INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD FROM 10 TO 15 SEPTEMBER 2018

The M/V "Norstar" Case (Panama v. *Italy),*
Merits

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
TENUES DU 10 AU 15 SEPTEMBRE 2018

Affaire du navire « Norstar » (Panama c. Italie),
fond

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Minutes of the Public Sittings held from 10 to 15 September 2018

Procès-verbal des audiences publiques tenues du 10 au 15 septembre 2018

10 September 2018, a.m.

PUBLIC SITTING HELD ON 10 SEPTEMBER 2018, 10 A.M.

Tribunal

Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

Panama is represented by:

Dr Nelson Carreyó Collazos Esq.
LL.M, Ph.D., ABADAS (Senior Partner), Attorney at Law, Panama,

as Agent;

and

Dr Olrik von der Wense,
LL.M., ALP Rechtsanwälte (Partner), Attorney at Law, Hamburg, Germany,

Mr Hartmut von Brevern,
Attorney at Law, Hamburg, Germany,

as Counsel;

Ms Mareike Klein,
LL.M., Independent Legal Consultant, Cologne, Germany,

Dr Miriam Cohen,
Assistant Professor of International Law, Université de Montréal, Member of the Quebec Bar, Montreal, Canada,

as Advocates;

Ms Swantje Pilzecker,
ALP Rechtsanwälte (Associate), Attorney at Law, Hamburg, Germany,

Mr Jarle Erling Morch,
Intermarine, Norway,

Mr Arve Einar Morch,
Manage, Intermarine, Norway,

as Advisers.

Italy is represented by:

Mr Giacomo Aiello,
State Attorney, Italy,

as Co-Agent;

and

Dr Attila Tanzi,
Professor of International Law, University of Bologna, Italy, Associate Member - 3VB Chambers, London United Kingdom,

as Lead Counsel and Advocate;

Dr Ida Caracciolo,
Professor of International Law, University of Campania "Luigi Vanvitelli", Caserta/Naples, Member of the Rome Bar, Italy,

Dr Francesca Graziani,
Associate Professor of International Law, University of Campania "Luigi Vanvitelli", Caserta/Naples, Italy,

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

as Counsel and Advocates;

Dr Gian Maria Farnelli,
University of Bologna, Italy,

Dr Ryan Manton,
Associate, Three Crowns LLP, Member of the New Zealand Bar,

as Counsel;

Mr Niccolò Lanzoni,
University of Bologna, Italy,

Ms Angelica Pizzini,
Roma Tre University, Italy,

as Legal Assistants.

AUDIENCE PUBLIQUE TENUE LE 10 SEPTEMBRE 2018, 10 H 00

Tribunal

Présents : M. PAIK, *Président* ; MM. NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, Mme KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mme LIJNZAAD, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier.*

Le Panama est représenté par :

M. Nelson Carreyó Collazos,
LL.M., docteur en droit, ABADAS (associé principal), avocat (Panama),

comme agent ;

et

M. Olrik von der Wense,
LL.M., ALP Rechtsanwälte (associé), avocat, Hambourg (Allemagne),

M. Hartmut von Brevern,
avocat, Hambourg (Allemagne),

comme conseils ;

Mme Mareike Klein, LL.M.,
conseil juridique indépendant, Cologne (Allemagne),

Mme Miriam Cohen,
professeure assistante de droit international, Université de Montréal, membre du barreau de Québec, Montréal (Canada),

comme avocates ;

Mme Swantje Pilzecker,
ALP Rechtsanwälte (collaboratrice), avocate, Hambourg (Allemagne),

M. Jarle Erling Morch,
Intermarine (Norvège),

M. Arve Einar Morch,
gérant, Intermarine (Norvège),

comme conseillers.

L'Italie est représentée par :

M. Giacomo Aiello,
procureur général (Italie),

comme co-agent ;

et

M. Attila Tanzi,
professeur de droit international, Université de Bologne (Italie), membre collaborateur, 3VB Chambers, Londres (Royaume-Uni),

comme conseil principal et avocat ;

Mme Ida Caracciolo,
professeure de droit international, Université de Campanie « Luigi Vanvitelli », membre du barreau de Rome (Italie),

Mme Francesca Graziani,
professeure associée de droit international, Université de Campanie « Luigi Vanvitelli »,

M. Paolo Busco,
membre du barreau de Rome, *European Registered Lawyer* auprès du barreau d'Angleterre et du Pays de Galles, 20 Essex Street Chambers, Londres (Royaume-Uni),

comme conseils et avocats ;

M. Gian Maria Farnelli,
Université de Bologne (Italie),

M. Ryan Manton,
avocat collaborateur, Three Crowns LLP, Londres (Royaume-Uni), membre du barreau de Nouvelle-Zélande,

comme conseils ;

M. Niccolò Lanzoni,
Université de Bologne (Italie),

Mme Angelica Pizzini,
Université Rome 3 (Italie),

comme assistants juridiques.

Opening of the Oral Proceedings

[ITLOS/PV.18/C25/1/Rev.1, pp. 1–3; TIDM/PV.18/A25/1/Rev.1, pp. 1–4]

THE PRESIDENT: Good morning. I wish to welcome you to this hearing.

The Tribunal meets today pursuant to article 26 of its Statute to hear the Parties' arguments on the merits of the *M/V "Norstar" Case.*

At the outset, I wish to note that Vice-President Attard is prevented from sitting on the bench during this hearing for reasons duly explained to me.

By Application filed in the Registry of the Tribunal on 17 December 2015, the Republic of Panama instituted proceedings against the Italian Republic in a dispute concerning the arrest and detention of the *M/V "Norstar"*, a Panamanian-flagged vessel.

On 11 March 2016, Italy raised preliminary objections to the jurisdiction of the Tribunal and to the admissibility of Panama's Application pursuant to article 97, paragraph 1, of the Rules of the Tribunal. On 4 November 2016, the Tribunal delivered its Judgment on the preliminary objections. In its Judgment, the Tribunal found that it has jurisdiction to adjudicate upon the dispute and that the Application filed by Panama is admissible.

I now call on the Registrar to summarize the procedure relating to the merits of the case.

LE GREFFIER : Merci, Monsieur le Président. Par ordonnance du 29 novembre 2016, le Président du Tribunal a respectivement fixé au 11 avril 2017 et 11 octobre 2017 les dates de présentation du mémoire du Panama et du contre-mémoire de l'Italie. Le mémoire et le contre-mémoire ont été déposés dans les délais prescrits.

Par ordonnance du 15 novembre 2017, le Tribunal a autorisé la soumission d'une réplique par le Panama et d'une duplique par l'Italie et a fixé les dates d'expiration des délais de dépôt de ces pièces respectivement aux 28 février 2018 et 13 juin 2018. La réplique et la duplique ont été déposées dans les délais prescrits.

Je vais à présent donner lecture des conclusions des Parties.

(Continues in English) In paragraph 593 of its Reply, Panama makes the following submissions:

> Panama requests the Tribunal to find, declare, and adjudge
>
> First: that by ordering and requesting the arrest of the *M/V "Norstar"*, in the exercise of its criminal jurisdiction and application of its customs laws to bunkering activities carried out on the high seas, Italy has thereby prevented its ability to navigate and conduct legitimate commercial activities therein, and that by filing charges against the persons having an interest on the operations of this Panamanian vessel, Italy has breached
>
> 1. the right of Panama and the vessels flying its flag to enjoy freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as set forth in article 87(1) and (2) and related provisions of the Convention; and
>
> 2. other rules of international law that protect the human rights and fundamental freedoms of the persons involved in the operation of the *M/V "Norstar"*;
>
> Second: that by knowingly and intentionally maintaining the arrest of the *M/V "Norstar"* and indefinitely exercising its criminal jurisdiction and the application of its customs laws to the bunkering activities it carried out on the high seas, Italy acted contrary to international law, and breached its obligations to act in good faith and in a manner which does not constitute an abuse of right as set forth in article 300 of the Convention;

Third: that as a consequence of the above violations, Italy is responsible to repair the damages incurred by Panama and by all the persons involved in the operation of the *M/V "Norstar"* by way of compensation amounting to twenty-six million four hundred ninety-one thousand five hundred forty-four U.S. dollars 22/100 (USD26.491.544.22) plus 145.186,68 EUR with simple interest; and

Fourth: That as a consequence of the specific acts on the part of Italy that have constituted an abuse of rights and a breach of the duty of good faith, as well as based on its procedural conduct, Italy is also liable to pay the legal costs derived from this judicial action.

Italy, in paragraph 226 of its Rejoinder, makes the following submission:

Italy requests the Tribunal to dismiss all of Panama's claims according to the arguments that are articulated above.

By order dated 20 July 2018, the President fixed 10 September 2018, that is today, as the date for the opening of the hearing.

Pursuant to the Rules of the Tribunal, copies of the written pleadings are being made accessible to the public as of today. They will be placed on the Tribunal's website. The hearing will also be transmitted live on this website.

Mr President.

THE PRESIDENT: Thank you, Mr Registrar.

The first round of the hearing will begin today and will close on Thursday, 13 September 2018. The second round of the hearing will take place on Friday, 14 September 2018 and Saturday, 15 September 2018.

At this morning's sitting, Panama will present the first part of its oral argument until one o'clock and there will be a 30-minute break between 11.30 and noon.

I note the presence at the hearing of Agents, Counsel and Advocates of the Parties.

First, I call on the Agent of Panama, Mr Nelson Carreyó, to introduce the delegation of Panama.

MR CARREYÓ: Good morning to everybody. Thank you, Mr President. May I introduce them, and I would like them to stand up to make sure we see who she or he is: Ms Mareike Klein, Advocate from Cologne, Germany; Dr Miriam Cohen, Advocate, in Canada, Montreal; Dr Olrik von der Wense, who is an Attorney at Law here in Hamburg; Ms Swantje Pilzecker, also an Attorney, Counsel, here in Hamburg; Mr Hartmut von Brevern, Attorney at Law, Hamburg, Germany, and Mr Jarle Erling Morch, from Intermarine, Norway.

THE PRESIDENT: Thank you, Mr Carreyó.

I now call on the Co-Agent of Italy, Mr Giacomo Aiello, to introduce the delegation of Italy.

MR AIELLO: Mr President Paik, Members of the Tribunal, it is an honour and a privilege to appear before you today for the first time and to do so as Co-Agent of my Country, Italy, in the merits phase of this litigation brought by the Republic of Panama against Italy.

Mr President, allow me also to express my warmest congratulations on your election as President of this honourable Tribunal, together with my highest esteem and consideration for you and the Members of the Tribunal. Italy has a longstanding history of compliance with international law and respect of the institutions of the international community. My country has full confidence in the role of international adjudication, as evidenced by its continued

acceptance of the Tribunal's compulsory jurisdiction ever since its establishment. It is on the basis of this confidence that Italy takes part in the merits phase of these proceedings in a co-operative spirit in the interest of justice and its administration by this honourable Tribunal.

