working in the general tribunal of the Cassation Court in Italy, but always as a magistrate, as a Public Prosecutor. As you know, for the Italian judicial system we have judges and we have Public Prosecutors. The Public Prosecutor is a magistrate in the same way as a judge is a magistrate, so for many years I have worked in the Cassation Court but I have also worked for 13 years as a judge of the Supreme Court of Cassation. I have been a judge in Rome for the first criminal section of the Cassation Court.

MR CARREYÓ: My question is because in your resumé you stated that you were the chief Public Prosecutor between 2008 and 2012. That is what I wanted to corroborate.

MR ESPOSITO (*Interpretation from Italian*)**:** Yes, indeed, but the Public Prosecutor in Italy is actually an organization that is completely independent from the executive organization because it belongs to the judiciary system and this is the same situation as exists in France, consequently, to the French Revolution during which the Public Prosecutor and the judge for the first investigations are actually both part of the judiciary organization.

MR CARREYÓ: Can you confirm that you were the chief Public Prosecutor during four years? Is that correct?

MR ESPOSITO (*Interpretation from Italian*)**:** Yes, indeed, I have been for four years the Public Prosecutor of the Cassation Court, so I would like to say that I do not understand the reason for this question. I was not the chief of all the Public Prosecutors. I was the chief of the magistrate for the public judiciary of the Cassation Court because in Italian law the power of the Public Prosecutor is a very diffused

power, which means that it is the power for each magistrate, which means that I, as a Public Prosecutor of the Cassation Court, could not intervene in any way with the judge who was working and was ordering the seizure. I could not have intervened in this situation, if this is what you mean by your question.

MR CARREYÓ: Not at all. I have not suggested such a particular question. Given your wide experience as a prosecutor, have you participated in the arrest of goods and particularly in the arrest of vessels?

MR ESPOSITO (*Interpretation from Italian*)**:** No, absolutely not. I have learned about the seizure of this vessel on this occasion, but not even my predecessors, no one could intervene. The only possibility that we had for the general tribunal to be aware of this case could have actually come in case there would be actually a remedy or an appeal for this decision, but this was the only situation and in the case of the *"Norstar"* this did not happen because, if you read the decision, the first degree decision, you can see that the judge of the tribunal who ordered the seizure, in acquitting actually the person says that there is no discussion concerning the preventative measures because the preventative measures have been organized, have been ordered in order to put in place, or because there were all the exhausted remedies in Italy, but these measures do not concern *"Norstar"*; these measures concern *"Spiro F"* vessel for *"Norstar"* case there has never been an appeal to the judge of liberties or to other tribunals. So as a Public Prosecutor, I have never worked on this case. I could never have worked on this case, not even in an indirect manner.

MR CARREYÓ: I think the witness has misunderstood my question, Mr President, because my question was whether he had participated. That means if he had gone to the actual seizure action or if he had access to the vessels in his experience.

(*To the witness*) Do you understand my question? If you had gone as a prosecutor to the actual seizure of the vessel physically. Have you been there to know how the procedure goes?

MR ESPOSITO (*Interpretation from Italian*)**:** No, never, and how could I have had access? I do not understand your question, I am afraid. I repeat: the Public Prosecutor of the cassation through a magistrate who is working with him could be interested in the *"Norstar"* Case only in the case where there would actually be an appeal for the cassation court and this has not happened; there has never been an appeal to the cassation court.

MR CARREYÓ: Yes, but my question is through the whole history of your life, have you ever been able to participate as a prosecutor in the lower instance courts such as Mr Landolfi? Do you know Mr Landolfi?

MR ESPOSITO (*Interpretation from Italian*)**:** No, I do not know him. I have never seen him.

MR CARREYÓ: Mr Landolfi was the Public Prosecutor –

MR ESPOSITO (*Interpretation from Italian*)**:** I only know that he was born in Naples and I was born in Naples too. I have been working in Rome since 1962.

MR CARREYÓ: Yes. Mr Landolfi, for your knowledge, was the Public Prosecutor who issued the Decree of Seizure in this case. If you had been in the position of Mr Landolfi, could you be able to go physically to see the vessel?

MR ESPOSITO (*Interpretation from Italian*)**:** Absolutely not. I have never participated in trials of this kind. I have worked with the judiciary in Naples but I was working with the judiciary for minors and so –

(*Interpretation from French*) I do not have much experience in the law of the sea. I have a lot of experience in Italian procedure, in human rights and in letters rogatory, as I worked a lot as a scientific expert in a number of sectors.

