WRITTEN OBSERVATIONS AND SUBMISSIONS OF THE REPUBLIC OF ITALY IN REPLY TO OBSERVATIONS AND SUBMISSIONS OF THE REPUBLIC OF PANAMA, SUBMITTED ON 8 JULY 2016

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

THE M/V NORSTAR CASE

THE REPUBLIC OF PANAMA *v.* THE ITALIAN REPUBLIC

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1. These *Written Observations and Submissions in Reply to the Observations and Submissions* ("Reply") of the Republic of Panama ("Panama") are filed in accordance with Order 2/2016 of the Tribunal dated 15 March 2016 which fixed 9 July 2016 as the time limit for Italy to submit written observations and submissions.

CHAPTER 1
INTRODUCTION

2. The present *Reply* will respond to the challenges to Italy's *Preliminary Objections* advanced by Panama in its *Observations and Submissions* ("Observations") in four Chapters, as follows.

3. Chapter 2 will address Panama's challenges to Italy's objections to the jurisdiction of the Tribunal. Section I will respond to Panama's challenge to Italy's contention that the requirement for the existence of a dispute, as well as the requirement to pursue an exchange of views before resorting to adjudication, have not been fulfilled by Panama. Section II will respond to Panama's assertions concerning the lack of the Tribunal's jurisdiction *ratione personae*. To that end, Italy will contend that *a*) the order for seizure of the *M/V Norstar* does not *per se* amount to a breach of an international obligation; *b*) no alleged internationally wrongful conduct is attributable to Italy; and *c*) the "indispensable party principle" applies to the present case.

4. Chapter 3 will develop the objections to the admissibility of Panama's Claim in order to address the challenges to such objections advanced by Panama in its *Observations*. Section I will address the issue of the so-called "preponderance test", demonstrating that the Panamanian Claim is preponderantly, if not exclusively, one of a diplomatic protection nature. It will be shown that the nationality requirement, accordingly, applies, and that it has not been met. In the alternative, it will be shown that, Panama's Claim being of an "indirect" character, the local remedies rule applies anyhow and that it has not been met. In Section II Italy will show that Panama is in any event precluded from bringing its Claim before this Tribunal because of acquiescence, extinctive prescription and estoppel.

5. Finally, Chapter 4 will contain Italy's conclusions concerning this Tribunal's lack of jurisdiction and, in the alternative, the inadmissibility of Panama's Claim. Any failure in the present *Reply* to address specific allegations by Panama should not, of course, be construed or deemed as an implicit admission of such allegations.

CHAPTER 2
OBJECTIONS TO THE JURISDICTION OF THE TRIBUNAL

6. This Chapter addresses the arguments made by Panama in response to Italy's objections to the Tribunal's jurisdiction. First, Italy will argue that the requirement of the existence a dispute prior to the filing of the *Application* has not been met, together with the requirement to engage in a genuine attempt to exchange views (**Section I**). Second, Italy will reply to Panama's challenges concerning the lack of the Tribunal's jurisdiction *ratione personae* (**Section II**).

I. The requirement of a dispute has not been met and, in any event, no exchange of views has been pursued by Panama.

7. In this Section, Italy addresses the arguments made by Panama responding to Italy's objections to the jurisdiction of the Tribunal due to the inexistence of a dispute between the Parties to the present case. To that end, Italy will, first, argue that Panama has fallen short of proving that a dispute exists between Panama and Italy (**Subsection A**). Second, Italy will reply to Panama's challenges to the assertion that it has not met the requirement to engage in a genuine attempt to exchange views under Article 283 UNCLOS prior to filing its *Application* (**Subsection B**).

A. The inexistence of a dispute between Panama and Italy

1. The irrelevance of the communications from Panama for lack of representative powers

8. In its *Observations*, Panama argued that it "would not have instituted proceedings before the Tribunal if it felt that a legitimate dispute did not exist".[1] Italy does not doubt it, except that it still finds Panama's institution of the present proceedings legally groundless, due, *inter alia*, to the inexistence of a dispute with Italy over the facts complained of in its *Application*, at the time of its filing, based on the following facts and considerations.

9. Italy fully acknowledges the statement by the ICJ in *Georgia v. Russian Federation* to the effect that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".[2] However, such a jurisprudential statement is immaterial in relation to the facts of the present case, insofar as the communications received from Mr Carreyó and from Panama on the *M/V Norstar* were not legally capable of leading to an inter-State dispute with Italy. First and foremost, Italy has not failed to respond to diplomatic communications from Panama on the matter in issue, it simply did not respond to Mr Carreyó since he was not vested with powers to negotiate with Italy over the facts of the present case.

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[1] Observations and Submissions of the Republic of Panama to the Preliminary Objections of the Italian Republic, 5 May 2016, para. 6 ("Observations") (**Annex A**).

[2] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary objection, 1 April 2011, *ICJ Reports*, 2011, pp. 70 ss., p. 84, para. 30 (**Annex B**).

10. As stressed in the above mentioned ICJ Judgment, "negotiations may help demonstrate the existence of the dispute and delineate its subject-matter".[3] Indeed, the inexistence of a dispute between Panama and Italy at the time of the *Application* is corroborated precisely by the fact that no meaningful attempts at negotiated settlement were made by Panama over any putative difference between the two States on the points of law, or fact, concerning the present proceedings. The communications received by the Italian Government on the facts in issue did not come from Panamanian governmental authorities, nor were they aimed at conducting intergovernmental bilateral negotiations. Even if they were, they concerned proceedings different from the one at issue. No less importantly, such communications never concerned the rights invoked by Panama in its *Application* instituting the recent proceedings.

11. In reporting the facts of the present case in its *Objections*, Italy, contrary to Panama's allegations,[4] did not conceal communications from Mr Carreyó, or Panama, but argued the impropriety and irrelevance – for diplomatic, hence legal, purposes – of such communications and will substantiate this point further in the present *Reply*.

12. From 15 August 2001 to 31 August 2004, Italy received written communications exclusively from Mr Carreyó, a private Panamanian lawyer who was acting in the interest of the owner of *M/V Norstar*. In his first communication to Italy, on 15 August 2001, Mr Carreyó maintained that he "has obtained the authorization from the Ministry of Foreign Affairs of Panama Republic, to start a legal action against the Republic of Italy, at the International Tribunal of the Sea in Hambourg".[5] However, he did not provide evidence of any such official mandate to act as "legitimate representative" of Panama.

13. Such powers were demonstrated neither in its second communication, dated 7 January 2002,[6] nor in its third one of 6 June 2002 and written on his personal headed paper.[7] Indeed, as highlighted in Italy's *Objections*,[8] such letters simply reiterated the first communication of 15 August 2001.

14. The same applies to the fourth communication of 3/6 August 2004, again written on Mr Carreyó's personal headed paper, curiously emphasised by Panama in its *Observations*.[9] Even though Mr Carreyó asserted that "this is a letter from the Panamanian Government to the Italian Government", reiterating the language used in its first communication, the letter in point does not add any element of legal relevance to the previous [and subsequent] communications from Mr Carreyó, since, again, he failed to provide any evidence of his representative powers.[10]

15. That Mr Carreyó was acting in his private capacity is corroborated by the fact that the above letters were "certified" under the Hague Convention of 5 October 1961. Such a certification – so called "apostille" – under no circumstances may relate to the content of the

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[3] *Ibidem*.
[4] *Observations* (fn. 1), para. 31.
[5] Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs, 15 August 2001 (**Annex C**).
[6] Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs, 7 January 2002 (**Annex D**).
[7] Letter sent by Mr Carreyó to the Italian Embassy in Panama, 6 June 2002 (**Annex E**).
[8] Written Preliminary Objections under Article 294, Paragraph 3, of the United Nations Convention on the Law of the Sea, 10 March 2016, para. 10 ("Objections") (**Annex F**).
[9] *Observations* (fn. 1), para. 22.
[10] Letter sent by Mr Carreyó to the Italian Embassy in Panama, 3/6 August 2004 (**Annex G**).

underlying document, nor may it ground the qualification of Mr Carreyó as a representative of Panama. In fact, Article 1 of the Hague Convention provides that "the present Convention shall not apply: [...] a) to documents executed by diplomatic or consular agents". *A fortiori*, the same applies to the Ministry of Foreign Affairs.

16. Only more than three years after his first communication, on 31 August 2004, did Mr Carreyó provide Italy with a document concerning his representative powers.[11] It was a communication sent by Panama to this Tribunal on 2 December 2000 which exclusively authorised Mr Carreyó to represent Panama for purposes of an application for prompt release under Article 292 UNCLOS which has never been activated.[12] Such an authorisation was forwarded informally by telefax to Italy by Mr Carreyó himself four years after it was sent to ITLOS, and long after the circumstances putatively justifying resort to a prompt release procedure had terminated. In fact, as highlighted in Italy's *Objections*,[13] on 13 March 2003 the Tribunal of Savona had reversed the order for seizure of *M/V Norstar*.[14] Further, with respect to the communication of 2 December 2000, Mr Carreyó has not been empowered to legitimately represent Panama for the purposes of an exchange of views concerning the interpretation and application of UNCLOS, and an application for compensation due to the seizure of the *M/V Norstar*.

17. That is to say that Italy has not been made aware that Mr Carreyó had been authorised to apply for prompt release during a period of time in which it would be relevant for it to know. Italy has instead been so informed by Mr Carreyó himself long after such an authorisation had lost any legal relevance.

18. According to the above considerations, Mr Carreyó's communication of 31 August 2004 could certainly not cure the lack of representative powers *vis-à-vis* Italy for the previous four years. As it will be demonstrated below, nor could it produce new powers capable of vesting Mr Carreyó with representative functions for the purposes of conducting negotiations with Italy over the subject-matter of the present proceedings.

19. Since 31 August 2004, Italy was never notified by Panama that Mr Carreyó had ever been mandated by that Government to negotiate, or exchange views under Article 283, with Italy over the points of facts and law in the present case.

20. The letter sent by Mr Carreyó on 17 April 2010 to the Italian Government did not change the legal and diplomatic irrelevance of his communications, since no new representative powers had been vested in Mr Carreyó.[15]

21. The above considerations concerning the inexistence of a dispute between the Parties based on the communications coming from Mr Carreyó are not countered by the few isolated communications coming from Panama, namely, Notes Verbales, A.J. No. 2227, also dated 31

[11] Fax sent by Mr Carreyó to the Italian Embassy in Panama, 31 August 2004 (**Annex H**).
[12] Document of authorisation issued by the Republic of Panama in favour of Mr Carreyó to apply for prompt release procedure before ITLOS, 2 December 2000 (**Annex I**).
[13] *Objections* (fn. 8), para. 11.
[14] Communication to the Spanish Authorities of the judgment of 13 March 2003, 18 March 2003 (**Annex J**).
[15] Letter of Mr Carreyó to the Italian Minister of Foreign Affairs, 17 April 2010 (**Annex K**).

August 2004,[16] and A.J. No. 97 of 7 January 2005.[17] As to the former, it simply reiterated that the powers vested upon Mr Carreyó were specifically confined to triggering a prompt release procedure under Article 292 UNCLOS by explicitly referring to the communication to ITLOS of 2 December 2000, stating as follows:

> The Ministry of Foreign Affairs – Directorate General for Legal Affairs and Treaties – with regard to the present case, is pleased to inform the Honourable Embassy of Italy that by means of Note D.M. No A.J 2387 of December 2nd 2000, Lawyer Nelson Carreyó acts on behalf of the Panamanian State and represents the interests of the Panama-flagged Motor Vessel NORSTAR before the International Tribunal of the Law of the Sea, based in Hamburg, Germany.[18]

22. The same consideration applies to Note Verbale A.J. No 97, since it simply referred to Note Verbale A.J. No. 2227.[19]

23. In the event that, contrary to Italy's contentions, this Tribunal were to consider Mr Carreyó's communications as attributable to Panama, neither those communications nor the two above mentioned Notes Verbale could be deemed, with regards to their contents, as elements of negotiations, or attempted negotiations, capable of creating an international dispute based on the Claim advanced by Panama in its Application. This is because none of these communications invoked any right possessed by Panama under UNCLOS and which Italy therefore could have allegedly breached and could, accordingly, object to or agree upon.