With your permission, Mr President, I shall now briefly introduce the members of the delegation representing Italy before your Tribunal: Professor Attila Tanzi, Lead Counsel; Professors Ida Caracciolo and Francesca Graziani, also Counsel; and Mr Paolo Busco, lawyer, also Counsel. The names and titles of the other members of the Italian delegation have already been duly communicated to the Tribunal.

This ends my brief presentation, Mr President. I thank you for your attention.

THE PRESIDENT: Thank you, Mr Aiello.

I now give the floor to the Agent of Panama, Mr Carreyó, to make his statement.

First Round: Panama

STATEMENT OF MR CARREYÓ
AGENT OF PANAMA
[ITLOS/PV.18/C25/1/Rev.1, pp. 3–10]

Dear honourable Judges of this high Tribunal, Registrar, and members of the Italian delegation, distinguished personnel of the support technical aspects and the interpreters, I thank God I am here today and I am honoured to have the opportunity to represent Panama in this case. According to the agenda of Case 25 between Panama and Italy, concerning the *M/V "Norstar"*, Panama opens this first round of its oral arguments by introducing its main parts starting with respectfully reminding the Tribunal of the proven facts and how those facts are subsumed within articles 87 and 300 of the Convention, and how Italy breached them.

In the second part of this first round, Panama will also call the witnesses, Mr Silvio Rossi, who will be examined by me; Mr Arve Morch, who will be examined by Advocate Miriam Cohen, and Captain Tore Husefest, who will be examined by Advocate Mareike Klein.

After the examination of these three witnesses, and regarding article 87, paragraph 1, Panama will refer, firstly, to the location of activities for which the *"Norstar"* was arrested and, secondly, to the location of the arrest, as well as how this reflects that such arrest was unjustified.

Panama will also refer to the principle that an arresting State seizes at its own peril, raising the Italian reference to the *"Norstar"* as a *corpus delicti* and why this description does not apply to these proceedings.

We will then turn to the other rules of the Convention that refer to the right to freedom of navigation, in order to clarify the nature and extent of the violation of article 87.

We will also explain why article 87, paragraph 2, applies universally, and so is not binding only on Panama, as Italy has suggested, before concluding this part by explaining how and why the rule of *effet utile* is applicable to this case.

Panama will also analyze some of the violations of article 300 and its rules of good faith and abuse of rights. It will be argued that Italy did not act in good faith by delaying the arrest, thus involving both acquiescence and estoppel; that Italy has been inconsistent when referring to the location of the *"Norstar"'s* activities as the basis for the arrest, and that Italy ordered and executed a premature arrest by not taking into account the requirements of a precautionary measure. This will end the first part of our first round of oral arguments.

The second part of this first round will be initiated by Advocate Mareike Klein, who will continue examining the acts of Italy that have failed to represent good faith, particularly by using silence as a tacit defensive strategy, including an intentional refusal to reply to all of Panama's attempts to communicate prior to this case being brought before this court, by not disclosing all relevant information, by contradicting its own previous conduct, and by blaming others such as Spain and Panama for its own inaction concerning its unfulfilled promise to effectively return the vessel and its absolute lack of compliance with its duty to provide maintenance for the *M/V "Norstar"*, as well as by intending to take advantage of its own wrong.

Advocate Dr Miriam Cohen will then cover the subjects of abuse of rights, the human rights violations that have ensued, their influence on the damages quantum, the condition of the *"Norstar"*, the alleged non-compliance of Italy with its own order to execute the release of the *M/V "Norstar"*, which Italy has subsequently blamed Panama and the shipowner for, both in 1999 and in 2003.

Before deposing an expert on the proper amount of reparation in such a case, Dr Cohen will briefly refer to what constitutes the onus of proof, and how the principles of alleged contributory negligence and duty to mitigate damages claims apply to this case.

Panama will end its first round of oral statements by allowing Dr Olrik von der Wense to examine Mr Horacio Estribi, a Panamanian economic expert, followed by a presentation concerning the amount of reparation by way of damages.

With these concepts in mind, Panama will ask the Tribunal to declare that, by arresting the *"Norstar"* while in the territory of a third State, by confiscating and keeping this vessel under its jurisdiction for an indefinite period, by bringing unsubstantiated charges against persons having an interest in its operations, Italy improperly curtailed the *"Norstar"'s* free navigation and commercial activities, thereby breaching the right of Panama to enjoy the right to freedom of navigation and other international lawful uses of the sea, as set forth in paragraphs 1 and 2 of article 87 and related provisions of the Convention; breached its duty to act in good faith; and committed an abuse of rights as set forth in article 300.

Let us review the facts.

The facts on which Panama has based the above main submissions are that between 1994 and 1998 the *M/V "Norstar"* bunkered on the high seas without any interference by the Italian authorities.

Italy then suddenly and unjustifiably started treating such activity as "criminal association aimed at smuggling and fraud", and on 11 August 1998 the Public Prosecutor of the Court of Savona issued a Decree of Seizure against the *M/V "Norstar"* in the context of criminal proceedings against several individuals linked to the operation of the vessel for the alleged crimes of smuggling and tax evasion.

The Decree ordered the seizure of the *"Norstar"* as a "*corpus delicti*" for the alleged criminal offences of smuggling and tax evasion and tax fraud, and in September of the same year this order was carried out by Spain, at the request of Italy, while the vessel was in Spanish waters.

In so doing, Italy made a complete confiscation of the *"Norstar"* and its effects, thus completely removing its freedom to navigate and conduct legitimate business on the high seas.

I would now like to start by recalling the ICJ's Advisory Opinion in the case of *Treatment of Polish Nationals in Danzig*, which says that

> while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law … , on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.

With this in mind, Panama will continue to refrain from addressing any of the Italian legal provisions, but will use only its judgments as elements of evidence before this Tribunal.

Having said that, Panama will also respectfully remind the Tribunal that Italy has contested the submissions by Panama by saying that the right to freedom of navigation was not breached, because the arrest of the *"Norstar"* was based on investigations of crimes occurring *within* Italy.

We will therefore firstly refer to the location of the acts investigated as the *locus* of the acts.

The other Italian argument to sustain that article 87 had not been breached by the arrest was that the arrest took place in the port of a third State.

We will therefore refer, secondly, to this aspect as the *locus* of the arrest.

In paragraph 7 of its Counter-Memorial, Italy's argument is: "an extraterritorial exercise of jurisdiction that does not determine any physical interference with the movements of a ship on the high seas … does not breach article 87".

In paragraph 3(e) of its Rejoinder, Italy also stated that "freedom of navigation does not entail freedom of a legally detained vessel to reach the high seas".

Panama contends that with these statements Italy has expressly admitted the exercise of its jurisdiction extraterritorially.

Panama will then reaffirm that by ordering the arrest of the *"Norstar"* for bunkering activities on the high seas, and while it was in a foreign port, Italy first exercised its extraterritorial jurisdiction, and, secondly, that by so doing Italy did indeed breach article 87 of the Convention.

Panama will remind Italy that the exercise of one's jurisdiction represents the execution of authority to adjudicate and enforce the seizure of persons or assets, and that this is, in international law, almost exclusively territorial. Such authority may only be exercised within a nation's own territory unless there is authorization granted by the relevant flag States, or by a special exemption under international law.

In cross-border criminal proceedings, the question is not what the law applicable to a particular country is – because this is always *lex fori* – but whether that law can control extraterritorial conduct.

By continuing to differentiate, as elements of the arrest, between the Decree of Seizure and the request for its execution, on the one hand, and the actual execution of that Decree, on the other, Italy has ignored, all along its pleadings, what this Tribunal clearly stated in paragraph 165 of its Preliminary Objection Judgment by saying that "the Decree of Seizure and the request for its enforcement by Italy were central to the eventual arrest of the vessel. It is clear that without the Decree of Seizure, there would have been no arrest".

In sum, this means that this Tribunal has clearly characterized the order of arrest, its request for enforcement and its execution, as one under Italian jurisdiction.

Panama continues to take issue with some of the attempts by Italy to circumscribe its arguments.

For example, Italy has also indicated that any reference made by Panama to the Italian judgments is "misplaced" because the focus of the investigations of the Tribunal is the Decree of Seizure and not these judgments.

In response, Panama would like to reiterate strongly, firstly, that the Italian judgments and its reasoning cannot be disassociated from the Decree of Seizure because such judgments reflect the final outcome of the Italian decision that is at the root of this case; and secondly, that such references are made only because those judgments have formed an important part of the documentary evidence that demonstrates how Italy breached article 87.

Italy has also falsely accused Panama of stating that Italy's judiciary "acted under an erroneous premise".

Panama did not accuse the Italian courts of any error, because it was the Italian judiciary itself that described the arrest in this way. The Italian conduct may have been either intentional or inadvertent. What cannot be contested is that the Italian judiciary found that its Prosecutor acted under the misguided assumption that a crime had been committed through the *M/V "Norstar"* in its territory.

That the learned Judges of this Tribunal confirmed that the Italian judiciary found that no crime had been committed indicates that the claim that Panama has falsely accused Italy in this regard is completely unfounded.

Italy has also argued at paragraph 8 of its Rejoinder that "no Italian court found that the arrest of the *Norstar* was unlawful, but simply that the material elements of the crimes allegedly committed also through the *Norstar* were not integrated."

However, it seems that Italy does not understand the meaning and results of its revocation of such arrest because its unlawfulness is a natural consequence of the reversal of the arrest order by the Italian authorities themselves.

Besides, the revocation order neither nullifies nor rectifies the wrongful act, particularly since no compensation has been offered.

As to whether the "material elements of the crimes" were integrated or not, Italy has failed to identify which elements of the crimes it is referring to.

In fact, the lack of integration of the material elements of the crimes to which Italy refers not only reaffirms their nonexistence but also confirms that the only reason Italy arrested the *"Norstar"* was the presumption rather than the actual occurrence, of a crime.

Article 87 has been breached because Italy decided to impede the *"Norstar"'s* right to navigate back to the high seas while postulating a crime that it knew, or should have known, had not occurred, because the *locus* where its activities had been carried out was the high seas.

Therefore, we can conclude that the *"Norstar"*'s freedom of navigation was curtailed by an arrest order without justification.

Panama reaffirms that the freedom of navigation protected by article 87 has been overtly hindered by Italy, not only by preventing the *"Norstar"* from regaining access to the high seas but also by deciding that the bunkering activities it carried out on the high seas were not supported by the international law of the sea in the first place. In short, if Italy had respected this provision, it would not have ordered the arrest of this vessel.

Italy has argued that if the Italian courts had "thought" that the arrest of the *"Norstar"* was unlawful because it constituted an extraterritorial exercise of Italian jurisdiction, the consequence would not have been an acquittal but a declination of their jurisdiction.

Specifically, in paragraph 27 of its Rejoinder, Italy stated that if Panama's argument about the *locus* of the activities were true, its courts would have "declined jurisdiction", citing its Criminal Code, which precisely prohibits any application of its laws to acts committed outside Italian territory.

However, that Italy did not decline jurisdiction does not mean that the seizure is supported by international law.