MR CARREYÓ: But in your previous answer you referred to the probative objectives of the seizure. If the Public Prosecutor is not able to go and see the good which is arrested for probative purposes, how do you explain that you are trying to seek proof of the arrest of a vessel?

MR ESPOSITO (*Interpretation from Italian*)**:** The Public Prosecutor, Mr Landolfi, for example, was the magistrate of the Public Prosecutor's office who was in charge of this case. In his position of Public Prosecutor, he could either order the probatory decree, as he did, so the probatory seizure; he could go on the boat in order to arrest the vessel. So he had all the powers as chief of the judiciary police, because, as I said before, when I spoke about this monolithic block, we in Italy, the investigations are guided by the Public Prosecutor. The Public Prosecutor also has the judiciary police which is available for him to work with him, and there are several agents of the *Guardia di Finanza*, the finance police, who were working with the magistrate. Then there were the office secretaries, where there were the technical staff. There was a big group of magistrates, police agents, judiciary, also the finance police, the *Carabinieri*, the police forces. All of them could work with him and he could go on the vessel and he could require, he could issue the rogatory for the seizure order of the vessel. He could also go with the agreement of the Spanish authority in Spain and he could interrogate, he could examine whether he wanted to.

MR CARREYÓ: Could you let us know what was he evidence that Mr Landolfi collected from the *"Norstar"* in this case?

MR ESPOSITO (*Interpretation from Italian*)**:** Well, I do not actually know all the documentation of these proceedings but in order to order the probative seizure, it did not need any proof. No proof was necessary as to the guilt. What was necessary is that the judge should prosecute a crime, an offence, so there had to be a dossier with an offence or a crime that needed to be looked at, and it was also necessary to have the vessel that was related to the crime, so the alleged crime, and we have a ship, and the judge has to prove the relationship between the vessel and the charge, and the Public Prosecutor only needs to do – and this is quite different from the preventative seizure, because if we look at the documentation we can see that on 5 October the Public Prosecutor asked to the investigative judge – so this is the judge investigating and looking after the procedure – is asking for the preventative seizure.

So in this order for the preventative seizure, all the charges, all the proof that existed at the time on the probability that the accused had actually committed a crime. I do not know whether what I have said is clear. These are two separate issues. If on 11 August 1998 there was immobilization because there was a rogatory demand, so the ship, the vessel, was arrested. On 5 October the Public Prosecutor that had some proof would ask the investigating judge to act on the seizure and the investigating judge would act on the seizure on 24 February, and on the same day, the judge, the Public Prosecutor, will through the consular authorities in Oslo based on the document that you have as Appendix 8, say, "If you would like to have the ship, you need to pay 250 million as security". This was requested only after the fact that the investigative judge had stated that the preventative seizure was necessary. It means the vessel could be seized should they have arrived at the conclusion and the seized asset, which means the vessel and the fuel, particularly the fuel, was necessary and to be used to pay for legal costs and as a guarantee of any possible cost attributed or as payment of damages if this was to be proven the case.

MR CARREYÓ: I understand then that your sworn declaration today is that the Public Prosecutor is authorized by Italian law to go physically into the good that is arrested and that Mr Landolfi had the opportunity to do so but your sworn declaration is also that no evidence so far as you know has been collected from the vessel itself in order to prove anything. Is that correct?

MR ESPOSITO (*Interpretation from Italian*)**:** I am sorry. I did not understand your question. Could you please repeat?

MR CARREYÓ: Yes, with pleasure. You have stated that Mr Landolfi has the authority to go physically and inspect the vessel to collect evidence. Is that correct?

MR ESPOSITO (*Interpretation from Italian*)**:** Yes, but only if the ship was in Italian territorial waters, but if it was in Spanish territorial waters to have access to the ship, to go on board, he had to ask the permission of the Spanish authorities.

MR CARREYÓ: Do you know if Mr Landolfi in this case asked that permission from the Spanish authorities to do so?

MR ESPOSITO (*Interpretation from Italian*)**:** I do not know. I do not even know whether Mr Landolfi went on board the vessel. I really do not know. I do not know all the details. You are asking me questions for which I am not prepared to reply. I do not have answers.

MR CARREYÓ: Yes, but I need to know. If you do not know that Mr Landolfi went to see the vessel and request the evidence that it was entitled to, of course, having the permission of the Spanish authorities, how do you think he could have complied with his obligation to collect evidence from the vessel given the fact that the vessel was arrested for probative purposes?