24. Note Verbale A.J. No. 2227 rather laconically refers to the fact that Mr Carreyó "requested the transmission via diplomatic channels of the claim note addressed to the Italian Ministry of Foreign Affairs, regarding the detention of the Panamanian flagged vessel NORSTAR",[20] merely transmitting translations in French, English and Italian of Mr Carreyó's letter of 3/6 August 2004.

25. In even clearer terms, the Ministry of Foreign Affairs of the Republic of Panama in Note Verbale A.J. No. 97 stated that "[l]awyer Nelson Carreyó, Legal Representative of the Republic of Panama and of the interests of the owners of the motor vessel NORSTAR, *requests that the case of the Government of the Italian Republic be submitted to the attention of the judiciary*"[21] and asked Italy "*to provide information on the progress of the case at issue*".[22] The expressions used by Panama, *i.e.* that the case "be submitted to the attention of the judiciary", cannot refer to anything different from the criminal proceedings before the Italian judiciary concerning the allegedly offences committed through the *M/V Norstar*. As such, Panama simply requested Italy to provide "information on the progress" of the proceedings *before the Italian domestic courts* concerning the case of the *M/V Norstar*.

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[16] Note Verbale A.J. No. 2227 sent by the Ministry of Foreign Affairs of Panama to Italy, 31 August 2004 (**Annex L**).
[17] Note Verbale A.J. No. 97 sent by the Ministry of Foreign Affairs of Panama to Italy, 7 January 2005 (**Annex M**).
[18] Document of authorisation (fn. 12).
[19] Note Verbale A.J. No. 97 (fn. 17).
[20] Note Verbale A.J. 2227 (fn. 16).
[21] Note Verbale A.J. No. 97 (fn. 17); emphasis added.
[22] *Ibidem*; emphasis added.

26. In light of the above, Italy contends that the communications received both from Mr Carreyó and the Government of Panama had no relevance for the purposes of the fulfilment of the requirement of the existence of an international dispute between Italy and Panama. First, Mr Carreyó's communications could not be deemed as coming from a State representative entitled to invoke Italy's responsibility for the facts complained of in the present proceedings, as Panama's communications never appropriately vested Mr Carreyó of representative powers encompassing the substantive scope of the *Application* in the instant case. Second, even if Mr Carreyó's communications were to be considered as attributable to Panama, they either concerned the anticipation that a prompt release procedure would be triggered – which has never been done – or consisted in advancing a claim for damages without advancing the legal grounds for such requests under international law, least of all indicating the rights invoked in the *Application*.

27. As stated by the PCIJ in *Mavrommatis*, "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[23] In the present case, no differences of views concerning the interpretation or application of UNCLOS could be found in any interactions between Panama and Italy over the rights invoked by the former in the present proceedings before the *Application* was filed by Panama on 16th November 2015.

2. *The manifest irrelevance of the rights invoked*

28. The above submissions demonstrating that there is no dispute between Panama and Italy concerning the interpretation or application of UNCLOS are complemented by the following submissions demonstrating that the provisions invoked by Panama in its *Application* are manifestly irrelevant to the present case and therefore Panama has failed to establish a *prima facie* case.

29. According to Article 288 UNCLOS, ITLOS has jurisdiction over any dispute concerning the interpretation or application of the Convention. In its *Application*, Panama requests ITLOS to adjudge and declare that Italy has violated Articles 33, 73 (3) and (4), 87, 111, 226 and 300 of UNCLOS.[24]

30. Italy submits that in order to establish the jurisdiction of the Tribunal it is not enough for Panama to randomly invoke UNCLOS provisions. It is rather necessary for it to establish, at least *prima facie*, an adequate link between the facts of the present case and the provisions of UNCLOS referred to. In the present Section, Italy will demonstrate that Panama failed to establish a *prima facie* case with regard to each and all of the provisions invoked by Panama.

31. In its *Observations*, in order to substantiate its argument that "the rights claimed by Panama are not based on obligations concerning the treatment of aliens", Panama maintained that "the actions of Italy against the M/V Norstar, a ship flying the Panamanian flag, violated the right of Panama, as a flag State under the Convention, to have its vessels enjoy the freedom of navigation and other internationally lawful uses of the sea related to that freedom, as set out in Articles 33, 58, 73(3) and (4), 87, 111, and 300 among others".[25]

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[23] *Mavrommatis Palestine Concessions*, Judgment, 30 August 1924, in *PCIJ Series A, No. 2*, p. 11 (**Annex N**).
[24] Application of the Republic of Panama, 16 November 2015, para. 9 ("Application") (**Annex O**).
[25] *Observations* (fn, 1), para. 71.

32. Italy firmly contends that the provisions of UNCLOS that Panama relies upon are manifestly inapplicable to the facts of the present case, and therefore cannot provide an appropriate legal basis for sustaining Panama's Claims. In particular, Italy submits that Panama refers to provisions totally inconsistent, both *ratione loci* and *ratione materiae,* with respect to the seizure of the *M/V Norstar* in the Bay of Palma de Mallorca, that is, in Spanish internal waters, by the Spanish Authorities.

33. To begin with, Panama's Claim based on Article 33 of UNCLOS is plainly unfounded *ratione loci*. The arrest of the *M/V Norstar* was executed, as Panama expressly admitted in the *Application*, "while the Vessel was anchored at the Palma the Mallorca Bay".[26] Therefore, the event from which the present case results occurred in Spanish internal waters, not in the Italian contiguous zone.

34. Secondly, Panama's assertions concerning the alleged violations by Italy of Article 73(3) and (4) UNCLOS are also unfounded – not only *ratione loci*, but also *ratione materiae*. As for Paragraph 3, it is applicable in cases in which a State applies penalties due to alleged violations of "fisheries law and regulations", which is plainly not relevant in the case of *M/V Norstar*. As to Paragraph 4, it is relied upon by Panama in order to claim that Italy was required under UNCLOS to notify Panama, as the flag State, of the seizure of the vessel.[27] However, that obligation, too, is applicable exclusively in case of arrest and detention of foreign vessels carried out to ensure compliance with the laws and regulations concerning the conservation and management of fish stocks in the exclusive economic zone.

35. Since the arrest of the Vessel occurred in the Spanish internal waters, Article 73 is also manifestly irrelevant to the present case *ratione loci*. Further to that, the provision in point is also not applicable *ratione materiae* to the present case. The seizure of the *M/V Norstar* was undertaken in the context of criminal proceedings relating to alleged offences of criminal association aimed at smuggling mineral oils and tax fraud. As clearly reported in Panama's *Application*, the Order for seizure against *M/V Norstar* "said that the business of supplying oil offshore to mega yachts constituted a criminal act under various articles of Italian Criminal Law and thereby making money by avoiding customs. The vessel and the oil transported were to be considered by Italy as *corpus delicti* and thus justifying the arrest".[28] Consequently, the seizure was not ordered in relation to a possible violation of laws and regulations concerning the living resources in the exclusive economic zone.

36. In light of the above considerations, Article 73 UNCLOS is manifestly irrelevant to the present case and Panama has therefore not established *prima facie* grounds for its Claim in respect of the allegedly illegal detention of the *M/V Norstar* in the port of Palma de Mallorca.

37. Thirdly, Panama submits that Italy has breached Article 87 UNCLOS. This provision codifies the customary rule on the freedom of the high seas and imposes upon States an obligation not to impede that freedom, with special regard to navigation. This provision is

[26] *Application* (fn. 24), para. 5.
[27] *Ibidem*, para. 10.
[28] *Ibidem*, para. 5.

also irrelevant *ratione loci* with respect to the instant case since the *M/V Norstar* was seized while it "was anchored at the Palma de Mallorca Bay",[29] *i.e.* within Spanish territorial waters.

38. As emphasised by Judge Wolfrum in the *M/V "Louisa" Case*, "it is hard to imagine how the arrest of a vessel in port in the course of national criminal proceedings can be construed as violating the freedom of navigation on the high seas. To take this argument to the extreme it would, in fact, mean that the principle of the freedom of navigation would render vessels immune from criminal prosecution since any arrest of a vessel, under which ground whatsoever, would violate the flag State's right to enjoy the freedom of navigation".[30]

39. A similar situation was addressed by this Tribunal in the *M/V "Louisa" Case*. In that case, Saint Vincent and the Grenadines argued that, by reason of the detention of the *M/V Louisa* the vessel was denied access to the high seas and that "this detention violated the freedom of vessels under the flag of Saint Vincent and the Grenadines to navigate on the high seas as provided for in article 87 of the Convention".[31] In response, Spain held that "the detention did not take place on the high seas but while the *M/V Louisa* was docked voluntarily in a Spanish port".[32] Thus, Spain maintained that the interpretation given to Article 87 by Saint Vincent and the Grenadines was "not in conformity with the true meaning of this provision, which is a codification of the long-standing norm of *mare apertum*".[33]

40. ITLOS decided that case in terms most germane to the present case. In particular, Italy recalls that this Tribunal maintained that "Article 87 cannot be interpreted in such a way as to grant the M/V "Louisa" a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it".[34] Accordingly, ITLOS concluded that the arguments advanced by Saint Vincent and the Grenadines "do not establish that article 87 of the Convention could constitute a basis" for its Claim.[35] The same would apply to Panama's Claim in the present case.

41. Fourthly, Panama's Claim under Article 111 of the UNCLOS is also unfounded *ratione loci*. Article 111 deals with the right of hot pursuit, according to which such pursuit must be commenced by the competent authorities of the coastal State when the foreign ship or one of its vessels is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone, of the pursuing State, and may only be continued outside the territorial sea, or the contiguous zone, if the pursuit has not been interrupted. But, again, the facts underlying Panama's Claim clearly show that "the seizure took place [...] by the Spanish officials upon a request of Italian authorities, when the vessel was anchored at the Palma de Mallorca Bay waiting for orders under the running Charter Party".[36] Accordingly, Article 111 of the UNCLOS is not relevant *ratione loci*.

42. Fifthly, the Claim based on Article 226 of UNCLOS is clearly unfounded *ratione materiae*, as amply shown by the case law of this Tribunal.

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[29] *Ibidem*.
[30] *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Judgment, 28 May 2013, *Dissenting Opinion of Judge Wolfrum*, p. 77 at p. 84, para 22.
[31] *Ibidem*, para. 106.
[32] *Ibidem*, p. 33, para 107.
[33] *Ibidem*.
[34] *Ibidem*, p. 33, para 109.
[35] *Ibidem*.
[36] *Application* (fn. 24), para 5.

43. In the *M/V "Louisa" Case*, Saint Vincent and the Grenadines, acknowledging "that the scope of the application of [this] provision[], is confined to the marine environment", contended that Article 226 "reflect[s] values in international law that should be given consideration in this case, specifically freedom from undue seizure and inspection, and freedom from discrimination".[37] The Tribunal rejected this argument which would have broadened the scope of Article 226 UNCLOS, contrary to the provision's ordinary meaning of its terms, as well as object and purpose.[38]

44. Therefore, against the circumstances of the present case Article 226 of the Convention cannot serve as a basis for the Claim submitted by Panama in respect of the detention of the *M/V Norstar* connected with criminal proceedings for smuggling of oil and tax fraud.

45. Lastly, the irrelevance of all the Articles of UNCLOS invoked by Panama rules out the applicability of Article 300 to the facts and circumstances of the present case.

46. Article 300 reads as follows:

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

47. The plain terms of Article 300 make it clear that it cannot be applied independently of the rights, jurisdiction and freedoms provided for by UNCLOS.[39] Only the exercise of a right, jurisdiction and freedom accrued under UNCLOS may be challenged as being abusive.

48. Since Panama has not plausibly challenged Italy's exercise of the rights, jurisdiction and freedoms recognized in UNCLOS, its claim based on Article 300 of UNCLOS is manifestly unfounded.