Concerning the *locus* of the activities for which the *"Norstar"* was arrested, Panama would like to stress that in paragraph 6 of its judgment the Court of Savona concluded first, that "before asserting any kind of criminal liability, a preliminary test is needed as to where the provision of supplies occurred because if it took place outside the line of territorial waters no one of the offences charged does actually exist".

The court went on to say that "[a]s it came to light that the provision of supplies has always taken place offshore according to the Prosecution's arguments ..., the offences … shall be regarded as unsubstantiated and consequently this leads to the defendants' acquittal" and that "the purchase of fuel intended to be stored on board by leisure boats outside the territorial sea … shall not be subject to payment of import duties."

Despite this, Italy has asserted in paragraph 29 of its Rejoinder that the legality of the arrest under article 87 must be assessed on the basis of the requirements of that same provision, and not under the prism of whether the alleged crimes were found to have been actually committed. In fact, Italy itself has stated that the arrest could have been made in violation of article 87 if the alleged crimes were found to have occurred. However, this is not what actually transpired, so we are not here to elucubrate this.

Panama maintains that Italy's defence against the claim that the arrest of the *"Norstar"* breached article 87 has been, and still is, revolving around a crime that it was only *suspected* of committing in Italy, and which served as the basis for the arrest.

However, what is more important at this moment is that the Italian argument is highly contradictory. As we have just seen, in its Rejoinder Italy stated that the legality of the arrest under article 87 should not be seen under the prism of whether a crime had been committed. Italy used this same argument throughout its Counter-Memorial, where it also stated that the arrest was based on the commission of the crimes of smuggling and tax evasion.

When Panama argued that the arrest was made, instead, for bunkering activities on the high seas, Italy repeatedly objected, arguing for instance in paragraph 3 of its Counter-Memorial that "the plain text of the relevant judgments demonstrates that ... the *M/V "Norstar"* was instead arrested in connection with the suspected crimes of smuggling and tax evasion."

The same idea was repeated in paragraphs 117 and 151 of that same document, where Italy stated again that "[t]he *M/V 'Norstar'* had been arrested and detained not because of its bunkering activity, but because it was *corpus delicti* of the crimes of smuggling and tax evasion" and because it was "allegedly part of a unitary criminal plan concerning the commission of the crimes of tax evasion and smuggling".

Thus, according to Italy, the *"Norstar"* was arrested for crimes that were not committed. This faulty line of reasoning cannot be used to argue that there was no breach of the *"Norstar"*'s freedom of navigation. It is important that all parties respect the fact that the freedom of navigation is *also* an obligation of result.

Italy has been trying to separate the facts about the location of the *"Norstar"*'s operations on the high seas from the crimes of smuggling and tax fraud in order to disassociate itself from its breach of article 87, but such a strategy does not negate the facts because of their unity.

That the *"Norstar"* was, one, bunkering on the high seas, and, two, arrested on suspicion of participating in smuggling and tax fraud in spite of such location of its operations are facts that Italy has accepted, and they may not be separated to benefit either of the Parties in this case.

They are a factual unit because both elements were taken into account when Italy decided to arrest the *"Norstar"*; both led to the jurisdictional action of Italy, and both form the basis for the present dispute as well.

Being about ten thirty in the morning, and after this brief introduction, Mr President, we will kindly ask you to call our first witness, Mr Silvio Rossi, for his examination. Thank you.

THE PRESIDENT: Thank you, Mr Carreyó.

Examination of witnesses
[ITLOS/PV.18/C25/1/Rev.1, p. 10]

THE PRESIDENT: Now I understand that Panama wishes to examine a witness.

Before proceeding to the examination of the first witness called by Panama, and in light of the fact that both Parties will call several experts and witnesses, I wish to explain briefly the procedure that is to be followed in this regard.

Pursuant to article 80 of the Rules of the Tribunal, a witness or expert shall remain out of court before testifying. Only after a Party signals to me that it intends to call a witness or expert, I will invite the witness or expert to enter the courtroom. Once the witness or expert has taken his or her place, the Registrar will ask the witness or expert to make the solemn declaration in accordance with article 79 of the Rules of the Tribunal. Different declarations are to be made by witnesses and experts, as set out in subparagraphs (a) and (b) of article 79 respectively.

Under the control of the President, witnesses and experts will be examined first by the Agent, Co-Agent or Counsel of the Party who has called them. After that, the other Party may cross-examine the witness or expert. If a cross-examination takes place, the Party calling the witness or expert will, when the cross-examination is concluded, be asked if it wishes to re-examine. I wish to emphasize that a re-examination shall not raise new issues but shall limit itself to the issues dealt with in cross-examination.

Thereafter, if the Tribunal wishes to put questions to the witness or expert, questions will be posed by the President on behalf of the Tribunal, or by individual Judges. After that, or if the Tribunal does not wish to put questions, the witness or expert will be allowed to withdraw.

In accordance with article 86, paragraph 5, of the Rules of the Tribunal, witnesses and experts will also have the opportunity to correct the verbatim record of their testimony produced by the Tribunal. However, in no case may such corrections affect the meaning and scope of the testimony given.

EXAMINATION OF MR SILVIO ROSSI
BY MR CARREYÓ (PANAMA)
[ITLOS/PV.18/C25/1/Rev.1, pp. 10-16]

THE PRESIDENT: Now, Mr Carreyó, once again, could you confirm that you intend to examine a witness?

MR CARREYÓ: Yes, your Honour.

THE PRESIDENT: Thank you, Mr Carreyó. The Tribunal will then proceed to hear the witness, Mr Silvio Rossi. He may now be brought into the courtroom.

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

(The witness made the solemn declaration)

Thank you, Mr Registrar.

I give the floor to Mr Carreyó to start the examination of the witness.

MR CARREYÓ: Thank you, Mr President.

Mr Rossi, you have been called as a witness in this case. Would you please introduce yourself and let this Tribunal know if you are familiar with the facts of this case, and give us a brief on why you became involved with the facts of this case.

MR ROSSI: Yes. Good morning to everybody. My name is Silvio Rossi. I am still president of the company Rossmare International, which is a company that was involved in this issue. Rossmare International is a trading company active in bunkering worldwide, specializing in supplying fuel to mega yachts. In 1993, with the single market in the EU, it happened that France and Italy became one single customs territory. As I said before, we supplied fuel worldwide but our main business, of course, is in our area, which is the north-west of Italy in the Ligurian Sea. My town is just in the Italian Riviera, and the Italian Riviera and French Riviera together are the main place for mega yachts.

With the completing of the single market, on the contrary of the other part of Italy, we could not supply duty-free fuel to yachts anymore, so we lost 70 per cent of our business. For this reason I thought, in order to re-establish a kind of equal situation, equal opportunity between us and all the other competitors, to start offshore bunkering in this area, in the north-west of the Ligurian Sea. For this reason I checked which were the most important companies operating this kind of business in the world, and I found that in Denmark there was a company called OW, who were the leader in the offshore bunkering of Denmark, so I went to Aalborg, which was the main office of this company, and speaking with the owner of the company, Mr Sorensen, we decided to start a new kind of business like that in the Mediterranean. For this reason the first year, the first time in 1993, Mr Sorensen sent a boat, a tanker, of his fleet – the name was *"Sijla"* – and we started this kind of operation.

Since the business for him was not so good, he said me that it was not going to continue the next year, and by chance I was in Malta and speaking with a colleague of mine from Malta. He introduced me to Mr Morch and, all together, we decided to start again offshore bunkering with a boat *"Norstar"*. That was the time I met Mr Morch.

MR CARREYÓ: I understand you said that the ports of the north of Italy were affected.

MR ROSSI: Yes.

MR CARREYÓ: Why were they affected?

MR ROSSI: I am sorry. Okay, I can say that now. In our customs book – and our customs book is big; it is like this *(showing a book)* – there is four articles that concern the naval provision: no 252, no 253, no 254, and 255. The first article, 252, describes which kind of goods, which kind of products can be considered naval provision, which actually are the goods, the products, that they need to run a ship, such as, for example, the food for the crew members or the spare parts, but the main product that needs a ship to run is the fuel. So the fuel is included in naval provision.

Then there are the two articles 253 and 255. They concern the consumption of the naval provision. Article 254 concerns the supply and, in the supply of the naval provision that for the commercial ship is absolutely duty-free, there is a clause regarding the yacht, the pleasure boat, and this clause gives the possibility to supply duty-free fuel to those yachts on the condition that within 8 hours they leave the port and they set sail for a non-Italian port, a foreign port, and when the boat arrives at the foreign port the captain has to stamp a kind of paper that we give during, after the supply. It is called *giornale partenze e arrivi* – it is a kind of logbook – in order to demonstrate that the boat arrived in the foreign port. And with this demonstration ultimately the fuel that was national and exported becomes foreign fuel. This is very important to know, foreign fuel, because with foreign fuel customs law enters in function. So the boat can go back, can use this fuel, either in international waters, of course, but for article 255 and 253 of the customs book, it can consume the fuel either in the waters and in certain conditions also in the port. In the port, 99.9 per cent, they do not use fuel because they plug in and they get electricity from the shore, so we can say that the fuel is only consumed in the international waters, in open sea, or in the national waters. Legally.

Why we are affected? We are affected because from my area the nearest foreign port westward was Gibraltar, 800 NM; southward, Malta – at that time it was not in Europe, and to Malta it is another 800 NM more or less. On the contrary, all the other parts of Italy, the south, they had Malta near and they had Tunisia. In the east, all the ports of east Italy, the Adriatic Sea, they had the former Yugoslavia and Albania just in front of them. So the only area that was affected by this new situation in Europe was my area. That is why, in order to re-establish a kind of equal opportunity, we started this kind of business.

MR CARREYÓ: Mr Rossi, are you related to the operation named Rossmare International? If this is true, will you tell us what is your relationship with that corporation and whether that corporation has something to do with this case and the police officers?

MR ROSSI: Yes.

MR CARREYÓ: Of the customs …

MR ROSSI: Okay. We always had a good relationship with the police, with the custom office, because we are also a physical supplier locally. We supply fishing craft, we supply dredgers, tug boats, so at that time it was not the telematics system like now, so every operation that we used to do was at the custom house, so there was a friendly relationship with the people from the custom house, and also I have to say that my office was just 30 metres away, the same street, just 20 metres near the custom building.

Of course, we had a good relationship. I always keep them aware about what we are doing, and also, in addition to supplying fishing craft and tug boats, we used to supply and we still supply the little fleet of the fiscal police and the little fleet of the coastguard. So there was

good cooperation, and in order to cooperate with them I used to give the position of the boat and the arrival of the boat to the chief of the fleet, every time the boat, the tanker, was coming and the time the tanker was going, so they were aware about our operations, and our operations they were really – everybody knew because there was advertisement. They were very noted by everybody. There was nothing hidden.

MR CARREYÓ: Mr Rossi, Can you describe the bunkering operations or activities in which you and the *"Norstar"* were involved and if you ever informed the Custom *brigada* about its position?

MR ROSSI: As I said before, we are a bunker trading company, so what is our business? We have some clients – as said before, specialized in mega yachts – and these mega yachts sail all over the world; and we have in any part of the world connection with local suppliers.