MR ESPOSITO (*Interpretation from Italian*)**:** I do not know what proof Mr Landolfi needed, and maybe he did not necessarily have to go to Spain to obtain it. Maybe he could have done so in Italy by interrogating all those that were involved, other vessels, other sailors, but this is not relevant because, given his activity, the Public

Prosecutor, Mr Landolfi on 5 October asked the investigating judge the preventative seizure, and here he indicated all the reasons that he had and that was proof of the fact that the accused were in the wrong. Now, this was something that had been collected by the investigative judge, because we have the guarantee of a judge that checked everything that was done by Mr Landolfi and this measure dated 24 February was used and there was no re-examination that was asked for or the appeal to the Court of Cassation. So no measure was taken.

MR CARREYÓ: Thank you. You have previously referred to the concept of exhaustion of legal remedies. I would like to know if you are aware that this Tribunal already issued – are you? Are you aware that this Tribunal issued a judgment on 4 November 2016 in which it addressed the issue of exhaustion of legal remedies?

MR ESPOSITO (*Interpretation from Italian*)**:** I read what the Court decided on the preliminary phase of the appeal. Yes, I did read that, but the fact that I read this does not change the substance, because the substance is, once the final sentence was passed in 2005, and even earlier, so once we have a final sentence or verdict in 2005, there could be an action decided by the judge in compliance with law 117 of 1980 and there is the article 2043 of the Civil Code and also appeal in Strasbourg 180 days from the final decision in Italy.

During this procedure had there been unlawful acts by the Public Prosecutor apart from the remedies that I mentioned earlier, so re-examination in the Court of Cassation, they could have come to the general prosecutor for a disciplinary action against the magistrate or they could have asked the minister for justice for a disciplinary action.

MR CARREYÓ: Mr Esposito, I was just asking you whether you had read the 4 November 2016 decision, and you said yes, and I only wanted also to know if, having read that decision, you became acquainted with the fact that this Tribunal had already decided about the issue of exhaustion of local remedies. Are you aware of that?

MR ESPOSITO (*Interpretation from Italian*)**:** Yes, I read what is written in the verdict, so I do not understand the reason for your question. This does not mean that as an expert I can say that there could have been a whole series of remedies that were not actually done. So all I am saying is that the fact is that the people concerned had available to them a whole series of means that they did not use. In the case of the *"Norstar"* there is no appeal to the Court of Cassation, there is no request for re-examination against the measure adopted by Mr Landolfi. So the measure of 18 January in which the Public Prosecutor rejected the request to lift the seizure and there was no opposition and no appeal with the investigative judge.

All I can say is that this is the situation and maybe at the discretion of the Tribunal one could take into account this also in assessing damages. This is as far as the local remedies are concerned.

MR CARREYÓ: If you do not understand the reason for my question, then I will give it to you. The reason for my question is the following. The decision of this Tribunal decided that for Panama it was not necessary to exhaust local remedies – so if you

read that decision and you already knew that this Tribunal had already decided that Panama did not necessarily have to exhaust local remedies in Italy, why is your statement in this Court that you feel that Panama had to go and exhaust local remedies in Italy?

MR ESPOSITO (*Interpretation from Italian*)**:** I can only repeat what I said. So I am describing a *de facto* situation. It is a legal situation, so the *de facto* situation is that according to Italian law – and this is not just my opinion – there are two main legal remedies, because there is no country in the world where, for a probative seizure, there is an appeal to the Court of Cassation. So these measures can be adopted also during the enforcement of the sentence, so also *ex post*. So in relation to the questions that are put to me, I can only give you what the legal situation in Italy is, and what is the *de facto* situation; so it will be the Tribunal to decide. I will obviously respect and comply with the decision of the Judges. So I really do not understand the reason for your question. I am sorry, I do not understand. Or, it is I am being accused of something, but that is different.

MR CARREYÓ: I need to explain to you because you do not seem to understand.

THE PRESIDENT: Mr Carreyó, I do not want to interrupt your cross-examination. On Tuesday I allowed the Co-Agent of Italy to continue his cross-examination more than 15 minutes over time; so if you want, I will allow you to continue your cross-examination for five more minutes; but if you prefer to take a break at the moment, I will do that. Whichever you prefer: I will either allow you to go on for five more minutes, if you are able to finish your cross-examination within five minutes; or to stop here and continue after the lunch break.

MR CARREYÓ: Thank you, Mr President. I do not want to be responsible for the hunger of all the persons that are here, so I am happy to break now so that we can come back after lunch.

THE PRESIDENT: Thank you very much. This brings us to the end of this morning's sitting. The cross-examination of the expert will have to be continued in the afternoon when the hearing will be resumed at 3 p.m. The sitting is now closed

(*The sitting closed at 1.12 p.m.*)