49. In light of the above considerations, Italy contends that a dispute between the Government of Italy and Panama over the facts complained of in the *Application* does not exist. Italy, therefore, respectfully asks the Tribunal to adjudge and declare that it does not have jurisdiction over the *Application*.

B. Panama has failed to pursue an exchange of views with Italy under Article 283 UNCLOS

50. In the event that, contrary to Italy's contentions advanced in the previous section, this Tribunal should find that a dispute does exist between Panama and Italy over the instant case, Italy submits that Panama has not met the requirement under Article 283 UNCLOS to pursue an exchange of views aimed at an amiable settlement of the dispute, or at agreeing other peaceful means for resolution, before filing its *Application*.

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[37] *The M/V "Louisa" Case* (fn. 30), pp. 34-35, para. 111.
[38] *Ibidem*, p. 35, para. 113.
[39] *Ibidem*, p. 41, para. 137.

51. In the first place, Italy contends that the contacts between Panama and Italy referred to above[40] cannot qualify as an "exchange of views", nor as genuine attempts to pursue it, under Article 283 UNCLOS. For a communication to be considered relevant for the purposes of an "exchange of views" it should be made by State representatives. As shown above in Section I, Subsection A,[41] this is not the case in the instant proceedings.

52. In the event that, contrary to Italy's contentions, this Tribunal should consider Mr Carreyó's communications as attributable to Panama, Italy contends that the means and contents of those communications may not qualify as a genuine pursuit of an "exchange of views" under Article 283 UNCLOS.

53. Italy is pleased to note that Panama in its *Observations* has not objected to Italy's construction of the requirement under Article 283 UNCLOS as consisting of the "obligation upon the Parties […] to seek to settle their disputes by recourse to negotiations", as it was put by the Annex VII Tribunal in *Barbados v. Trinidad and Tobago*.[42] This *dictum* is in line with the statements by the ICJ in the *North Continental Shelf* case, whereby the Parties to a dispute are under an obligation "so to conduct themselves that the negotiations are meaningful,",[43] as well as in the *Gulf of Maine*, where the Court stressed that negotiations are to be carried out "in good faith and with the genuine intention of achieving a positive result".[44]

54. This Tribunal has repeatedly applied the principle in question to the factual circumstances brought before it including in *Southern Bluefin Tuna*,[45] *MOX Plant*[46] and *Land Reclamation*.[47] The fact that that under the circumstances of all such cases this Tribunal has found that the requirement in question has been met does not provide ground for Article 283 to be interpreted and applied in relation to the present circumstances so restrictively as to set at naught any legal relevance of this provision with regard to the instant case.

55. On the contrary, the above case law corroborates the contention that, again in the event that contrary to Italy's submissions above, the conduct of Mr Carreyó were to be deemed by this Tribunal as attributable to Panama, Mr Carreyó's and Panama's communications fall short of the requirement to pursue an exchange of views under Article 283 UNCLOS.

56. In the first place, as it is stressed below in Chapter 3, Section II, Subsection A,[48] the lack of consistency and continuity of Mr Carreyó's communications renders such communications incapable of meeting the requirement in question. This is particularly so

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[40] Above, paras. 12-25.
[41] Above, para. 26.
[42] *Barbados/Trinidad and Tobago*, Award, 11 April 2006, para. 206; emphasis added (**Annex P**).
[43] *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal republic of Germany v. The Netherlands*), Judgment, 20 February 1969, in *ICJ Reports*, 1969, p. 3 ff., p. 47, para. 85 (**Annex Q**).
[44] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, 12 October 1984, in *ICJ Reports*, 1984, p. 246 ff., p. 299, par. 112(1) (**Annex R**).
[45] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures*, ITLOS Cases No. 3 & 4, Order, 27 August 1999, paras. 56-61.
[46] *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*, ITLOS Case No. 10, Order, 3 December 2001, paras. 54-60.
[47] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures*, ITLOS Case No. 12, Order, 8 October 2003, paras. 33-51.
[48] Below, paras. 124-134.

insofar as the requirement at issue, as put by Professor Nordquist, has been conceived as "a continuing obligation applicable at every stage of the dispute".[49]

57. It is notable that the only communication in which reference was made to Article 283 is the letter sent by Mr Carreyó on his headed paper to Italy of 3/6 August 2004, i.e., before Italy was ever notified that the sender in question was vested with any governmental capacity. But apart from the representative powers of Mr Carreyó and apart from the formal reference to the UNCLOS provision in question, ever since that letter, Italy received communications on the matter in hand, either from the same individual, or from Panama, only on 31 August 2004, 7 January 2005 and 17 April 2010, with none of them ever proposing an exchange of views, consultations or negotiations, or invoking the rights that Panama claimed in the *Application*[50] were infringed.

58. Secondly, as put by Professor Anderson, Article 283 requires the Parties "to indicate a view on the most appropriate means of settlement in the circumstances existing at the time, in the context of consultations",[51] and, most importantly, "[t]his is not the same as announcing an intention to have recourse to litigation".[52] In the above communications since 2004, Panama or Mr Carreyó never advanced a proposal to engage in "an exchange of views regarding [the] settlement by negotiation or other peaceful means" of the putative dispute in question as provided for under Article 283, except for a threat to file an application before ITLOS unless Italy paid the compensation claimed.

59. In light of the above, in the event that this Tribunal should find that a dispute does exist between Panama and Italy over Panama's Claim, Italy submits that Panama has not met the requirement under Article 283 UNCLOS to pursue an exchange views. As such, Italy respectfully requests this Tribunal to adjudge and declare that it lacks jurisdiction over Panama's *Application* – or, in the alternative, that Panama's Claim is inadmissible – due to Panama's failure to fulfil the requirement to engage in an exchange of views with Italy under Article 283.

II. The Tribunal lacks jurisdiction *ratione personae*

60. In the present Section, Italy will challenge the contention put forward by Panama in its *Observations* that "Italy, and only Italy, is the proper respondent in these proceedings".[53] To that end, Italy will, first, analyse the relevance of the order for seizure issued by the Italian judiciary for the purposes of the existence of an internationally wrongful act (**Subsection A**). Second, it will address the issue of the exclusive attribution of the actual seizure and detention of the *M/V Norstar* to a State which is not a party to the present proceedings (**Subsection B**). Finally, it will demonstrate that, in any event, the "indispensable party" principle applies to the present case (**Subsection C**).

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[49] NORDQUIST, ROSENNE, SOHN (eds.), *United Nations Convention on the Law of the Sea. A Commentary*, Vol. V, Martinus Nijhoof, 1989, p. 29, para. 283.3.

[50] See, respectively, Note verbale A.J. 2227 (fn. 16), Note Verbale A.J. No. 97 (fn. 17) and Letter of 17 April 2010 (fn. 15).

[51] ANDERSON, DAVID, *Article 283 of the United Nations Convention on the Law of the Seas*, in NDIAYE, WOLFRUM (eds.), *Law of the Sea, Enviromental Law and Settlement of Disputes*, Martinus Nijhoff, 2007, pp. 848 ss., at 858; emphasis added.

[52] *Ibidem*.

[53] *Observations* (fn. 1), para. 5. See also *ibidem*, Chapter 2, Section I, Subsection B, paras. 10-15.

A. The order for seizure of the *M/V Norstar* does not *per se* amount to a breach of an international obligation

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

62. Under the established international law of State responsibility, the essential elements of an internationally wrongful act are the existence of conduct in breach of an international obligation and the attribution of such conduct to a State.[54]

63. As it has been stressed by the ILC in its introductory comments to Chapter III on "Breach of an international obligation" in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* ("ASR"):

> The essence of an internationally wrongful act lies in the non-conformity of the State's *actual* conduct with the conduct it ought to have adopted in order to comply with a particular international obligation.[55]

64. Italy contends that the order for seizure issued by the Italian judicial authorities, together with a request for its enforcement addressed to the Spanish authorities, did not amount *per se* to a breach of the Convention. This holds true irrespective of whether one would frame the act in question as an instantaneous act, or one extended in time, according to the ILC legal framework.[56]

65. On this score, in *Gabčíkovo-Nagymaros* the ICJ maintained as follows:

> A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which *is of a preparatory character and which 'does not qualify as a wrongful act'*.[57]

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[54] Article 2 of the *Draft Articles* provides that: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State" (*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, pp. 31 ff., p. 34, Article 2 ("ASR")).

[55] *Ibidem*, p. 54; emphasis added.

[56] Article 14 of the *Draft Articles* provides that: "1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue. [...] 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation. [...] 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation" (*ibidem*, p. 59).

[57] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, in *ICJ Reports*, 1997, pp. 7 ff., para. 79; emphasis added (**Annex S**).

66. The Court stressed this point relying on the ILC's *travaux préparatoires* for the *ASR*, with special regard to the consideration according to which "[a] distinction should particularly be drawn between a State's conduct that 'completes' a wrongful act (whether instantaneous or extended in time) and the State's conduct that precedes such conduct and *does not qualify as a wrongful act*".[58]

67. This is precisely the situation in the instant case, where, assuming that the arrest of the *M/V Norstar* was to be considered as internationally unlawful, the order for seizure of the Italian judiciary could only be deemed as conduct "preparatory" to an internationally wrongful act – to use the ICJ's expression in the above quoted passage – and "would not qualify as a wrongful act".[59]

68. The above considerations, to the effect that Italy is not the proper respondent in the present case because the order for seizure of the *M/V Norstar* would not amount to an internationally wrongful act, are complemented by the fact that the actual conduct complained of by Panama is not the order for seizure, but the material arrest and detention of the *M/V Norstar*, which cannot be attributable to Italy, neither as a matter of fact, nor of law.

69. It is to be recalled that Mr Carreyó addressed precisely the issue of the material detention of the vessel when anticipating that he would trigger a prompt release procedure before ITLOS under Article 292 UNCLOS. In its *Application*, Panama acknowledged that "[t]he seizure took place on 24 September 1998 by the Spanish officials on request by the Italian authorities, when the vessel was anchored at the Palma de Mallorca Bay".[60] It also appears that the Panamanian complaints are based on the contention that the *M/V Norstar* "was held longer than sensible for purposes of a lawful investigation".[61] But it was not the Italian authorities that held the vessel.

70. Since the order for seizure was not enforced by the Italian authorities, nor was it enforced in Italy, the Panamanian Claim has been addressed to the wrong respondent, both as a matter of fact and law, irrespective of its merits, as will be further demonstrated by the complementary submissions developed in the following Subsection.

B. No internationally wrongful act alleged in the present case is attributable to Italy

71. In its *Application*, Panama claimed that "[t]he right of peaceful navigation of the Republic of Panama through the *M/V Norstar* was violated by the Italian Republic agents".[62]

72. Italy challenged that claim in its *Objections* of 10 March 2016. In order to substantiate its contention that the Tribunal has no jurisdiction *ratione personae*, Italy maintained that:

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[58] *Ibidem*, referring to *Document A/48/10: Report of the International Law Commission on the work of its forty-fifth session (3 May-23 July 1993)*, in *Yearbook of the International Law Commission*, 1993, vol. II, Part Two, pp. 1 ff., p. 57, para. 14; emphasis added.
[59] Above, para. 65.
[60] *Application* (fn. 24), para. 5.
[61] *Ibidem*, para. 9.
[62] *Ibidem*.

> [E]ven though the order for seizure of the M/V Norstar has been issued by an Italian Public Prosecutor, the actual arrest and detention of the vessel has not been executed by Italian enforcement Officials, but by the Spanish Authorities. The Applicant acknowledged this matter of fact in its letter dated 17 April 2010 to the Italian Ministry of Foreign Affairs, in which it stressed that the vessel was still being kept in Palma de Mallorca.[63]

73. Conversely, Panama in its *Observations* argued that:

> [It] has not instituted proceedings against Spain and does not consider Spain to have any liability in this case. The detention of the M/V Norstar was based on an order given by Italy, not by Spain. Thus, *this case does not involve the actions of a third State, only those of Italy*.[64]

74. This proposition is oblivious to the basic international rules of the law of State responsibility regarding the attribution of an internationally wrongful act, on the one hand, and the "independent responsibility principle", on the other.