I give you an example. If the boat goes to Panama, in Panama we have a couple of local suppliers. If the boat needs, for example, 50,000 litres, my people call the local supplier. They establish a price with them, and usually we have 30 days of credit line. We send a nomination in which we write the quantity, price agreed, and terms and conditions of payment, and they supply our client. Then, when they get the fuel receipt, the delivery receipt, they send off the invoice, as agreed, and with the fuel received we put our profit on what we paid, and we invoice our client. This happens all over the world.

In this case, it was exactly the same because a tanker in the middle of the sea, in international waters – and this boat was 22/23 miles off the coast, so it was far, far away from the border of the national waters – it was the same situation because, having a Panamanian flag, we sent the boat to be supplied and they sent us the invoice for the fuel supplied – and we invoiced the company that was our client. That was our business, that we do still now everywhere in the world.

MR CARREYÓ: Did you ever communicate to the police officers or to the customs the position of the vessel *"Norstar"*?

MR ROSSI: To communicate?

MR CARREYÓ: The position.

MR ROSSI: Yes, yes I did. I said before, since there was a very good relationship between us and the fiscal police, because we supplied – and still now we supply – their fleet, local fleet. In order just to be polite, just to be correct with them, I used to advise them the position of the boat; and at the same time, when the boat was arriving and when the boat was leaving; so everything was under a reciprocal correctness.

MR CARREYÓ: But you have not mentioned about the position. Where was the boat located?

MR ROSSI: Usually it was located 22/23 miles off San Remo, which is in more or less the border between France and Italy.

MR CARREYÓ: Mr Rossi, do you know if the Public Prosecutor of Savona – Savona is the town you are from?

MR ROSSI: Yes.

MR CARREYÓ: ... asked for the opinion of the customs officers concerning the bunkering operations of the *"Norstar"* and what was their opinion?

MR ROSSI: Never. He never ask anything to the custom office, which is the main office that is entitled to manage the duty of the fuel – it is called "excise tax". I know that when they arrested the *"Spiro F"*, speaking with the people in the customs – I told you that most of them, they are my friends – they were also my friends – the chief of the customs told me: "We had the feeling that there was something doing, but we did not know – we were not aware about what was going on."

I just want to inform you that my office was in Rebagliati Square and in the building near my office there was, on the two first floors, the customs house, and the other two first floors there was the *Guardia di Finanza*, which is the police brigade. So everything was in this area.

MR CARREYÓ: What do you believe were the real reasons for the Public Prosecutor arresting the *"Norstar"*? What were the real reasons?

MR ROSSI: I really do not know the real reason because – I do not know the reason. There is only one thing that I want to pinpoint. As I said before, there are four articles of the customs rules, and also it is difficult to make a mistake in reading these rules because they are very simple. What they have done – I do not know if it is done for ignorance or for bad faith – I cannot say that – is that they confuse national product, national fuel, with foreign fuel. They confuse consumption with supply. This is something very – in my opinion – it is very serious, but they made all the ... I just want to tell you something. When the first judgment ..., of course, we win because the judge was very good to understand things very quickly. Then the Prosecutor made the appeal in the Genoa court. In the Genoa court there was the judge – one of three judges that confirmed the judgment of Savona – so against the Prosecutor's theories – said: Dr Landolfi and Maggiore Marotta seemingly confused consumption with supply.

"I am coming from Milan. In Milan, I never in my life – I never dealt with maritime." I confess to you that when he said that, I was a bit concerned because it was something new for this judge. He said, "but I see a castle, and the base of the castle is a brick that is article 255, which is the article to be considered. Taking off this brick, the castle goes down." That is why it was done, because they had – this process was not a process of action; it was a process of a customs matter, so it was not necessary to arrest the ships in the middle of the sea or to arrest the ships around; it was only the matter of discussing if we were legal or not legal in doing this kind of business.

There is the principle that comes from the old Roman law that says: "*Qui jure suo utitur neminem laedit*" That means that if I do something with my right, I do not damage anybody. So in this case somebody probably is finding some damage, and this action was done, in my opinion, in a reckless way

MR CARREYÓ: There are a number of pieces of evidence collected during the investigation, which Italy has presented in this case. Those pieces of evidence confirmed the suspicion of a criminal plan masterminded by you with the *"Norstar"*. What do you have to say about this?

MR ROSSI: Yes, I am a mastermind, I am a criminal, I am everything what they are saying here – the Italian lawyers – but it is a pity that four judges and one prosecutor in Italy, they say that it was not like this. The custom officer and the VAT officer never indicted me, never asked me for one penny because everything was legal. I had another thing – that when the Prosecutor of Savona made an appeal in Genoa, the Prosecutor of Genoa was not the same – was another

prosecutor at a higher level – that when the appeal was rejected did not make a further appeal in the Corte di Cassazione in Rome because he was sure that there was no possibility to add something different than what has been judged before. So it was so easy, these things.

I can tell you that I was serene. I was confident in the justice, and the justice gave me the right and so everything was fine. Of course, I felt a little bit concerned in the beginning because I was in this kind of situation, that was not so nice to be in; but I think that if you are correct, if you work well and everything is correct, then justice will prevail – and is what happened in Italy.

MR CARREYÓ: Mr Rossi, were you aware that the Public Prosecutor was citing some articles of the Criminal Code of Italy?

MR ROSSI: Yes, he was using article 40, decree 504. As I said before, he made a big confusion between national fuel and foreign fuel because this article is regarding national law regarding excise tax, for national fuel; but when you have a ship in the middle of international waters, for sure this is not national fuel – it is foreign fuel. It can be foreign because it was a boat outside of Italy, like it was some time with the *"Norstar"* – the boat in Malta, that time was in Europe, the boat I think once a couple of times in Gibraltar – so it was absolutely foreign fuel. But also, when the boat was in Italy, when it is on board and the ship goes out of the port, automatically becomes foreign. So the only book to use is *this*. No other book can be used – and in this case they used the book that was – it is like, if there is a homicide and you use the civil code rather than the penal code, it cannot work.

MR CARREYÓ: Can you repeat that?

MR ROSSI: If there is a homicide, use the penal code, the penal law, not the civil law. It is a kind of different thing, you know. So when you have foreign fuel, you have to use the custom book, and the custom book is four articles, and it is very easy to understand.

MR CARREYÓ: Did you ever find out whether the arrest of the *"Norstar"* was according to internal and international law of the sea? Was it in agreement with those laws? Did you find out if the arrest breached it?

MR ROSSI: Yes. They didn't find any. They arrested the boat. I do not know why they arrested the boat because they thought they have to find the treasure of the pirates, but they did not find anything because everything was as it should be done and everything was correct.

MR CARREYÓ: Did you ever have a communication with the Public Prosecutor about this case?

MR ROSSI: Yes, when they arrested the boat I made – I have here – I made a memory to him explaining everything – if I can show you.

INTERVENTION BY MR AIELLO
CO-AGENT OF ITALY
[ITLOS/PV.18/C25/1/Rev.1, pp. 16–17]

MR AIELLO: Excuse me, Mr President, I would like to know if this document is already registered.

MR ROSSI: No, not registered.

MR AIELLO: Because we do not know this document.

MR CARREYÓ: Can I answer?

MR AIELLO: Anyway, he is making reference to a new document.

MR CARREYÓ: May I answer, Mr President? We do not know because he is in the middle of his sworn declaration. I think we should wait until he is going to show what he is going to show. Also, I thought that we had agreed yesterday, Mr President, that we would not interrupt the declaration of the witnesses; so I would pray Italy to allow the witness to wait to end his declaration in order for you to make the objections – if there are any objections – because, as I understand, I repeat, we agreed not to interrupt the sworn declarations of the witnesses.

THE PRESIDENT: Mr Carreyó, do you know whether this document is a document that has already been introduced before closure of written proceedings?

MR CARREYÓ: I do not have the slightest idea, Mr President, because the witness is referring to something probably that he does not recall, and I think he has a right to let us know what this is about.

THE PRESIDENT: I will not allow the introduction of a document you refer to, in light of the situation.

MR CARREYÓ: We are not introducing any document, Mr President.

MR ROSSI: So if I swear, it is enough? I did – I swear that I gave this …

THE PRESIDENT: Mr Rossi, Mr Carreyó, you may continue your statement, but I will not allow the introduction of any document the legal status of which is uncertain at this moment. So, Mr Carreyó, you may continue your examination, without referring to the document.

MR CARREYÓ: Just one question, Mr President: if a witness wants to refer to some document of his own files, can he do that?

THE PRESIDENT: He may make a statement based on his recollection.

MR CARREYÓ: Okay.

THE PRESIDENT: Please proceed.

MR SILVIO ROSSI
EXAMINED BY MR CARREYÓ (PANAMA) (continued)
[ITLOS/PV.18/C25/1/Rev.1, pp. 17-21]

MR CARREYÓ: Continue with your declaration, referring to the document. Do you want to see the document to see what does it say to refresh your memory?

MR ROSSI: Yes, but, anyway, since I swear that I have the document – so we made a memorial to the Prosecutor, explaining that everything was neat, everything was legal because there was article 255. We explained to him Italian customs law regarding naval provision

MR CARREYÓ: Were other vessels arrested for similar reasons?

MR ROSSI: Yes, they arrested also at that time *"Norstar"* was operating in the Balearics, and in front of San Remo there was another boat called the *"Spiro F"* – Maltese flag and a Maltese owner.

MR CARREYÓ: Do you know the outcome of that case? What was the result of that case – do you know?

MR ROSSI: The case – I had…

MR AIELLO: Excuse me, Mr President. I am so sorry, but now we are speaking about a different case. We do not know anything about the *"Spiro"*.

THE PRESIDENT: Mr Aiello, I already informed you that you should not interject unless it is really necessary. I will allow Mr Carreyó to continue his examination, so please be seated and listen to the answer of the witness.

MR CARREYÓ: Thank you, Mr President.
Will you please continue?

MR ROSSI: Yes. It was arrested, this boat, *"Spiro F"*, that was operating in front of San Remo, more or less in the same place it was the year before *"Norstar"*. The owner of course was furious about this because he found that it was something legal, and I got a telephone call from the responsible – the chief of the contentious office of the Farnesina which is the Foreign Office of Italy – and Dr Lianza – who asked me what was going because he has in front of him – he told me he has in front of him the Foreign Minister of Malta, who was furious because of this arrest.

I explained to him everything by telephone and he kindly asked me to send him a fax – at the time there was no internet – so I sent him a fax with all that I said by telephone, and then I did not hear from him any more news. I have to say that suddenly the shipowner of *"Spiro F"* never called me later. Previously he was calling me every night and then no more. I thought that everything had been solved in a good way between Malta and Italy.

MR CARREYÓ: Did the arrest proceedings offer –

THE PRESIDENT: Mr Carreyó, I advise you to confine your questions to the case before the Tribunal, that is the *M/V "Norstar" Case*.

MR CARREYÓ: Thank you, sir.

(*To the witness*) Did the arrest proceedings of the *"Norstar"* offer information different to what the Prosecutor already knew before the arrest, such as the type of goods etc?

MR ROSSI: Yes. I did not know anything at all because, as I said before, as the judgment proved, this was a matter of customs law, not a matter of anything else. I have to tell you that we suffered three years of investigation at a cost to my country and the taxpayers – I am an Italian taxpayer – only for recording telephone calls between me and my employees, even privately. The Ministry of Justice paid about €400,000 to the telephone companies to record our conversations. For three years we had our conversations recorded, heavily violating our privacy, and they did not find anything because there was nothing to find. Even with the arrest of the *"Norstar"*, they probably thought they would find something on board, but there was nothing to find. I therefore think that they have spent a lot of money to try to demonstrate what it was not possible to demonstrate.

MR CARREYÓ: If the Prosecutor had not arrested the *"Norstar"*, would the evidence of the case have been exactly the same as it was?

MR ROSSI: No, because the boat has been very efficient, an excellent boat.

MR CARREYÓ: You are referring to before and I am asking whether, if there had been no arrest, the evidence of the case would have been exactly the same?

MR ROSSI: Yes, it did not change anything because everything is correct, everything is legal, so there was nothing to find. They did not find anything on board.

MR CARREYÓ: Did your name ever appear in the press concerning this case?

MR ROSSI: Of course it happened. I have here a copy of the front page. I have to say that the press were correct, they gave me a reply, but the problem was that in the press there was a big line stating what the Prosecutor said and a small line about my reply, but in the end I was confident that I was serene. Thank God my reputation in my town, in my area of business, was good. The people and my friends were sure that I was right and that the Prosecutor was wrong. Of course I was in an uncomfortable situation, but in the end justice prevailed, as I always hoped would happen.

MR CARREYÓ: Can you be a little more explicit about how you felt in this situation of being exposed publicly and committed to trial as well?

MR ROSSI: I felt uncomfortable but serene and confident of justice. I am 70 and I have to say that in my life justice always prevailed in the end.

MR CARREYÓ: Did you ever receive any communication from any authority to effectively deliver or return the vessel?

MR ROSSI: No.

MR CARREYÓ: Were you aware of the physical conditions of the *"Norstar"* before its arrest in Spain?

MR ROSSI: Yes. The small tanker – it is between a barge and a tanker, a barge – was in good condition. In our business we supply mega yachts, which cost a fortune. Some yachts cost even more than 50 million, maybe 100 million, and they do not approach. The barge is in better condition, it was in very good condition, and of course after staying five years, or how many years, the situation was not the same, because a boat without maintenance becomes a wreck.

MR CARREYÓ: Did the *"Norstar"* carry out any activity different from bunkering in Italy or anywhere else?

MR ROSSI: Only fuel. It is possible in international waters – you know better than me – that the only trade that is forbidden is slavery. They can sell cigarettes, but we sold only fuel. Our business is fuel, so there is no other activity than fuelling.

MR CARREYÓ: Would you have been informed of any technical problem that could not allow the *"Norstar"* to leave from Spain before being arrested?

MR ROSSI: No.

MR CARREYÓ: You would not have been informed or you would have been informed?

MR ROSSI: The boat was fine. The boat was operating before being arrested.

MR CARREYÓ: I just want to know if you had any communication with the boat.

MR ROSSI: No.

MR CARREYÓ: Have you ever been accused of fraud?

MR ROSSI: Before, never. This was the first time that it came out. It was ridiculous.

MR CARREYÓ: Based on your shipping industry knowledge, particularly in bunkering operations, how high do you estimate the likelihood that the charter would have been kept working until today, and how much would its charter freight cost be?

MR ROSSI: I am a fuel trader, so I do not know much about the management of a ship like that. What I can say is that in my business, from that year to nowadays, the business grew up a lot, because the mega yachts are bigger and bigger and they require more and more fuel. Now I will give you an example. We operate now for seven or eight years in Algeria. In Algeria they have good quality fuel, there is no biodiesel, and costs 0.46-0.50 per litre. In the Balearics it costs 1.3 per litre, so more than double. We supply some boats, some yachts, as they enjoy themselves in the Balearics, and when the yachts are empty we try to send them to Algeria. Usually Ibiza is near the main port of Algeria, but in the main port of Algeria there is utter congestion because it is a big commercial port and the yachts do not like to go in there because they have to wait hours and hours in a commercial port, so we try to send them to Bejaia, which is another port a little further east but more comfortable for the yachts, and we do some business with that. We could do five times the business, having a boat like this because, first of all, many yachts do not want to go to North Africa because they have to pay more insurance and they do not want to lose time by staying in a commercial port. So having a boat like this, in my opinion, getting the fuel in Algeria and going 45 to 60 miles away from Algeria and the Balearics would

be a business of over one million in three months, so it would be very worth doing the job. If they did not arrest it, the boat could have done the job that was very worth doing.

MR CARREYÓ: Did you have to invest any time, effort and money during the investigations and proceedings in Italy, and did you need to hire lawyers?

MR ROSSI: Of course. I had to pay lawyers, which cost me I think around $40,000 or something like that in total, because in three years, through recording, telephone calling, writing and everything, they produced two cubic metres of paper. When we had the judgment in Savona the Prosecutor came with two trolleys with at least 500 kilos of paper. We did not know what was written on this paper, so we had to read what it said. I had one person in my office – unfortunately, he passed away – our customs broker, our forwarding agent, who spent days and days in the court to check all this fantasy that was narrated by the Prosecutor. Now I want to add something for the Judges. I am sorry to say that I am here and after all the judgments, after everything, I read the same story narrated by the Prosecutor narrated here in this court. I am upset, as a taxpayer, because I think that after three judgments in Italy it is useless to speak to something that is already judged; the case is closed. As a taxpayer, I hope that the new government will start to check how this matter has been handled, because as an Italian I am really sorry to have my country in this court and as a taxpayer I am very sorry to see how much money has been spent on producing things that were not supposed to be done.

MR CARREYÓ: Thank you. Mr President, I have finished. I would like to place the witness at your and Italy's disposition. Thank you, sir.

THE PRESIDENT: Thank you, Mr Carreyó. We have reached 11.35. At this stage the Tribunal will withdraw for a break of 30 minutes. When we resume after the break I will ask the Co-Agent of Italy whether Italy wishes to cross-examine the witness. The meeting is adjourned and we will resume at 12.05.

(*Break*)

THE PRESIDENT: Pursuant to article 80 of the Rules of the Tribunal, a witness called by one Party may also be examined by the other Party. Therefore, I ask the Co-Agent of Italy whether Italy wishes to cross-examine the witness.

MR AIELLO: Yes.

THE PRESIDENT: So, Mr Aiello, you will conduct the cross-examination?

MR AIELLO: Yes.

THE PRESIDENT: Now I give the floor to Mr Aiello to cross-examine the witness.

MR SILVIO ROSSI
CROSS-EXAMINED BY MR AIELLO (ITALY)
[ITLOS/PV.18/C25/1/Rev.1, pp. 21-23]

MR AIELLO: Good morning, Mr Rossi.

MR ROSSI: Good morning.

MR AIELLO: I just want to make some questions, and we are only interested in facts, not opinions, please. Thank you. Can you please tell the Tribunal in which country is Rossmare International SAS registered?

MR ROSSI: In Italy.

MR AIELLO: Where does it have its main site of business?

MR ROSSI: Can you repeat, please?

MR AIELLO: Where does it have its main site of business?

MR ROSSI: In Italy.

MR AIELLO: Do you remember precisely for which suspected crimes you were indicted and *"Norstar"* was subject of investigation?

MR ROSSI: I was indicted for smuggling fuel, but it was an indictment.

MR AIELLO: Have you ever been imprisoned, detained or subject of any other compression of your freedom?

MR ROSSI: I have never been in prison in my life, and never had a fine in my life, regarding smuggling. Can I make a joke? My lawyer told me if you had one day of prison you could make a lot of money.

MR AIELLO: Yes, but it is enough for me if you can just answer. Before the execution of the arrest, was the *"Norstar"* activity ever hindered, ever compressed?

MR ROSSI: The activity was always in the high waters, never entering Italy. Yes, once it entered in Italy to be supplied, yes. Probably I did not understand well. Sorry.

MR AIELLO: My question is, before the execution of the arrest…

MR ROSSI: Of the boat?

MR AIELLO: Yes – was the *"Norstar"*'s activity ever hindered in relation with this criminal proceeding?

MR ROSSI: It was doing offshore bunkering in the high seas.

MR AIELLO: So, yes or no?

MR ROSSI: Yes, it was in the high sea doing…

MR AIELLO: Do you remember when the decree of seizure was enforced? The decree of arrest.

MR ROSSI: The *"Norstar"* you mean?

MR AIELLO: Yes.

MR ROSSI: It was in Palma. I never see. I never saw. I did not go to Palma.

MR AIELLO: But you do not remember the date of the decree enforcement?

MR ROSSI: No, I do not remember. No, I do not remember. I can check if you want. I have here the paper. If you want, I can check.

MR AIELLO: Okay, I can tell you that it was enforced on 25 September 1998.

MR ROSSI: It is possible.

MR AIELLO: Can you confirm that at the moment of the arrest the vessel was perfectly efficient?

MR ROSSI: Yes, it was.

(Document handed to witness)

MR AIELLO: Mr President, we are making reference to Annex K to the Counter-Memorial, page 3. Could you please read this document to the Tribunal?

MR ROSSI: Yes. This comes from the maritime port authority and it says: "Our reference regarding motor tanker Norstar in Palma de Mallorca. Dear Sirs …"

Okay. First of all I can say that it was sent by an agency that is in Palma de Mallorca called Transcoma, and the person who sent this letter was Enrique Oliver. He says:

> Dear Sirs, as you are aware, last Saturday 5th current month, current year, we restrained the motor vessel above specified. We informed the JA, Juzgado de Instancia …

– the judge –

> thanks to the support of the patrol of the maritime police.
>
> However, the said circumstance does not elude the situation which occurred later and is the reason of the said fax.
>
> We were informed by the captain of the vessel that due to the bad conditions of the chains aboard, and the sea and wind worsening conditions, the anchor of the starboard broke the chain and the one of the portside, now moored, is in very bad state. This circumstance together with the breakdown of one of the main generator as well as the need to stock the boat urge us to request to the port authority and maritime authority the authorisation to get into the port and moor the vessel to the quay.
>
> Without adding any other detail, and thanking in advance for your cooperation, we take this opportunity to send you the expression of my highest consideration.

MR AIELLO: Thank you, Mr Rossi. After this information, have you made any activity or initiative of maintenance of the vessel?

MR ROSSI: But you are asking me something about the vessel. This is not my vessel. I am a trader, not managing a vessel. This is more correct to speak with the owner of the vessel.

MR AIELLO: Thank you very much. We have finished, Mr President. Thank you very much.

THE PRESIDENT: Thank you, Mr Aiello.

A witness who was cross-examined by the other Party may be re-examined by the Party who had called the witness. Therefore, I ask the Agent of Panama whether Panama wishes to re-examine the witness.