75. As for the rules on attribution, conduct may be attributed to a State when it has been carried out by its regular organs under Article 4 *ASR*,[65] or it is performed by so-called *de facto* organs, under Article 5,[66] 6[67] or 8.[68]

76. Articles 5, on "Conduct of persons or entities exercising elements of governmental authority", and 8, on "Conduct directed or controlled by a State", are manifestly irrelevant in the present case, whereas Article 6, on "Conduct of organs placed at the disposal of a State by another State" and the ILC *travaux* thereto deserve attention in relation to the facts complained of in the present case. On that score, it is undisputed that the seizure and detention of the *M/V Norstar* were carried out by Spanish State officials. While this is an example of the most satisfactory treaty cooperation with Spain, of which Italy is most appreciative, the conduct of the authorities of Spain could be attributed to Italy only if they could be deemed to have acted as "organs put at the disposal" of Italy under Article 6 *ASR*. The circumstances complained of in the *Application* show that this is not the case.

77. As clearly stated by the ILC in its commentary to Article 6 *ASR*, for an organ of State A to be considered to have been put at the disposal of State B:

> Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State

[63] *Objections* (fn. 8), para. 21.
[64] *Observations* (fn. 1), para. 12; emphasis added.
[65] *ASR* (fn. 54), p. 40, Article 4.
[66] *Ibidem*, p. 42.
[67] *Ibidem*, p. 43.
[68] *Ibidem*, p. 47.

> and *under its exclusive direction and control, rather than on instructions from the sending State*.[69]

78. The circumstances of the present case fall squarely within the legal reasoning of the ILC. The Spanish authorities cannot be held to have been put at the disposal of Italy under Article 6 *ASR* when enforcing the order for seizure of the Italian authorities on the basis of the 1959 *Strasbourg Convention on Mutual Assistance in Criminal Matters*. This contention is further corroborated by the ILC when it emphasised precisely that "Article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise".[70]

79. It is interesting to note that the ILC has substantiated Article 6 by reference to the *Xhavara* case before the European Court of Human Rights.[71] There, the ECtHR was seized with a request to assess whether Italy, or Albania, was responsible for the sinking of an Albanian ship in the course of an investigation at sea by Italian authorities upon request by Albania under The Convention between Italy and Albania of 25 March 1997. Just as the ECtHR found that "the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania",[72] likewise the conduct of Spain pursuant to the 1959 Strasbourg *Convention on Mutual Assistance in Criminal Matters* is not attributable to Italy.

80. As for the "independent responsibility principle" referred to above,[73] once the process of attribution is completed – either in the positive, or in the negative – such principle plainly provides, as stressed by the ILC, that "each State is responsible for its own internationally wrongful conduct, *i.e.* for conduct attributable to it […] which is in breach of an international obligation of that State".[74]

81. The principle in question is particularly germane to the circumstances of the present case, where the enforcement of the arrest of the vessel was carried out by a State other than the Respondent State upon request by the latter, on the basis of the 1959 Strasbourg *Convention on Mutual Assistance in Criminal Matters.* Again, as stressed by the ILC, it is "[i]n most cases of collaborative conduct by States [that] responsibility for the wrongful act will be determined according to the principle of independent responsibility".[75] Its implications, in combination with the general principle of the consensual nature if international adjudication, whereby , for the lack of jurisdiction *ratione personae* in the present case, will be addressed in the following Subsection.

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[69] *Ibidem*, p. 44, para. 2; emphasis added.
[70] *Ibidem*.
[71] *Xhavara and Others v. Italy and Albania*, application no. 39473/98, 11 January 2001 (**Annex T**).
[72] *ASR* (fn. 54), p. 44, footnote 130.
[73] Above, para. 74.
[74] *ASR* (fn. 54), p. 64, para. 1.
[75] *Ibidem*, p. 64, para. 5.

C. The "indispensable party" principle applies preventing the exercise of jurisdiction over the instant case

82. In the event that the Tribunal were to consider that, contrary to the above contentions, the alleged internationally wrongful conduct concerning the seizure and detention of the *M/V Norstar* engaged the international responsibility of Italy, Italy contends that this Tribunal should nonetheless dismiss Panama's Claim because of lack of jurisdiction *ratione personae*, based on the following considerations.

83. In its *Objections*, Italy has grounded the above contention on the "indispensable party principle" as interpreted and applied by the ICJ in the *Monetary Gold* decision,[76] and on the fact that "Spain is not a Party to the present proceedings".[77]

84. In its *Observations* Panama replied as follows:

> In the present case, the only legal interests which may be affected are those of Italy, not those of Spain, and the very subject matter of a decision on its merits would concern only Italy as Respondent.[78]

85. Panama substantiated the above contention maintaining that "Spain has not been mentioned, summoned, cited, or even referred to in this case either as defendant or as a third party, nor has it shown any interest in participating through any of the possible methods accepted by the Convention".[79] This argument is immaterial, as it is based on the subjective attitude of the Applicant, and of the third State in question, neglecting the objective factual and legal aspects of the circumstances before this Tribunal, as they are.

86. In the event that, contrary to the above contentions advanced by Italy, the order for seizure issued by the Italian judiciary should be considered as inextricably linked to the seizure and detention of the *M/V Norstar* carried out by Spain, then, by assessing the lawfulness, or unlawfulness, of Italy's conduct, this Tribunal would inevitably find itself assessing the conduct of Spain, which is not a party to the present proceedings.

87. In such an event, Italy contends that Panama's Claim should be dismissed on the basis of the "indispensable party principle".[80] As already recalled in Italy's *Objections*, this principle was clearly spelt out by the ICJ in the *Monetary Gold* case in the following terms:

> Where [...] the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.[81]

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[76] *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, 15 June 1954, *ICJ Reports*, 1954, pp. 19 ss.
[77] *Objections* (fn. 8), para. 24.
[78] *Observations* (fn. 1), para. 15.
[79] *Ibidem*.
[80] *Objections* (fn. 8), para. 24.
[81] *Case of the Monetary Gold* (fn. 76), p. 33 (**Annex U**).

88. This principle has been consistently applied by the ICJ case law, including in *Military and Paramilitary Activities*,[82] *Maritime Frontier Dispute*[83] and *Nauru*.[84] Curiously, Panama relies on the latter case in an attempt to argue that the principle in point is not relevant in the instant case.[85]

89. In fact, in *Nauru* the Court enunciated the requirements for the application of the principle in question in restrictive terms, to the effect that the relationship between the conduct of the State party to the dispute and that of the third State should be "not purely temporal but also logical".[86] The facts of the instant case fully satisfy such a restrictive approach, in so far as the relationship between the order for seizure and its enforcement is, indeed, not one of a purely temporal succession, but also of logical connection.

90. The "indispensable party principle" was developed by the ICJ in *East Timor*[87] in the following terms:

> Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act.[88]

91. The circumstances of the present case fall perfectly within the framework of this statement, whereby an international adjudicative body would not be entitled to assess the alleged wrongfulness of the respondent State when this would imply assessing the legality of the conduct of another State, which is not a Party to the proceedings in question. Should the Tribunal entertain its jurisdiction over the conduct of Italy about which Panama complains, it would be inevitably assessing whether Spain had the right to materially arrest and detain the *M/V Norstar*.

92. In sum, Italy has, first, contended that Italy's order for the seizure of the *M/V Norstar* does not *per se* amount to the breach of an international obligation and the conduct complained of by Panama as the ground for its Claim for compensation is the actual arrest and detention of the *M/V Norstar*. Second, it has been shown that the actual arrest and detention of the *M/V Norstar* cannot be attributed to Italy under the established rules on the attribution of conduct for the purposes of determining an internationally wrongful act. Finally, in the event that the Tribunal, contrary to the above contentions, should nonetheless consider that the conduct complained of in the *Application* is attributable to Italy, it has been demonstrated that the "indispensable party principle" applies to the effect that the Tribunal

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[82] *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, 26 November 1984, *ICJ Reports*, 1984, pp. 392 ss., p. 431, para. 88 (**Annex V**).

[83] *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening)*, Application to Intervene by Nicaragua (**Annex W**).

[84] *Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, 26 June 1992, *ICJ Reports*, 1992, pp. 240 ss., p. 261, para. 55 (**Annex X**).

[85] *Observations* (fn. 1), paras. 14 and 61.

[86] *Case concerning Certain Phosphate* (fn. 84), para. 55 (**Annex X**).

[87] *Case concerning East Timor (Portugal v. Australia)*, Merit, 30 June 1995, *ICJ Reports*, 1995, pp. 90 ss., p. 102, para. 29 (**Annex Y**).

[88] *Ibidem*.

should not be entitled to assess the legality of such conduct, because, if it did so, it would inevitably find itself ascertaining the legality, or otherwise, of the conduct of a State which is not a party to the present proceedings.

93. In light of the above, Italy respectfully submits that the Tribunal should dismiss the Claim advanced by Panama in its *Application* due to lack of jurisdiction.

CHAPTER 3
OBJECTIONS TO THE ADMISSIBILITY OF THE CLAIM

94. In this Chapter, Italy addresses the arguments made by Panama responding to Italy's objections to the admissibility of its Claim. To that end, Italy will, first, demonstrate that the Claim is predominantly one of an espousal nature and it is inadmissible because of Panama's failure to exhaust local remedies(**Section I**). Second, Italy will argue that Panama is precluded from bringing its Claim before this Tribunal based on the principles of acquiescence, extinctive prescription and estoppel (**Section II**).

I. The Claim is predominantly one of an espousal nature

95. In this Section, Italy addresses Panama's challenge to Italy's objection to the admissibility of the Claim for lack of exhaustion of local remedies by demonstrating the predominantly espousal nature of Panama's Claim. To that end, Italy will, first, highlight the predominantly espousal nature of Panama's Claim for compensation for the damages incurred by the owner of the *M/V Norstar* (**Subsection A**); second, Italy will demonstrate that, irrespective of the nationality requirement, the local remedies rule applies to the present case (**Subsection B**).

A. The predominantly espousal nature of the Claim based on an alleged "indirect violation"

96. In its *Observations*, Panama argued that it "has the right and duty to protect its registered vessels and use the peaceful means to assure that other members of the international community respect its rights".[89] In relation to such a contention, Italy fully acknowledges the principle authoritatively stated by this Tribunal in the *M/V "Saiga" (No. 2) Case* to the effect that "the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State".[90] However, in the present Subsection, Italy will demonstrate that, against the background of the factual circumstances of the present case, Panama's Claim predominantly, if not exclusively, pertains to alleged "indirect" violations and that, therefore, Panama's Claim is of an espousal nature.

97. The ILC, in its 2006 *Articles on Diplomatic Protection*, while recognizing in Article 18 "the right of the State of nationality of the ship to seek redress in respect of the members of the ship's crew", felt the need to stress as follows:

> Although this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship's crew, there is nevertheless a close

[89] *Observations* (fn. 1), para. 58.
[90] *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Case No. 2, Judgment, 1 July 1999, para. 106.

> resemblance between this type of protection and diplomatic protection.[91]

98. One of the elements associating the two situations pertaining to the State of nationality in the field of diplomatic protection, on the one hand, and to the flag State of a ship when seeking redress for the injury suffered by "the ship, everything on it and every person involved or interested in its operations",[92] on the other, is their espousal nature. The claims put forward by the State of nationality or by the flag State under such circumstances are equally "indirect" in nature. Accordingly, when a claim is lodged by the flag State, preponderantly, if not exclusively, to seek redress for the individuals involved in the operation of the ship, the local remedies rule applies on the same grounds as in a diplomatic protection case.

99. In *Interhandel* the ICJ held that: "The two actions, that of the Swiss company in the US courts and that of the Swiss Government in this Court, in its principal submission, are designed to obtain the same result: the restitution of the assets of Interhandel vested in the US".[93] Consequently, the Court concluded that the Swiss claim was one "in which the Swiss Government appears as having adopted the cause of its national, Interhandel, for the purpose of securing the restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies".[94]

100. In the *ELSI* case the Chamber of the International Court affirmed that it was not possible "to find a dispute over alleged violation [...] resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of *Raytheon and Machlett*".[95] The Chamber then referred to the ruling of the Court in *Interhandel* case and held that the United States' claim for monetary damages on behalf of its nationals "colours and pervades the United States claim as a whole".[96] Thus, the Chamber rejected the US argument "that in the present case there is a part of the Applicant's claim which can be severed so as to render the local remedies rule inapplicable to that part".[97]

101. The above ICJ case law is particularly germane to the instant case. In those cases, in order to reject the proposition that a mere breach of a treaty *ipso facto* caused a direct injury to a State, the ICJ examined whether the injury claimed was distinct from the indirect injury, i.e., the one caused to the nationals in question. To that end, the Court looked at the object and purpose of the applicants' claims to find that the object and purpose of Switzerland's and

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[91] Commentary to Draft Article 18 on "Protection of Ship's Crew" in *Draft Articles on Diplomatic Protection with Commentaries*, in *Yearbook of the International Law Commission, 2006*, vol. II, Part Two, pp. 23 ff., p. 51, para. 1.
[92] *The M/V "Saiga"* (fn. 90), para. 106.
[93] *Interhandel* (*Switzerland v. United States of America*), Preliminary Objections, Judgment, 21 March 1959, in *I.C.J. Reports*, 1959, pp. 6 ff., p. 27 (**Annex Z**).
[94] *Ibidem*, pp. 28-29.
[95] *Case concerning Elettronica Sicula S.p.A. (ELSI),* Judgment, 20 July 1989, *I.C.J. Reports*, 1989, pp. 15 ff., p. 43, para. 51 (**Annex AA**).
[96] *Ibidem*, p. 43, para. 52.
[97] *Ibidem*.

the United States' claims was to secure the interests of their nationals and not to vindicate their own rights.[98]

102. ITLOS itself has repeatedly relied on the same line of reasoning. In the *M/V "Saiga" (No. 2) Case*, it upheld the admissibility of the claim by Saint Vincent and the Grenadines finding that:

> 98. None of the violations of rights claimed by Saint Vincent and the Grenadines [...] can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.[99]

103. It is Italy's contention that in the light of the different factual background to the present case, the application of the very same legal principle and reasoning should bring the Tribunal to the dismissal of Panama's Claim.

104. This submission seems all the more corroborated by the *M/V "Virginia G" Case*, where the Tribunal stated as follows:

> 153. It is a well-established principle of customary international law that the exhaustion of local remedies is a prerequisite for the exercise of diplomatic protection. [...] It is also established in international law that the exhaustion of local remedies rule does not apply where the claimant State is directly injured by the wrongful act of another State.
> 154. The Tribunal thus has to consider whether the claims of Panama relate to a "direct" violation on the part of Guinea-Bissau of the rights of Panama. If the answer is in the affirmative, the rule that local remedies must be exhausted does not apply.[100]

105. In order to establish whether a given claim is "direct" or "indirect", ITLOS' case law shows a consistent application of the "preponderance test" in line with the ILC's contribution to the codification of international law and with the case law of the ICJ. This clearly emerged in the *M/V "Virginia G" Case* in which ITLOS, although treating the claim in that case as one concerning a "direct violation", stated as follows:

> 157. When the claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant.[101]

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[98] *Second Report on Diplomatic Protection, by Mr. John R. Dugard, Special Rapporteur*, UN Doc. A/CN.4/514, 28 February 2001, para. 29.
[99] *The M/V "Saiga"* (fn. 90), paras. 96, 97 and 98.
[100] *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, ITLOS Case No. 19, Judgment, 14 April 2014, paras. 153-154.
[101] *Ibidem*, para. 157; emphasis added.

106. The legal implications of the factual circumstances of the present case, which are different from those in the *M/V "Virginia G" Case*, show that the violations claimed by Panama are preponderantly "indirect" and that, therefore, the Claim in question is preponderantly, if not exclusively, espousal in nature.

107. It clearly emerges from each and all of the communications sent by Mr Carreyó, or Panama, on the matter at issue, that the nature of the Claim and the remedy sought by Panama concern preponderantly, if not exclusively, the monetary interests of the owner of *M/V Norstar*.[102]

108. In his letter dated 15 August 2001, Mr Carreyó plainly declared to act "in order to obtain a damage compensation for damages (*sic*) caused by the arrest of MC Norstar in Palma de Majorca Port (Baleari, Spain), still occurring at the moment".[103] Mr Carreyó has reserved the right to lodge a claim before this Tribunal in the event that Italy has not replied, "within the reasonable time", to a request to "release the vessel and pay the damages caused by the illegal procedures".[104] The same request was made by Mr Carreyó in his letter dated 7 January 2002.[105]

109. In his letter dated 3/6 August 2004, Mr Carreyó acknowledged that "[a]s a consequence of the sentence of Savona Tribunal dated 13.03.2003, the vessel has been released"[106] inviting the Italian Government to decide, by 30 August 2004, "whether it wants to pay the damages caused by the illegal procedure".[107] Similarly, six years later, in his letter of 17 April 2010, Mr Carreyó requested Italy to decide "within reasonable time [...] if will pay the damages caused by the illegal procedure adopted by its competent authorities".[108]

110. Curiously, Panama has explicitly recognised the espousal character of its Claim in its *Observations*, arguing that "Panama […] has the right to protect its [*sic*] national subjects by diplomatic action or through the institution of international judicial proceedings",[109] and reiterated the point stating that "it is entitled to exercise diplomatic protection by diplomatic action *or* by international judicial proceedings not limited to formal presentation before international tribunals".[110]

111. The preponderance of the indirect character of the injury invoked by Panama, not only emerges from the claims for damages in question, but is also corroborated by the manifest irrelevance of the random UNCLOS provisions relied upon in the *Application* as the basis for the putative direct violation of Panama's rights. This point has been addressed above in Chapter 2, Section I, Subsection A(2).[111]

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[102] See Letter of 15 August 2001 (fn. 5), Letter of 7 January 2002 (fn. 6), Letter of 6 June 2002 (fn. 7), Letter of 3/6 August 2004 (fn. 10) and Letter of 17 April 2010 (fn. 15).
[103] Letter of 15 August 2001 (fn. 5).
[104] *Ibidem*.
[105] Letter of 7 January 2002 (fn. 6).
[106] Letter of 3/6 August 2004 (fn. 10).
[107] *Ibidem*.
[108] Letter of 17 April 2010 (fn. 15).
[109] *Observations* (fn. 1), para. 5.
[110] *Ibidem*, para. 54; emphasis in text.
[111] Above, paras. 28-49.

112. It is sufficient to recall and emphasize here that all the communications from Mr Carreyó, or Panama, prior to the *Application* omit any reference to the rights invoked in the latter based on UNCLOS, except for a vague and unsubstantiated reference to the "principle of freedom of commerce [...] outside territorial waters".[112]

113. In light of the above, it is manifest that Panama's Claim is one of an "indirect" nature, pertaining preponderantly, if not exclusively, to the protection of rights of the owner of the Vessel. Consequently, as illustrated in the next Subsection, the local remedies rule applies and it has not been met.

B. The requirement of the local remedies rule applies and it has not been met

114. In its *Observations*, Panama has repeatedly maintained that the rule requiring the exhaustion of local remedies does not apply in the *M/V Norstar* case, including as follows:

> [T]he exhaustion of local remedies rule does not apply in the present case since the actions of Italy against the M/V Norstar, a ship flying the Panamanian flag, violated the right of Panama, as a flag State under the Convention, to have its vessels enjoy the freedom of navigation and other internationally lawful uses of the sea related to that freedom, as set out in Articles 33, 58, 73(3) and (4), 87, 111, and 300 among others.[113]

115. Under the previous Subsection A above, as well as in Chapter 2, Section I, Subsection A(2),[114] Italy has amply countered the premise of this contention and proved that Panama's Claim is clearly one predominantly, if not exclusively, of an espousal nature. Accordingly, the local remedies rule applies to the instant Claim. The present section will address the international rule in question and how its requirements have not been met in relation to the same Claim, which, therefore, is inadmissible.

116. The customary law character of the local remedies rule is generally accepted as reflected in Article 44 *ASR*[115] and Article 14 of the 2006 ILC *Draft Articles on Diplomatic Protection*.[116] As acknowledged by the ICJ, "[t]he local remedies rule represents an important principle of customary international law".[117] The rationale of the rule in question ensures that the State where the conduct not in conformity with an international obligation has occurred has the opportunity through its domestic legal system to redress such a conduct by its own means before its international responsibility is called into question.

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[112] See Letter of 15 August 2001 (fn. 5), p. 2; Letter of 3/6 August 2004 (fn. 10), p. 2; Letter of 17 April 2010 (fn. 15), p. 2.
[113] *Observations* (fn. 1), para. 71; a similar language may be found *ibidem*, at para. 5.
[114] Above, paras. 28-49.
[115] *ASR* (fn. 54), p. 120.
[116] *Draft Articles on Diplomatic Protection with Commentaries* (fn. 91).
[117] *Interhandel* (fn. 93), p. 27 (**Annex Z**); *Case concerning Elettronica Sicula S.p.A. (ELSI)* (fn. 95), p. 42, para. 50 (**Annex AA**).

117. Most importantly, for the purposes of the application of the rule in question in the present case, Article 295 UNCLOS upholds its relevance and application to disputes arising out of the Convention. It reads as follows:

> Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

118. If there is a *raison d'être* for this provision in UNCLOS, with its safeguard clause "where this is required by international law", it must be precisely in order to envisage its application to factual circumstances such as those characterising the instant Claim. The interpretation of Article 295 to the effect of applying the admissibility requirement in hand to the present case would conform with the interpretative principle so called of the *effet utile*, or of effectiveness, whereby as put by the ILC in its *travaux* for the VCLT, "between two interpretations one of which does and the other does not enable the treaty to have appropriate effects [or a provision of a treaty …] the former interpretation should be adopted".[118]

119. The exceptions to the rule in question are spelt out in Article 15 of the ILC *Draft Articles on Diplomatic Protection*, as follows:

> Local remedies do not need to be exhausted where: (a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible; (c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; (d) The injured person is manifestly precluded from pursuing local remedies; or (e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.[119]

120. None of these exceptions applies in the present case. On the contrary, Italy recalls that the Tribunal of Savona acquitted all the accused of all charges and ordered the lifting of the seizure of the *M/V Norstar* on 13 March 2003 and transmitted this decision to the Spanish Authorities on 18 March 2003. The Public Prosecutor at the Court of Savona appealed the judgment on 18 August 2003, which was upheld by the Court of Appeal of Genoa on 25 October 2005. Pursuant to Article 585 of the Italian Code of Criminal Procedure, the latter decision became *res judicata* on 9 December 2005.[120]

121. Contrary to the unfounded contentions advanced by Panama, Italy continues to stand by its submissions on the point at issue advanced in its *Objections*. The companies involved in the use of the *M/V Norstar* should have brought civil proceedings and sought compensation for damages under Article 2043 of the Italian Civil Code. Those companies had a five-year time limit to file a claim for the damages allegedly caused by the order of seizure

[118] *Yearbook of the International Law Commission*, 1966, Vol. II, p. 219, para. 6.
[119] *Draft Articles on Diplomatic Protection with Commentaries* (fn. 91), p. 46.
[120] *Objections* (fn. 8), paras. 11-12.

before Italian domestic courts. This time limit expired on 9 December 2010, no action on the part of the ship-owner having been instigated.

122. In light of the above, Italy respectfully requests this Tribunal to adjudge and declare that the Applicant's Claim, being predominantly of an espousal nature, is inadmissible due to the non-exhaustion of local remedies by the interested individuals.