MR CARREYÓ: Yes, please.

MR SILVIO ROSSI
RE-EXAMINED BY MR CARREYÓ (PANAMA)
[ITLOS/PV.18/C25/1/Rev.1, pp. 24]

MR CARREYÓ: Mr Rossi, just one question.

THE PRESIDENT: Before you start, Mr Carreyó, I wish to emphasize that no new issues shall be raised in your re-examination.

MR CARREYÓ: Thank you.

Mr Rossi, you were just asked about indictment. Who do you think indicts you? The Prosecutor or the judges?

MR ROSSI: Not the judge, no; the Prosecutor.

MR CARREYÓ: Only the Prosecutor?

MR ROSSI: Always the Prosecutor, yes.

MR CARREYÓ: So the judges did not indict you?

MR ROSSI: The judge made a judgment at the end because the … From the arrest to the judgment I think there passed three years, something like that, so when the judge – there was the Prosecutor and the judge finished the case, closed the case, with a judgment.

MR CARREYÓ: That is all.

THE PRESIDENT: Thank you, Mr Carreyó. According to article 80 of the Rules, questions may be put to the witness by the President of the Tribunal and Judges. I understand that two Judges have indicated their intention to pose questions, so I invite first Judge Kulyk to pose a question to the witness.

MR SILVIO ROSSI
QUESTION FROM JUDGE KULYK
[ITLOS/PV.18/C25/1/Rev.1, pp. 24-25]

Mr Rossi, if you could recall, how many fuel sales contracts had been executed by *M/V "Norstar"* in the summer of 1998? In other words, how many yachts were supplied at that period? If you also could recall, when was the last date of the last yacht which was supplied by the *"Norstar"*, again in the summer of 1998?

MR ROSSI: In 1998 the boat was in the Balearics so we did not make much business with the boat. I think we supplied three or four – two or three boats, because our area, as I said before, it was more around the Ligurian Sea, between France and Italy, and in that time there was another boat doing this operation. It was the *"Spiro F"*, the one that was arrested as well, the Maltese flag.

With the *"Norstar"*, she was placed off Palma de Mallorca, and I think we had done two or three boats, not many.

JUDGE KULYK: If you remember, when was the last yacht supplied?

MR ROSS: I am sorry. I do not remember. I am sorry.

JUDGE KULYK: Thank you.

THE PRESIDENT: Thank you. I invite Judge Treves to pose a question to the witness.

MR SILVIO ROSSI
QUESTION FROM JUDGE *AD HOC* TREVES
[ITLOS/PV.18/C25/1/Rev.1, pp. 25-26]

Thank you, Mr President.

Good morning, Mr Rossi. When Mr Carreyó asked you what was your relationship with Rossmare, you did not answer; you spoke of other things. I would be grateful if you could, as is usual in these proceedings for witnesses, tell us a little more about your profession, your education and so on. We have heard from you a lot of views on Italian law, so I wonder whether you are a qualified Italian lawyer, if you could please explain whether you are or are not. Thank you.

MR ROSSI: Okay. Well, my relationship was as a trader, and the position of charterer, because the boat was chartered before by the company, the first year by the company BBL from Malta and then another company from Malta that was called Nor Maritime. They were physical suppliers; they loaded the ship and placed the ship in the high seas, international waters.

My position was, our position was to be trader, to find a client to send to the boat, to send to the –

JUDGE *AD HOC* TREVES: When you say "our position", you mean you personally or the company, Rossmare?

MR ROSSI: Rossmare International was a company at that time – I just want to point out that at that time it was a completely liability company so I was responsible with my …

JUDGE *AD HOC* TREVES: It was under Italian law.

MR ROSSI: Financially I was responsible personally for the company. It was – SAS is a company with the full responsibility of the manager of the company. Now we have – it is the same company but we changed the status of the company and now we are partial liable.

JUDGE *AD HOC* TREVES: SRL.

MR ROSSI: Yes. So at that time I was completely responsible personally for the company. Anyway, of course I had some employees and they were working, trading, and I said myself because I was the owner of the company at the time, but they were my employees that were doing this business, trading.

You want to know my profession?

JUDGE *AD HOC* TREVES: Yes.

MR ROSSI: I was an officer of passenger ships for ten years, and cruise ships, and then in 1978 I started to do my business in my town, and this is the business I am still doing now.

JUDGE *AD HOC* TREVES: So you are not a lawyer?

MR ROSSI: No, I am not a lawyer but I have been in university in my life. I could tell you that I always worked and studied, but starting this kind of business, I had to learn the customs law very well. I can tell you that I know also regarding our provision the French customs law, because it happened that in this situation of this offshore bunkering, France was also not happy about this kind of business, and they fined some client when they were coming from the tanker. They were in the port, they fined them, and this client came to me and told me, "Listen, I have the fine from the French customs." I checked the fine and I found that they were using the law of the passenger when they arrive at the airport and they have to declare only – they can take only two bottles of spirits and a carton of cigarettes. So I called, I met, I had an appointment with the chief of the French customs, south France, Madame Fahm and Monsieur Pasteur that was the chief of the customs brigade of south France, and I had a meeting in Marseille with them, and when they went to the French law, Madame Fahm was joking with me. She said, "Listen, you know the French law better than me."

JUDGE *AD HOC* TREVES: Well, I think you have another profession open to you.

MR ROSSI: I do not know the law of the French, only this provision. In fact, I have the *Code des douanes* and so for doing this business you must know what you are doing, and for this reason I always study it.

JUDGE *AD HOC* TREVES: Yes. Of course, you gave us much broader views of Italian law which are far beyond the customs law. Thank you very much. That is all from me.

MR ROSSI: Can I say something?

THE PRESIDENT: Mr Rossi, thank you for your testimony. Your examination is now finished. You may withdraw.

(The witness withdrew)

THE PRESIDENT: Mr Carreyó, I understand that Panama wishes to examine the next witness now. Could you please confirm that?

MR CARREYÓ: Yes, sir.

MR ARVE MORCH
EXAMINED BY MS COHEN (PANAMA)
[ITLOS/PV.18/C25/1/Rev.1, pp. 26-37]

THE PRESIDENT: Thank you, Mr Carreyó.

The Tribunal will then proceed to hear the next witness, Mr Arve Morch. He may now be brought into the courtroom.

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

(*The witness made the solemn declaration*)

Thank you, Mr Registrar.

I understand that this examination will be conducted by Ms Cohen. I give the floor to Ms Cohen to start the examination of the witness.

MS COHEN: Mr Arve Morch, could you please introduce yourself to the Tribunal?

MR MORCH: My name is Arve Morch. I have during the past years been working in various shipping companies with ships worldwide in several positions as organization manager, general manager, executive director and shipbroker, and been developing various shipping projects including bunkering operations, ferry- and liner-services around the world.
I have also from the mid 1970s been working for the transport department with oil tankers in the oil companies Hydro, Texaco, Statoil (Norol) and Shell Oil.

Formal education from Maritime High School the Norwegian Institute of Business Administration and the Norwegian Shipping Academy.

In several companies I have experience as president of the board of directors, and other relevant positions as executive director with responsibility for the management and daily operation of most all kinds of ships.

Today my work consists mostly of property development, and development of adventure centres for visitors on privately owned farms.

MS COHEN: Thank you, Mr Morch. Could you please explain to the Tribunal your participation in the facts of this case?

MR MORCH: My participation in the facts of this case in the Tribunal, between Panama and Italy, is related to my position as president of the board of directors in the company Inter Marine & Co. AS, which also in 1998 was the owner of motor tanker *"Norstar"*.

Due to my position, I had all contacts with the lawyers and authorities in any country involved in this process.

MS COHEN: Could you please state to the Tribunal your role in relation to the *M/V "Norstar"*, and whether you personally owned the vessel?

MR MORCH: In 1998, I was also the general manager for the shipbroker KS Borgheim Shipping, which was a member of the Norwegian Shipbroker Association, member of BIMCO, the world's largest international shipping organizsation with around 2000 members in more than 120 countries, whose members include ship-owners, managers, operators, agents and brokers.

Due to many years of experience also in the bunkering service, we were in 1998 very confident with the legal operation of the *M/V "Norstar"* in international waters (on the high seas) 21-23 nautical miles off the coast of Italy and France.

We were familiar with the 12 nautical miles Italian national territory, the EU Istanbul Convention, and other international conventions.

Based upon knowledge during the operation, and later after reading the Italian judgments in Tribunale di Savona and Genoa, there was no other option that this case had to be taken to the Tribunal for justice.

MS COHEN: Given your knowledge of the facts that gave rise to this case, I will ask you some questions about the *"Norstar"* and Italy's conduct. First, what was the state of the vessel at the time of arrest by Italian authorities?

MR MORCH: During the operation in the offshore market with supply of gasoil to the mega yachts, maintenance and presentation of a ship in good condition was always important. The vessel was always clean, newly painted and very well maintained. The last memo from the Classification Society was related to the anchor chain, which the owners bought from China. This was changed when Captain Tore Husefest was on board in 1997. There were no outstanding items from DnV when the ship arrived at Palma de Mallorca with gasoil from Malta in April 1998. Just for information, also the cargo tanks were completely cleaned, and, if necessary, painted prior to loading. That was also done before *"Norstar"* loaded the last products of gasoil in Algeria in July 1998.

Only clean products could be delivered to the mega yachts. Samples were taken during each delivery, and this was a part of the routine.

MS COHEN: Would you say that the *M/V "Norstar"* was seaworthy in the period preceding the arrest?

MR MORCH: The ship had, prior to the Italian arrest, all valid certificates such as Panamanian national certificate, trading certificate, load line certificate, and had passed the annual survey in 1997. Captain Tore Husefest was in 1997 attending the inspection, and had stored all or any relevant – all certificates and documents on the bridge on board the ship. These certificates should be available for the port authorities and also for port state control.

The ship was during summer 1998 bunkering mega yachts in a designated position given by Spanish authorities, 24 nautical miles between Mallorca and Ibiza. Between any delivery the vessel was anchored in Palma Bay.

There was in 1998 no recommendation or memo from the classification society Det Norske Veritas.

MS COHEN: I will now proceed to show you some photos of the *M/V "Norstar"*. First, I will show you some photos filed in Panama's Reply. *(Pause)*

I will now show you the photos of *"Norstar"* recently filed by Italy. *(Pause)*

The third set of photos contains photos retrieved from the Internet, similar to the photos filed by Italy.

Looking at these three photos, Mr Morch, could you please make some comments regarding the state of the vessel *"Norstar"*?

MR MORCH: The first set of pictures which Panama filed was from the vessel prior to the arrest in 1998. They show the clean and good condition of the vessel. The second part of pictures is the ones Italy filed. It is important to note that the pictures of the vessel are taken

many years after the arrest, dating from 2010 or 2012, that is 12 to 14 years after the arrest, as can be seen in the information contained in the third set of photos. The vessel was actually in good condition if we consider that it had been detained since 1998.