II. Panama is in any event precluded from bringing its Claim before this Tribunal

123. In the event that this Tribunal, contrary to Italy's submissions, should find that it has jurisdiction to entertain Panama's Claim and that Panama's Claim is not an espousal claim, Italy argues that the Claim brought by Panama is, nonetheless, inadmissible due to the operation of the principles of acquiescence, extinctive prescription and estoppel. Indeed, it is generally recognized that acquiescence, extinctive prescription and estoppel may render, under certain conditions, a party's claim inadmissible.[121] All such conditions are present in the instant case, as Italy will show in the paragraphs that follow.

A. Acquiescence

124. Under the doctrine of acquiescence, inaction on behalf of a State may lead to the loss of a right or claim if, under the circumstances, that State would have been expected to display some form of activity with respect to its claim. Acquiescence is a general principle of law within the meaning of Article 38 of the Statute of the International Court of Justice.[122] Its existence has been recognised in a series of judicial and arbitral awards.[123]

125. The requirements for the application of the principle of acquiescence are as follows: a) that the claimant must have failed to assert its claim; b) the failure to assert the claim must have extended over a certain period of time; c) that the claimant must have failed to assert its claims in circumstances that would have required action.[124] This includes circumstances "where the respondent State could legitimately expect that the claim would no longer be asserted".[125]

1. Panama has failed to assert its Claim for a long period of time

126. In paragraphs 12-20 Italy has explained why the various communications sent by Mr Carreyó were not capable of asserting Panama's Claim *vis à vis* Italy. Italy wishes to refer the Tribunal to those paragraphs also for the purposes of this section and in particular to demonstrate the acquiescence of Panama with respect to the Claim that it has now brought against Italy before this Tribunal.

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[121] CRAWFORD, *Bronwlie's Principles of Public International Law*, Oxford, 2012, p. 699
[122] *Ibidem.*
[123] By way of example, *Affaire de Grisbadarna*, Judgment, 23 October 1909, in *Reports of International Arbitral Awards*, Vol. XI, pp. 147 ff., p. 161-162 (**Annex AB**).
[124] TAMS, *Waiver, acquiescence and extinctive prescription*, CRAWFORD, PELLET, OLLESON (eds.), *The Law of International Responsibility*, Oxford, 2010, pp. 1035-1049, p. 1043.
[125] *Ibidem*, p. 1044.

127. In the event that the Tribunal should disagree with Italy on the preceding, and hold that Mr Carreyó had powers to assert Panama's Claim, Italy wishes to draw the attention of the Tribunal to what is undisputed between the Parties: that Italy received the last communication regarding the *M/V Norstar* from Mr. Carreyó on 17 April 2010. In that communication, Mr Carreyó asserted in very clear and unequivocal terms that the Republic of Panama would commence proceedings against Italy in the event that Italy did not pay compensation for the damages allegedly caused by its competent authorities in connection with the arrest and detention of the *M/V Norstar*.[126] Crucially, in its communication of 17 April 2010, Mr Carreyó specified the framework of the threatened legal action: within *reasonable time* of the communication dated 17 April 2010.[127]

128. However, after the communication of 17 April 2010, Panama remained completely silent for 5 years and 7 months, before commencing proceedings against Italy only on 15 November 2015. Not a single communication regarding Panama's alleged Claim was sent to Italy over the course of this entire period of time. It is therefore wrong to state, as Panama does in its observations, that "Panama has not ceased communicating with Italy concerning this case".[128] Quite on the contrary, Panama stopped communicating with Italy for 5 years and 7 months, before bringing a claim against Italy *ex abrupto*.

129. There can be no doubt, in these circumstances, that Panama failed to assert its claim for a *long period of time*. Indeed, 5 years and 7 months is a very long period of time to assert a claim for compensation of damages and Panama completely failed to pursue its claim throughout this entire period of time. As is further explained below,[129] this is indeed a considerably longer period of time than what even Panamanian law provides for the prescription of claims regarding damages.

130. Commenting on the question of the lapse of time in the *Grisbadarna* case, a case involving conflicting claims to territory, Professor Tams noted that "Norway's obvious failure to protest against a clear display of sovereign authority by Sweden was held to amount to acquiescence, although the period was rather short. There is no reason why the same argument should not be applied to situations involving claims for State responsibility. Hence, it may be said that where the circumstances would have called for the claim to be asserted, a short period of passivity may be sufficient to establish acquiescence".[130]

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[126] See Letter of 15 August 2001 (fn. 5), p. 2; Letter of 7 January 2002 (fn. 6), Letter of 3/6 August 2004 (fn. 10), pp. 2-3; Letter of 17 April 2010 (fn. 15), p. 2.

[127] See Letter of 17 April 2010 (fn. 15), whereas Mr Carreyó "respectfully requests that the Italian State, within reasonable time decides if it will pay the damages caused by the illegal procedure adopted by its competent authorities. Were the above mentioned not to happen, the Republic of Panama will apply to the Hamburg Tribunal".

[128] *Observations* (fn. 1), para 62.

[129] Below, paras. 131-134.

[130] TAMS (fn. 124), p. 1044.

2. Panama was inactive in a situation where it would have been expected to pursue its Claim

131. After Mr Carreyó asserted in 2010 that Panama would commence proceedings against Italy within a reasonable time, the assessment of whether Panama acquiesced to not pursuing its Claim can only be made on the basis of one parameter, namely whether Panama did indeed commence proceedings, as it had anticipated, with the modalities indicated by Mr Carreyó in its correspondence to Italy, namely *within a reasonable period of time*. Panama's failure to do so, for an unreasonably long period of time, means that after 5 years and 7 months, "the respondent State could legitimately expect that the claim would no longer be asserted".[131]

132. A State's failure to act to pursue a claim, after having indicated in clear and unequivocal terms its intention to pursue the claim judicially within a reasonable time, is, for the purposes of acquiescence, a situation in which the claimant has failed to assert claims in circumstances that would have required action.

133. This is confirmed by State practice. For instance, in *Ics Inspection and Control Limited*, Argentina explained that the circumstance in which the claimant must have been expected to act, but failed to do so, included a case in which "despite the fact that the Claimant notified the Respondent of a BIT dispute and threatened international arbitration in its 27 November 2006 letter, the Claimant did nothing further until June 2009".[132]

134. This comports with equitable principles, on which the doctrine of acquiescence in international law rests. In *Wena*, the Arbitral Tribunal recalled the existence of the principle of repose, according to which "a respondent who reasonably believes that a dispute has been abandoned or laid to rest long ago should not be surprised by its subsequent resurrection".[133] In that case the Tribunal, while acknowledging the principle, refused to apply it, in consideration of the fact that "Wena has continued to be aggressive in prosecuting its claims". This is quite different from the way Panama has conducted itself.

B. Extinctive prescription

135. Extinctive prescription is a general principle of law within the meaning of Article 38 of the Statute of the ICJ.

136. As early as 1925, the *Institut de Droit International* had stated that:

> [D]es considérations pratiques d'ordre, de stabilité et de paix, depuis longtemps retenue par la jurisprudence arbitrale, doivent faire ranger la préscription libératoire des obligations entre États parmi les

[131] *Ibidem*.
[132] *ICS Inspection and Control Services Limited (United Kingdom) v The Argentine Republic*, UNCITRAL, PCA Case No. 2010-9, Award on jurisdiction, 10 February 2012, para. 197 (**Annex AC**).
[133] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 105 (**Annex AD**).

> principes généraux de droit reconnues par les nations civilisées dont les tribunaux internationaux sont appelés à faire application.[134]

137. International Courts and Tribunals have confirmed this position.

138. In 1927, the Graeco-Bulgarian Mixed Arbitral Tribunal in the case of *Sarropoulos v Bulgarian State* had to decide the question of the prescription of a claim put forward in 1921, arising out of an event that had occurred in 1926. In confirming the extinction of the claim by prescription, the Arbitral Tribunal held as follows:

> [P]rescription appears to constitute a positive legal rule in almost all systems of law. It is an expression of a great principle of peace which is at the basis of common law and of all civilized systems of jurisprudence. Stability and security in human affairs require that a delay should be fixed which it should be impossible to invoke rights or obligations [...] Prescription being an integral and necessary part of every system of law must be admitted in international law.[135]

139. The ICJ in the case *Certain Phosphate Lands in Nauru* held that "even in the absence of any applicable treaty provision, delay on the part of the claimant may render an application inadmissible".[136]

140. Similarly, according to a NAFTA Tribunal in *Grand River Enterprises Six Nations, Ltd et Al, v United States*: "The principle of extinctive prescription (bar of claims by lapse of time) is widely recognized as a principle of law constituting part of international law, and has been accepted and applied by arbitral tribunals".[137]

141. Authoritative legal literature also supports the contention that the passage of time is a bar to the admissibility of a claim, and that this constitutes a general principle of international law. Professor Rosseau went so far as to note a trend "en faveur de l'admission de la prescription libératoire comme principe général de droit au sens de l'article 38-39".[138] The commonality of this principle across a number of jurisdictions is stressed by a number of other scholars.[139] The legal systems of Panama and Italy are no exception in this regard. That prescription is a general principle of law is also not contested by Panama.

1. The circumstances of this case support Italy's contention

142. In *Certain Phosphate Lands in Nauru (Nauru v Australia)*, the ICJ, after noting that international law does not lay down any specific time limit with respect to extinctive

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[134] *Résolution concernant la prescription libératoire en droit international public*, in *Annuaire de l'Institute de Droit International*, Vol. 32, 1925, pp. 558 ff., p. 559, para. I.

[135] *Sarropoulos v Bulgarian State*, in *Annual Digest and Reports of Public International Law Cases*, 1927-8, Case No 173, pp. 263 ff., pp. 263-264 (**Annex AE**).

[136] *Case concerning Certain Phosphate Lands in Nauru* (fn. 84), pp. 253-254, para. 32 (**Annex AF**).

[137] *Grand River Enterprises Six Nations, Ltd, et al v. United States*, UNCITRAL, Decisions on Objection to Jurisdiction, 20 July 2006, para. 33 (**Annex AG**).

[138] ROUSSEAU, *Droit international public*, Vol. I, Paris, 1970, p. 307.

[139] HOBÉR, *Extinctive Prescription and Applicable Law in Interstate Arbitration*, Brill-Martinus Nijhoff, 2002, pp. 253-263.

prescription, decided that it is for courts and tribunals to determine, in the light of the circumstances of each case, whether the passage of time renders an application inadmissible.[140]

143. The decision on whether Panama's Claim is extinct by prescription as a matter of international law is therefore a matter for the assessment of this Tribunal, in light of the circumstances of the case. Italy contends that a number of considerations point towards the prescription of the claim as a matter of international law: a) the specific conduct of the Parties b) the fact that Panama's Claim would be prescribed as a matter of Italian law and Panamanian law; c) the prejudice that Italy would suffer if such a late claim were to be deemed admissible.

2. The acquiescent conduct of the claimant

144. Panama claims in its observations that Mr Carreyó's first communication to Italy, and the subsequent communications, "*stopped the clock as far as a time bar was concerned*".[141] Panama's position overlooks the fact that in order to be able to interrupt prescription, a claim must be validly asserted by an individual duly authorised to do so. Italy has explained above[142] why Mr Carreyó did not possess authority in this regard and refers to those arguments for the purposes of the present section.

145. Even if the Tribunal found that Mr Carreyó had authority to act on behalf of Panama, Panama is in any event precluded, at this stage, from invoking a right for compensation of the alleged damages caused by the Italian authorities. As indicated earlier, Italy received the last communication regarding the *M/V Norstar* from Mr. Carreyó on 17 April 2010. After the communication of 17 April 2010, however, Panama remained completely silent for 5 years and 7 months, before commencing proceedings against Italy only on 15 November 2015. Not a single communication regarding Panama's alleged Claim was sent to Italy over the course of this entire period of time. Italy contends that the lapse of 5 years and 7 months from the last communication to Italy before Panama's commencement of proceedings means that Panama's Claim is inadmissible by virtue of extinctive prescription.

146. The conduct of the Parties, and, in particular, the behaviour of the claimant, indeed weighs crucially on the assessment of whether a claim is extinct at the international level. This is confirmed by Article 45(b) *ASR*. It provides that "[t]he responsibility of a State may not be invoked if: … (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim".[143]

147. It appears, therefore, that the question of the inadmissibility of the claim is strictly interwoven to the question of the conduct of the claimant over time. According to the Commentary to Article 45(b) *ASR*, the conduct of the State "could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim".[144] The ILC

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[140] *Case concerning Certain Phosphate Lands in Nauru* (fn. 84), pp. 253-254, para. 32 (**Annex AF**).
[141] *Observations* (fn. 1), para. 61.
[142] Above, paras. 8-27.
[143] *ASR* (fn. 54), p. 120.
[144] *Ibidem*, p. 122, para. 6.

Commentary in other words recognizes that the conduct of a claimant State resulting in unreasonable delay could determine the extinction of the claim.

148. The emphasis on the conduct of the creditor is confirmed by scholarship. According to Rutsel Silvestre:

> [T]he conduct of the creditor over time is critical. In the first place, the delay in the presentation of the claim gives rise to a presumption against the existence of the right forming the basis of the claim. Second, it raises a presumption in favour of the defence. In other words, when this presumption arises the inquiry shifts towards the extent the party can be considered as having by reason of its conduct validly acquiesced in the lapse of the claim. This is to say that for the plea of extinctive prescription to prevail, it will be necessary to demonstrate to an international court of tribunal that for a significant period of time the creditor failed to do everything it can reasonably undertake in order to maintain its claim.[145]

149. The largely acquiescent conduct of Panama with respect to its Claim has been addressed in the section related to the prescription of the claim by acquiescence, and Italy wishes to refer the Tribunal to the arguments made above[146] also for the purposes of assessing Panama's conduct as regards the extinction of its Claim by prescription. It is sufficient to mention here that the case law quoted by Panama does not assist Panama in trying to refute Italy's position on time bar. It is true, as Panama states, that "the presentation of a claim to competent authority within proper time will interrupt the running of prescription".[147] Italy does not challenge this proposition. It challenges the interpretation that Panama gives of this proposition: indeed, even once made, a claim is still extinguished by prescription, if it not pursued in a timely manner.

150. In addition, the *Case of Certain Phosphate Lands in Nauru* is of no advantage to Panama's argument. As indicated earlier, and as Panama acknowledges, in that case, the ICJ explained that assessing if the passage of time determines the extinction of a right by prescription is a matter to be assessed in the circumstances of each case. It is inappropriate to compare, as Panama does, a claim about territorial sovereignty with a mere claim for damages.

3. The conduct of the respondent

151. In addition to the conduct of the claimant State, the overall behaviour of the parties in their mutual relationship bears on the question as to whether a claim is extinct at the international level. International case law provides examples of relevant conduct that could have an impact on the question of the extinction by way of prescription of an international claim.

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[145] RUTSEL SILVESTRE, *The Financial obligation in International Law*, Oxford, 2015, p. 605.
[146] Above, paras. 126-134.
[147] *Observations* (fn. 1), para. 61, quoting a passage from the *Gentini case*, in *Reports of International Arbitral Awards*, Vol. X, pp. 551 ff., p. 561 (**Annex AH**).

152. In the 1998 *Wet Dock of Puerto Caldera* case between Italy and Costa Rica the Arbitration Tribunal held as follows:

> On voit mal en outre comment, vu les faits de la cause résumés plus haut, la prescription pourrait être atteinte 'in casu', vu en particulier les actes interruptifs que constituraient les réclamations du Gouvernement italien […], les divers actes du Gouvernement costaricien admettant l'existence de la dette […], l'ouverture de négociations entre les deux Pays, suivies de la conclusion d'un accord d'arbitrage, tous éléments qui seraient, dans de nombreux systèmes juridiques, de nature à interrompre ou suspendre la prescription si elle avait commencé à courir.[148]

153. *The Wet Dock of Puerto Caldera* case identifies what conduct of the respondent may be relevant for the purposes of establishing whether a claim is extinct by prescription, or whether prescription has been interrupted: Italy wishes to point to the Tribunal's attention that there have been no acts by the Italian Government that admit the existence of a dispute with Panama, no negotiations have occurred between the two States with respect to the dispute, and no agreement to submit the dispute to any judicial forum has ever been discussed, much less concluded, between the Parties.

4. The alleged right of Panama is prescribed domestically

154. Panama's right to claim any damage that it may have suffered as a consequence of the conduct of Italian authorities is prescribed as a matter of Italian law. Indeed, under Article 2947 of the Italian Civil Code, "the right to claim damages is extinct for prescription after five years of the date in which the event that gave rise to the damage occurred".

155. At the very latest, even if this Tribunal should not agree with Italy's argument as to the lack of representative powers by Mr Carreyó, and even considering the date of Panama's last communication as the relevant *dies a quo,* 5 years and 7 months elapsed since the last communication by Mr Carreyó that Panama would commence proceedings within a reasonable time and the actual commencement of proceedings. Italy did not receive any communication at all between 17 April 2010 and 15 November 2015. Panama's Claim is therefore certainly extinct as a matter of Italian law.

156. The law of Panama provides even stricter terms of extinctive prescription. According to Article 1706[149] of the Civil Code of Panama, civil claims to seek damages are extinct by

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[148] *Case concerning the Loan Agreement between Italy and Costa Rica (dispute arising under a financing agreement)*, Decision, 26 June 1998, Section IV, para. 67, in *Reports of International Arbitral Awards*, Vol. XXV, pp. 21 ff., p. 72 (**Annex AI**).

[149] The provision reads as follows: "La acción civil para reclamar indemnización por calumnia o injuria o para exigir responsabilidad civil por las obligaciones derivadas de la culpa o negligencia de que trata el Artículo 1644 del Código Civil, prescribe en el término de un (1) año, contado a partir de que lo supo el agraviado. [...] Si se iniciare oportunamente acción penal o administrativa por los hechos previstos en el inciso anterior, la prescripción de la acción civil se contará a partir de la ejecutoria de la sentencia penal o de la resolución administrativa, según fuere el caso. [...] Para el reconocimiento de la pretensión civil, en ningún caso es indispensable la intervención de la jurisdicción penal" (english: "The limitation period to start civil proceeding concerning compensation for defamation libel or slander, or regarding obligations stemming from torts of

prescription after only one year. Panama's Claim to seek damages *vis à vis* Italy is therefore also extinct from the perspective of the laws of Panama.

5. The relevance of Italy's and Panama's laws on the extinctive prescription in the Panama-Italy Claim

157. Italy does not argue that a domestic statute of limitation should always bar an international claim. However, Italy contends that the *specific circumstances* of this case require that the Panamanian and Italian domestic statutes of limitation should apply in the present case and bar it internationally; in the alternative, Italy contends that the time prescribed under the domestic statutes of limitation of Italy and Panama show that Panama has acted with unreasonable delay in pursuing its claim, and that its claim is hence barred.

158. The expiration of the terms of a domestic statute of limitation bears on the ability of the claimant to pursue its claim internationally. International case law provides useful interpretative guidance with respect to the relationship between domestic and international statutes of limitation.[150]

159. Indeed, when the circumstances so require, the expiry of a domestic statute of limitation has been recognized as barring claims internationally. In *Yury Bogdanov v Moldova*, a case decided under the Moldova – Russian Federation BIT, the Sole Arbitrator, in finding that certain claims were time-barred, stated as follows:

> The Republic of Moldova has made an objection based on statutory limitation arguing that the charges for the year 2005 are time-barred. The Treaty itself does not say anything about limitation as regards claims based on the Treaty. It would, however, appear that the limitation period applying under the laws of either Contracting Party must be applicable lest claims could be made indefinitely.[151]

160. Similar reasoning applies in the instant case.

161. If the Tribunal however should find itself in disagreement with this position, and hold that the statutes of limitation of Italy and Panama are not applicable to the present case, Italy contends that the expiry of both Italy's and Panama's domestic statutes of limitation show the unreasonable delay of Panama in pursuing its Claim.

162. In *Wena Hotels Ltd. v. Arab Republic of Egypt*, for example, the ICSID Tribunal held that "municipal statutes of limitation do not *necessarily* bind a claim for a violation of an

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negligence (Article 1644), is of one year. The limitation period starts to run from the date the damage became known to the injured party. […] If a criminal or administrative proceeding is started for the above mentioned facts, the limitation period commences from the date the judgment became enforceable. […] Under no circumstances the admissibility of the civil claim is conditioned upon the existence of criminal jurisdiction").

[150] *Spader et Al. Case*, in *Reports of International Arbitral Awards*, Vol. IX, pp. 223 ff., p. 224 (**Annex AJ**).

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

international treaty before an international Tribunal".[152] The use of the adverb "necessarily" is aimed at excluding any automatism in the relationship between domestic extinctive prescription and international extinctive prescription, but confirms that there may be cases in which domestic statute of limitation should apply, given the circumstances of the case. What *Wena* also suggests, however, is that the expiry of a domestic statute of limitation should be taken into account with respect to the assessment as to whether a claim is extinct internationally because the claimant has pursued it with unreasonable delay. According to the Tribunal in *Wena* "tribunals are entitled to consider such statutes as well as equitable principles of prescription when handling untimely claims".[153]

163. In *Alan Craig v. Ministry of Energy of Iran*, the Iran-US Claims Tribunal held that "[m]unicipal statutes of limitation have not been considered as binding on claims before an international tribunal, although such periods may be taken into account by such a tribunal when determining the *effect of an unreasonable delay in pursuing a claim*".[154]

164. Italy contends that the circumstances of the present case require that Panama's Claim be considered as barred because of extinctive prescription, either because the statutes of limitations of Italy and Panama apply to the present case, or because, in the alternative, the terms indicated in the domestic statutes of limitation of both Italy and Panama signal Panama's unreasonable delay in pursuing its Claim.

165. The specific circumstances of the instant case include: a) the fact that overall 18 years have elapsed since the alleged illegal arrest of the *M/V Norstar*; b) the fact that on 17 April 2010 Panama had qualified its intention to commence proceedings against Italy, by communicating that it would do so within a "reasonable time"; c) the fact that Panama remained *completely silent* for several years *vis à vis* Italy with respect to its claim; d) the fact that Panama's Claim is a claim for damages, and that Panama was in a position to bring a claim against Italy within a reasonable time, if it so wished.

6. The prejudice to Italy if Panama's Claim were found admissible

166. In addition to the conduct of the Parties, and, in particular, that of the claimant, a claim may be barred in circumstances when its late pursuit would create an unjust prejudice to the respondent. In other words, a claim will be deemed inadmissible either because of the conduct of the Parties, and, in particular, the creditor, or when "the debtor has been seriously disadvantaged".[155] Italy does not argue that prejudice is a *condicio sine qua non* for the principle of prescription to operate, but it does argue that prejudice features amongst the circumstances that the Tribunal should also consider in assessing Panama's Claim since, as the Tribunal in the *Gentini* case found, "[t]he principle of prescription finds its foundation in the highest equity – the avoidance of possible injustice to the defendant".[156]

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[152] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 106.
[153] *Ibidem*.
[154] *Alan Craig v. Ministry of Energy of Iran*, Award No. 71-346-3, 2 September 1983, in *Iran-United States Claim Tribunal Reports*, 1983, pp. 280 ff., p. 287; emphasis added (**Annex AL**).
[155] *Ibidem*.
[156] *Gentini case* (fn. 147), p. 552; emphasis added.

167. Italy would suffer serious unjust prejudice if Panama's Claim were to be considered admissible. The Claim of Panama is a claim for damages. In Panama's calculation, damages suffered as a consequence of the allegedly illegal conduct of Italy have been accruing due to the lapse of time. However, had Panama pursued its claim diligently, including by means of the domestic mechanisms of redress available to Panama in Italy, the prejudice that derives to Italy from Panama's pursuit of the claim would have been significantly less. Italy cannot bear the consequences of the late pursuit of the claim by Panama, especially in circumstances in which all the elements necessary to Panama to bring its claim have been known to Panama.