MS COHEN: There is a statement for estimation of value of the *M/V "Norstar"*, dated April 4, 2001, issued by CM Olsen A/S, in which the value of the vessel was stated at $625,000. CM Olsen writes, and I quote: "We have not inspected the vessel and/or its class records." The statement elsewhere reads: "Based on all information on the vessel available...".

Can you say what information was available to CM Olsen to assess the value of *M/V "Norstar"*?

MR MORCH: C.M. Olsen A/S knew very well the *M/V "Norstar"* as they had fixed the tanker which was under a time charter for the major oil company Brega Petroleum Ltd. In addition, C.M. Olsen A/S knew the *M/V "Norstar"* before entering into the charter contract of 10 May 1998 because it had been inspected prior to the signature of the contract.

CM Olsen also had photos of the *M/V "Norstar"* available. Those photos of the *M/V "Norstar"* had been made before the arrest.

So CM Olsen knew the *M/V "Norstar"* well, and in my opinion they were able to judge its value very well at the time of the arrest.

It is also important to explain that usually shipbrokers don't inspect vessels prior to valuation. During a process for sale, existing employment for a ship has also a certain value. With reference to the *M/V "Norstar"*, this ship had, during the Italian detention, a clean record from DnV.

MS COHEN: What was the nature of the activities performed by the *M/V "Norstar"*, and are these common activities for a vessel like the *"Norstar"*?

MR MORCH: A common description of bunkering activity is normal when one ship, after loading fuel, supplies another ship with the required fuel for main and/or auxiliary engines. The bunkering can also take place from an installation when a ship calls the port. It is common that even when a ship calls the port, the bunkering activity will be carried out by another bunkering tanker and/or barge. The employment for *M/V "Norstar"* in international waters off Italy and France was a common offshore operation, where the mega yacht received the bunkers through hoses in a ship-to-ship transfer.

This service had been carried out from 1993 in this area on the high seas, and from 1994 onwards by the vessel, here named *"Norstar.*

The service was fully approved by the customs office in Savona, and this office had every year been informed by Rossmare International SAS, prior to the arrival of the ship in the designated position.

During a previous time charter for Brega Petroleum Co. Ltd. (National Oil Company) in Libya, the ship had for nearly three years been employed in port bunkering service where bunkers had been carried from port installation to various ships, such as ferries, cargo ships and tankers in the port.

Captain Tore Husefest knows all about this service.

MS COHEN: Thank you, Mr Morch. In your experience, how many more years would you say the *M/V "Norstar"* could have continued performing bunkering activities if she had not been arrested?

MR MORCH: As the bunkering activity in the Mediterranean was a profitable business, it is important to understand that there had been no reason to leave this market. The advantage for *M/V "Norstar"* was the extreme manoeuvring ability. The ship was fitted by two schottle-propellers turnable 360 degrees under the ship. This is normal for the supply ships in North Sea in 2018. As *M/V "Norstar"* was a very well maintained ship, there is no limit for how long a ship can continue in bunkering activity or any other kind of employment. The only question is how a vessel is maintained.

Even today in the cruise market, we find ships built during the period from 1950-1966. In Scandinavia we still have ships built in 1950 and1960 in operation, carrying liquid cargo. The *M/V "Norstar"* was built in 1966.

We recently have been informed by the company Scan Bio Marine Group AS that *M/V "Norstar"* based on its age and specification, in 2018, well maintained, would have been offered a time charter rate of approx. US$ 3,750.- in coastal trade transporting liquid bio-products. They today operate six tankers from 350-3,500 tonnes in this market, all of them built from 1967 onwards.

MS COHEN: The written charter party states: "Owners agree to let and charterers agree to hire the vessel for a period of 5 (five) years time charter with charterers' option for further 1 (one) option 1 (one) year."

What was discussed verbally?

MR MORCH: The written contract may be misleading in that respect. In fact, the contracting parties agreed that there should be two renewal options, each of one year. This was specifically discussed when the charter contract was concluded between myself and Mr Petter E. Vadis for Inter Marine & Co and on the other hand for the charterer's Managing Director Mr Frithjof Valestrand. We all agreed that there should be these two renewal options, each of one year.

MS COHEN: Do you assume that the charterer, Nor Maritime Bunker Co Ltd, would have used the two extension options and would have extended the contract until June 2005, if Italy had not prevented *"Norstar"* from bunkering activities and arrested it?

MR MORCH: The offshore bunkering of mega yachts was a very profitable business. I assume that the charterer would have used the two renewal options and extended the contract until June 2005 if Italy had not arrested *M/V "Norstar"*.

We still today think that this business could have been even better after 2005 if the Italian prosecutor in Savona had not prevented *M/V "Norstar"* from bunkering activities and arrested the vessel. My opinion is still that the intention behind this action was to "destroy this business" and elimination of competition. There must be an underlying reason why the prosecutor "forgot" to inform the custom authorities where the bunkering activity had been approved.

MS COHEN: Did you receive any prior notice from Italy concerning its understanding that the activities carried out by the *M/V "Norstar"* were allegedly contrary to Italian laws?

MR MORCH: It would be too naïve to say that after many years of experience and knowledge we do not know how the system works in Italy today. Our understanding is that this action was not a coincidence; it was produced. The Italian public prosecutor had a reason to stop the legal bunkering business and to try to eliminate a lawful competition. He knew, or at least should have known, the international conventions, the Italian law, and should have been capable of reading them. We also hereby confirm that this question was raised before the pleadings in

Savona and Genoa, but the lawyers could not bring this question to the court as they were afraid of the consequence.

If, after all, the action had been made in good faith, common sense had been that various questions had been raised by competent authorities to the companies and persons involved in the bunkering activity. I presume also that this should have been included in this case by representatives from the flag State Panama. This was never the issue, and until this day we have never understood why the customs office in Savona was not informed about the ongoing investigation. They had from the first day approved the offshore bunkering activity, and when the chief of the customs office as a witness in the Tribunale di Savona explained to the judge that the business carried out offshore outside the Italian territory by the *"Norstar"* was legal, the case was closed. Even though the public prosecutor understood the correct content of the judgment, he again made an appeal on the last day to the Court of Genoa. We presume that this was only a game to extend the process and the final judgment.

After the day on which we received confirmation of the judgment, the prosecutor disappeared. The prosecutor never made a new appeal to Rome.

MS COHEN: Could you please describe how the arrest took place and whether you were informed of the reasons for the arrest?

MR MORCH: We were first informed by the customers and later also by Mr Silvio Rossi about the arrest of the Maltese motor tanker "*Spiro F*" in international waters off the coast of Italy outside the Italian territory some weeks before the arrest of *M/V "Norstar"*. Later, we understood that the Decree of Seizure for both ships had the same content. The rumours in the market very clearly gave an impression that also the *M/V "Norstar"* could meet the same fate as the *M/V* "*Spiro F*".

We were informed by the captain of the *M/V* "Norstar" about the arrest in a telex, and later also received the Decree of Seizure dated Savona 11/8/98, signed by Prosecutor Alberto Landolfi.

As all involved in this business were very familiar with the Italian law, the international conventions and the rules of the bunkering service, everybody was very surprised that in this situation it was possible to arrest any ship flying a foreign flag for activity based upon legal business outside Italian territory and jurisdiction in international waters (on the high seas).

As it was obvious that the bunkering service outside the territory was legal, we all had a reason to believe that this action, after five years of operation, and also after public marketing, which also included articles in the public, local newspaper in Savona, was only a part of an unknown game. We all knew very well that the most important competitor was the marina in San Remo.

MS COHEN: Did you, and respectively Inter Marine Company A/S, suffer moral or material damages as a result of Italy's conduct?

MR MORCH: The company Inter Marine Company had in 1998 only the ship *M/V "Norstar"*. It was obvious that the company was out of business as a result of the Italian detention of the vessel. The company was at that time without income from the time charter and still had to fulfil any responsibility and economical obligations.

The loss of the ship, loss of revenue from the charter, continuation of payment related to the detention, and also the moral damage due to the Italian detention, was very difficult to handle for the company and the persons involved. As the bank was not in a position to give any further credit or guarantee, the only way to survive was the economic support from the shareholders and board of directors.

MS COHEN: What were the legal fees that Inter Marine Company A/S had to pay for the behaviour of Italy and the arrest?

MR MORCH: In order to obtain the release of the *M/V "Norstar"*, Inter Marine Company engaged a number of legal services, the legal firm Abogados Bufete Feliu in Palma de Mallorca.

In 2002 Inter Marine Company A/S, together with Panama, engaged the lawyer Nelson Carreyó to obtain the return of the *M/V "Norstar"* to gain compensation. Because that was not successful, in preparation for bringing the case before the Tribunal, the law firm Remé Rechtsanwälte were additionally engaged in 2003.

Later, for the procedure before the Tribunal, other lawyers have been engaged.

Furthermore, in the proceedings before the Tribunal we already had translation and expert fees of $4,000.

I can confirm that the amounts submitted in the written proceedings are correct.

MS COHEN: What were the legal fees that you, Mr Morch, had to pay personally?

MR MORCH: I had assigned the lawyer Aurelio Palmieri in Savona to represent me at the Court of Savona and release the *M/V "Norstar"* from the arrest. I paid at least $4,000 to lawyer Aurelio Palmieri.

During the past years from 1998 until today, due to my position in the company, I personally have paid between $300,000 and $400,000 to keep the company alive and to cover any relevant expenses on behalf of the company.

MS COHEN: Do you know if the defendants before the Court of Savona, and later Genoa, suffered mental stress because of the procedure?

MR MORCH: Yes. The process dragged on for a long time and all the defendants could not be sure that they would be acquitted. This has meant mental stress for everyone. Affected were Silvio Rossi, Renzo Biggio, Emil Petter Vadis, Tore Husefest and myself.

MS COHEN: Did anybody suffer professional disadvantages?

MR MORCH: Yes. The captains Odd Falck and Tor Tollefsen, employed at the time of the arrest of the *"Norstar"*, lost their jobs due to the arrest of the *"Norstar"*. After the Italian detention of the vessel, I think they both stayed at home without employment until late1999 – nearly one year. Also, Captain Tore Husefest was in the same position.

MS COHEN: Can you tell the Tribunal, please, what monthly or yearly expenses Inter Marine Company A/S had in connection with the *M/V "Norstar"* before it was arrested?

MR MORCH: I can confirm that the amounts already stated in the written pleadings are correct.

MS COHEN: Were there any costs that went on after the arrest, even though the Inter Marine Company A/S had no revenue due to the arrest?

MR MORCH: Yes, those were the wages, which still had to be paid for some time. In addition, the fees and taxes for the *M/V "Norstar"* have not been paid to the Panama Maritime Authority and are therefore still open.

In addition, I expect that the Palma de Mallorca Port Authority still charges for the period from August 1998 until the auction in 2015, because in this period the *M/V "Norstar"* lay in the port of Palma. Here, no fees have yet been requested and have not been paid.

MS COHEN: Do you know much gasoil the *M/V "Norstar"* had on board at the time of the arrest?