168. If Panama's Claim for damages were to be considered admissible, the resulting principle would be that a State could hold off pursuing a claim for damages simply for the purposes of maximizing its advantage, as interest accrues, while holding a respondent State liable indefinitely. This is what Panama has indeed done.

C. Estoppel

169. Estoppel, like acquiescence and extinctive prescription, is a general principle of law within the meaning of Article 38 of the Statute of the ICJ. According to Sir Hersch Lauterpacht, estoppel "is recognised by all systems of private law"[157] and therefore, in the words of Sir Ian Brownlie, "estoppel is a general principle of international law".[158] Scholars agree that it is a principle "found in all major legal systems".[159]

170. The principle of estoppel in international law requires a State "to be consistent in its attitude to a given factual or legal situation"[160] and it "operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself".[161]

171. In the instant case, Italy has indeed relied on certain unequivocal representations previously made by Panama, and would be prejudiced if Panama were now authorised to rely on those representations against Italy.

1. Panama's representation

172. On 31 August 2004, Panama for the first time informed Italy that Mr Carreyó had powers to represent Panama in prompt release proceedings before this Tribunal. The communication by Panama dated 31 August 2004 must be read in conjunction with previous communications from Mr Carreyó. On 15 August 2001, Mr Carreyó represented in a clear

[157] LAUTERPACHT, *Private Law Sources and Analogies of International Law*, 1927, p. 204.
[158] BROWNLIE, *Principles of Public International Law*, Oxford, 2003 (6th ed), p. 616.
[159] MÜLLER, COTTIER, *Estoppel*, in BERNHARDT (ed.), *Encyclopaedia of Public International Law*, 2003, p. 118.
[160] MACGIBBON, *Estoppel in International Law*, in *International and Comparative Law Quarterly*, 1958, pp. 458 ff., p. 468.
[161] *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Judgment, 15 June 1962, Dissenting Opinion of Sir Percy Spender, in *ICJ Reports*, 1962, pp. 101 ff., pp. 143-144 (**Annex AM**).

and unequivocal manner to Italy that Panama would commence international proceedings against Italy, had Italy not released the *M/V Norstar* and paid damages to Italy within a reasonable time. Even more unequivocally, on 7 January 2002, Mr Carreyó intimated Italy to respond to his first communication, or else Panama *would institute proceedings within 21 days*. The communication by Mr Carreyó laid out a very precise and unequivocal timeframe with respect to Panama's intentions. Italy contends that such a clear declaration by Panama comports with the features of declarations that are relevant for estoppel, namely that they "must be unambiguous, at least in the sense that [they] must reasonably support the meaning attributed to it by the party raising the estoppel".[162]

2. *Italy's reliance on Panama's representation and prejudice*

173. After 31 August 2004, Italy has relied in good faith on the representation made in the two communications indicated above and in particular that Panama was supposed to bring prompt release proceedings within a very specific time frame. In the communication dated 7 January 2002, Mr Carreyó mentioned that such proceedings would be commenced 21 days after the receipt of that letter. Clearly, proceedings were never brought and it was not until 17 April 2010 that Mr Carreyó wrote again to Italy.[163] It is true that Panama "has never stated that it would not bring a claim for damages before this Tribunal". However, after 31 August 2004, it became clear to Italy that Panama intended to bring only prompt release proceedings, and that it never did so. Therefore, if the Tribunal, against Italy's contention, were to find that Panama's communication of 17 April 2010 is attributable to Panama, this still means that Panama's Claim is estopped at least until 17 April 2010, and that Panama cannot rely on its communications to Italy during that time, for the purposes of the Claim that it has now brought against Italy.

174. The nature of the prejudice is specified in paras. 166-168 above.

D. Conclusions on acquiescence, estoppel and prescription

175. In conclusion, Italy asks this Tribunal to adjudge and declare that Panama's Claim is extinct, and hence inadmissible, for acquiescence, extinctive prescription and time bar, in the terms specified above.

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[162] SINCLAIR, *Estoppel and Acquiescence*, in LOWE, FITZMAURICE (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge, 1996, pp. 104 ff., p. 107.
[163] See Letter of 15 August 2001 (fn. 5), p. 2; Letter of 7 January 2002 (fn. 6).

CHAPTER 4
CONCLUSIONS AND SUBMISSIONS

176. Italy summarises its preliminary objections to the jurisdiction of the Tribunal as follows:

(a) the case falls outside the jurisdiction of the Tribunal since there is no dispute between Panama and Italy or, in any event, Panama has failed to pursue an exchange of views under Article 283, paragraph 1, UNCLOS;

(b) the case falls outside the jurisdiction of the Tribunal since Italy is the wrong respondent in the present case and, in any event, adjudication over the Claim advanced by Panama would require the Tribunal to ascertain rights and obligations pertaining to a third State, in its absence.

177. Furthermore, Italy summarises its preliminary objections to the admissibility of Panama's Claim as follows:

(a) the Application is preponderantly, if not exclusively, one of an espousal character and the requirement of exhaustion of local remedies has not been met and, in any event, the provisions of UNCLOS invoked by Panama are not relevant to its Claim;

(b) Panama is time-barred and estopped from validly bringing this case before this Tribunal due to the lapse of eighteen years since the seizure of the Vessel and Panama's contradictory attitude throughout that time.

178. For the above reasons, Italy respectfully requests that the Tribunal adjudges and declares that:

(a) it lacks jurisdiction with regard to the Claim submitted by Panama in its Application filed with the Tribunal on 17 December 2015;

and/or that

(b) the Claim brought by Panama against Italy in the instant case is inadmissible to the extent specified in the preliminary objections.

Rome, 8 July 2016

Ms. Gabriella Palmieri, State Attorney
Agent of the Italian Republic

Note by the Registry: The following page 37 is empty and has been omitted.

CERTIFICATION

Pursuant to Articles 63(1), 64(3) and 89(4) of the Rules of the Tribunal, I hereby certify that the copies of the present written preliminary objection and of the documents annexed to it are true copies and conform to the original documents, and that the translations into English made by the Italian Republic are accurate translations.

Ms. Gabriella Palmieri, State Attorney
Agent of the Italian Republic

8 July 2016

Note by the Registry: The following page 39 is empty and has been omitted.

Annexes to the Written observations and submissions of the Republic of Italy in reply to Observations and submissions of the Republic of Panama

Annex A
Observations and Submissions of the Republic of Panama to the Preliminary Objections of the Italian Republic, 5 May 2016.

Annex B
Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary objection, 1 April 2011, *ICJ Reports*, 2011, pp. 70 ss., p. 84, para. 30 (excerpt)

Annex C
Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs, 15 August 2001.

Annex D
Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs, 7 January 2002.

Annex E
Letter sent by Mr Carreyó to the Italian Embassy in Panama, 6 June 2002.

Annex F
Written Preliminary Objections under Article 294, Paragraph 3, of the United Nations Convention on the Law of the Sea, 10 March 2016.

Annex G
Letter sent by Mr Carreyó to the Italian Embassy in Panama, 3/6 August 2004.

Annex H
Fax sent by Mr Carreyó to the Italian Embassy in Panama, 31 August 2004.

Annex I
Document of authorisation issued by the Republic of Panama in favour of Mr Carreyó to apply for prompt release procedure before ITLOS, 2 December 2000.

Annex J
Communication to the Spanish Authorities of the judgment of 13 March 2003, 18 March 2003.

Annex K
Letter of Mr Carreyó to the Italian Minister of Foreign Affairs, 17 April 2010.

Annex L
Note Verbale A.J. No. 2227 sent by the Ministry of Foreign Affairs of Panama to Italy, 31 August 2004.

Annex M
Note Verbale A.J. No. 97 sent by the Ministry of Foreign Affairs of Panama to Italy, 7 January 2005.

Annex N
Mavrommatis Palestine Concessions, Judgment, 30 August 1924, in *PCIJ Series A, No. 2*, p. 11 (excerpt).

Annex O
Application of the Republic of Panama, 16 November 2015.

Annex P
Barbados/Trinidad and Tobago, Award, 11 April 2006, para. 206 (excerpt).

Annex Q
North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal republic of Germany v. The Netherlands), Judgment, 20 February 1969, in *ICJ Reports*, 1969, p. 3 ff., p. 47, para. 85 (excerpt).

Annex R
Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, 12 October 1984, in *ICJ Reports*, 1984, p. 246 ff., p. 299, par. 112(1) (excerpt).

Annex S
Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 25 September 1997, in *ICJ Reports*, 1997, pp. 7 ff., para. 79 (excerpt).

Annex T
Xhavara and Others v. Italy and Albania, application no. 39473/98, 11 January 2001.

Annex U
Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question, 15 June 1954, *ICJ Reports*, 1954, pp. 19 ss., p. 33 (excerpt).

Annex V
Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application, 26 November 1984, *ICJ Reports*, 1984, pp. 392 ss., p. 431, para. 88 (excerpt).

Annex W
Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening), Application to Intervene by Nicaragua (excerpt).

Annex X
Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, 26 June 1992, *ICJ Reports*, 1992, pp. 240 ss., p. 261, para. 55 (excerpt).

Annex Y
Case concerning East Timor (Portugal v. Australia), Merit, 30 June 1995, *ICJ Reports*, 1995, pp. 90 ss., p. 102, para. 29 (excerpt).

Annex Z
Interhandel (*Switzerland v. United States of America*), Preliminary Objections, Judgment, 21 March 1959, in *I.C.J. Reports*, 1959, pp. 6 ff., p. 27 (excerpt).

Annex AA
Case concerning Elettronica Sicula S.p.A. (ELSI), Judgment, 20 July 1989, *I.C.J. Reports*, 1989, pp. 15 ff., pp. 42-43, paras. 50-51 (excerpt).

Annex AB
Affaire de Grisbadarna, Judgment, 23 October 1909, in *Reports of International Arbitral Awards*, Vol. XI, pp. 147 ff., p. 161-162 (excerpt).

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

Annex AD
Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 105 (excerpt).

Annex AE
Sarropoulos v Bulgarian State, in *Annual Digest and Reports of Public International Law Cases*, 1927-8, Case No 173, pp. 2463ff., pp. 263-264 (excerpt).

Annex AF
Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, 26 June 1992, *ICJ Reports*, 1992, pp. 240 ss., pp. 253-254, para. 32 (excerpt)

Annex AG
Grand River Enterprises Six Nations, Ltd, et al v. United States, UNCITRAL, Decisions on Objection to Jurisdiction, 20 July 2006, para. 33 (excerpt).

Annex AH
Gentini case, in *Reports of International Arbitral Awards*, Vol. X, pp. 551 ff., p. 561 (excerpt).

Annex AI
Case concerning the Loan Agreement between Italy and Costa Rica (dispute arising under a financing agreement), Decision, 26 June 1998, Section IV, para. 67, in *Reports of International Arbitral Awards*, Vol. XXV, pp. 21 ff., p. 72 (excerpt).

Annex AJ
Spader et Al. Case, in *Reports of International Arbitral Awards*, Vol. IX, pp. 223 ff., p. 224 (excerpt)

Annex AK
Yury Bogdanov, citizen of the Russian Federation v. Republic of Moldova, SCC Case No. 114/2009, Award, 30 March 2010, para. 94 (excerpt).

Annex AL
Alan Craig v. Ministry of Energy of Iran, Award No. 71-346-3, 2 September 1983, in *Iran-United States Claim Tribunal Reports*, 1983, pp. 280 ff., p. 287 (excerpt).

Annex AM
Case concerning the Temple of Preah Vihear (Cambodia v Thailand), Judgment, 15 June 1962, Dissenting Opinion of Sir Percy Spender, in *ICJ Reports*, 1962, pp. 101 ff., pp. 143-144 (excerpt).