MR MORCH: Yes. It was 177,566 metric tonnes. This is what Mr Petter Vadis, the managing director of Inter Marine Company A/S, confirmed to me by email on 17 May 2001. These were the remaining products loaded by Captain Tor Tollefsen in Alger in July 1998.

MS COHEN: What was the value of the gasoil on board at the time of the arrest?

MR MOCH: At that time, $612 per metric tonne – the market value.

MS COHEN: Did the owners or the charterers get back the gasoil or did you or the charterer have an opportunity to get it out of the *"Norstar"* during the arrest?

MR MORCH: No. We now understand that this gasoil was discharged under the control of the Port Authority in Palma de Mallorca in 2015, still under Italian jurisdiction.

I presume that this gasoil has later been contaminated or sold.

During the arrest it was impossible to discharge the gasoil as it also was in Italian jurisdiction.

MS COHEN: To your knowledge, what happened to the vessel after the arrest?

MR MORCH: According to the charter party, charterers had the right to cancel the remaining time of the charter. They were not even after the Italian detention in a position to pay for the vessel, which from the date of the Italian detention was without employment.

We all knew that even if the ship had been released, also if the owners had been capable of raising the requested bond for continuation of the existing trade, she would have been arrested again by Italy.

I also have to mention that the same trade outside Spanish territory, on the high seas and covered by the same European Union Istanbul Convention, the bunkering service was approved by Spanish authorities.

One way or another, the owners had to release the officers and crew from their contracts. They were given a notice of termination and later, after the arrest, sent home. Only the Spanish chief engineer living in Palma was available on short notice.

During the Italian detention the vessel was anchored in Palma Bay. The owners also made several attempts to bring the vessel alongside, but any request was refused by the Palma Port Authority, and the explanation was that the vessel had dangerous cargo on board. The owners' reply to this information was that no ship with any engine would call the Port of Palma de Mallorca without gasoil on board.

The owners' last attempt to berth the vessel was through the local agent Transcoma and to convince the port captain about any pollution problem that this situation could create. The owners sent a message to the Port Authority and stated that if the anchor chain should break

and the ship drifted, it could be a disaster for the Port of Palma, the beaches and the tourist industry.

The new anchor chain, purchased in China the year before and changed under the supervision of Captain Tore Husefest, was used during the stay at the anchorage. This was brand new and was in very good condition. When the captain and the crew had left the ship, the owners had the idea that the Port Authority would call the chief engineer in Palma to start the auxiliary engine and generator and use the anchor winch to bring the vessel alongside. We were all surprised when they sent a small tug, cut the new anchor chain and towed the vessel alongside without giving any notice. The vessel remained alongside this berth under Italian custody until 2015, and we now understand that it is sold on public auction also without notice to the flag State or the owners.

MS COHEN: Could you please describe your efforts to mitigate the damages and find a resolution to this dispute?

MR MORCH: First of all, the communication through Spanish, Italian and German lawyers, and then also the owners' contact through the Italian Embassy in Oslo, the Panamanian Consulate in Venice and the lawyers in Panama.

On behalf of the company, we first established contact through Spanish lawyers, Italian lawyers, the Italian Consulate in Oslo, the Panamanian Consulate in Venice, and later also through Panamanian lawyers and lawyers in Germany with experience from the Tribunal.

It was never possible to resolve the dispute with Italy as they never after confirmation of the judgment in Savona and Genoa made any attempt to establish any kind of contact or answer any request or official communication.

Any further effort to mitigate the ongoing damage was completely dependent on the Italian reaction to any attempts to communicate. As Italy never communicated for years, it was impossible to do anything more in this situation.

Also, finally, through Dr Nelson Carreyó, who was appointed as agent on behalf of the Panamanian Government. He made several attempts to obtain communication with Italy, without success.

No attempt to communicate in this case and resolve the conflict could be a success as long as Italy never answered any letters, private or public, or any form of requests.

I was personally very surprised when the Italian ambassador in Panama City one day in 2016 showed up in the Foreign Department and asked if it was possible to start negotiations. On the next day, when the Panamanian agent called the embassy, he was gone and later probably disappeared.

I presume that it is correct to say that the Italian delegation knows more about this strange action than me.

MS COHEN: Were you given any opportunity to retrieve or access the *M/V "Norstar"* after its arrest by Italy? More specifically, why was the vessel not retrieved after the Italian court issued the release order in 2003?

MR MORCH: The owners were working hard to retrieve the vessel after the detention in September1998. I believe that it was for Italy to deliver the vessel and allow us to confirm its condition, as well as the existence of the effects and ship's papers that were there at the moment of the arrest. In respect of this strange action and Italian detention of the vessel, we all knew that the problem was created based upon false accusations.

All who in this situation were capable of reading were familiar with the contents of Italian law and the international conventions.

After several attempts to have the vessel released, we received from the court a letter dated 18 January 1999 in which Italy offered to release the *M/V "Norstar"* against a bond of 250,000,000 lira.

The owners had no option. They could not pay the bond. In this situation all involved had to wait until the public prosecutor had lost his case that he had to start in the Tribunale di Savona. This was exactly what happened.

MS COHEN: Did Inter Marine Company A/S have the opportunity to provide the security requested amounting to 250,000,00 lira at this time?

MR MORCH: No. The *M/V "Norstar"* could not continue its commercial activity after the arrest and thus was not in a position to secure its release. Inter Marine Company A/S had no other ships to compensate for the loss of income; they had only one ship – the *M/V "Norstar"*.

Inter Marine Company A/S also did not have any option to provide security through its bank. When the "*Spiro F*" was arrested, Inter Marine Company A/S also feared that its vessel could be arrested and asked its bank if it was possible to obtain a guarantee in case of arrest. The bank announced by fax dated 16 September1998 that this was not possible. Therefore, the owner had neither the opportunity to pay the bond or to provide a bank guarantee.

MS COHEN: Thank you very much, Mr Morch.

I have no further questions, Mr President.

THE PRESIDENT: Thank you.

We have reached 1.05 p.m., which brings us to the end of this morning's sitting. The examination of the witness will be continued this afternoon when the hearing is resumed at 3 p.m. When we resume the hearing this afternoon I will ask the Co-Agent of Italy whether Italy wishes to cross-examine the witness.

The sitting is now closed.

(*Lunch break*)

PUBLIC SITTING HELD ON 10 SEPTEMBER 2018, 3 P.M.

Tribunal

Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

For Panama: [See sitting of 10 September 2018, 10 a.m.]

For Italy: [See sitting of 10 September 2018, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 10 SEPTEMBRE 2018, 15 HEURES

Tribunal

Présents : M. PAIK, *Président* ; MM. NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, Mme KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mme LIJNZAAD, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 10 septembre 2018, 10 h 00]

Pour l'Italie : [Voir l'audience du 10 septembre 2018, 10 h 00]

THE PRESIDENT: Good afternoon.

The Tribunal will now continue its hearing on the merits of the *M/V "Norstar" Case.*

M/V "NORSTAR"

Examination of witnesses (continued)

MR ARVE MORCH
CROSS-EXAMINED BY MR AIELLO (ITALY)
[ITLOS/PV.18/C25/2/Rev.1, pp. 1-3]

THE PRESIDENT: In this morning's sitting, Panama finished its examination of the witness Mr Morch.

Pursuant to article 80 of the Rules of the Tribunal, a witness called by one Party may also be examined by the other Party. Therefore, I ask the Co-Agent of Italy whether Italy wishes to cross-examine the witness.

MR AIELLO: Yes, Mr President.

THE PRESIDENT: You will be conducting cross-examination?

MR AIELLO: Yes, Mr President; I will begin and then, with your permission, Paolo Busco will take the floor.

THE PRESIDENT: I first give the floor to Mr Aiello to cross-examine the witness.

MR AIELLO: Good afternoon, Mr Morch. First of all, I would like to know something about you. You are a member of Panama's delegation and a witness. Can you confirm the double capacity in which you operate in this case?

MR MORCH: Yes, I am a member of the delegation and a witness.

MR AIELLO: To what extent, if any, did you contribute to the preparation of Panama's pleadings?

MR MORCH: No. I have given the decent information because I know the history.

MR AIELLO: So which is your answer? I would like to know if you contributed to the preparation of Panama's pleadings.

MR MORCH: No, I did not contribute. I have informed about the history.

MR AIELLO: Did you see the pleadings of Panama in this case, given the double hat you wear?

MR MORCH: I knew everything about double hats. It is depending on where you are working and what you are doing. You have to change the hat depending on where you are.

MR AIELLO: Have you ever seen the pleadings of Panama before your witness?

MR MORCH: I have seen the pleadings of Panama.

MR AIELLO: Thank you. Today you were reading a text in replying to counsel's questions. Who wrote those answers?

MR MORCH: I wrote the answers if I have given any answers to these questions. I am the only person who knows the answer.

MR AIELLO: When did you write these answers?

MR MORCH: I have done it during, let me say, the last days, because we also had a request from the Tribunal to present these answers and reply today at 9 o'clock. This Tribunal had a request to present these today.

MR AIELLO: Have you ever been imprisoned, detained or subject of any other compression of your freedom for these criminal proceedings?

MR MORCH: Once again?

MR AIELLO: In the criminal proceedings about the *"Norstar"* activity have you ever been imprisoned, detained or subject of any other compression?

MR MORCH: No, I have never been in prison, and that is good; we know we did not do anything wrong.

MR AIELLO: Before the execution of the arrest of the vessel, was the *"Norstar"* activity ever compressed by Italian authorities?

MR MORCH: No, as far as I know, we never heard from Italian authorities. We heard about the harassment in international waters from the patrol boats but we never heard anything else, never, during the years from 1994 to 1998.

MR AIELLO: Do you remember when the decree of arrest or seizure was enforced?

MR MORCH: It was enforced in September 1998.

MR AIELLO: Can you confirm that at the moment of the arrest the vessel was perfectly efficient?

MR MORCH: Yes, I can.

MR AIELLO: I have to show you again the document that is Annex K of the Counter-Memorial at page 3. *(Same handed)* This document for the Tribunal…

MR MORCH: I can. I think we have presented this document before. It says:

> Dear Sirs, as you are aware, last Saturday 5th current month, current year, we restrained the motor vessel above specified. We informed the JA, *Juzgado de Instancia* thanks to the support of the patrol of the maritime police.
>
> However, the said circumstance does not elude the situation which occurred later and is the reason of the said fax.
>
> We were informed by the captain of the vessel that due to the bad conditions of the chains aboard, and the sea and wind worsening conditions, the anchor of the starboard broke the chain and the one of the portside, now moored, is in very bad state. This circumstance together with

> the breakdown of one of the main generator as well as the need to stock the boat urge us to request to the port authority and maritime authority the authorisation to get into the port and moor the vessel to the quay.
>
> Without adding any other detail, and thanking in advance for your cooperation, we take this opportunity to send you the expression of my highest consideration. Regards, Transcoma Baleares SA, Enrique Oliver.

This is the company's agent in Mallorca.

MR AIELLO: After these indications, have you given any operation of maintenance on your vessel between 5 September 1998 and 25 September of the same year?

MR MORCH: This letter from the owner's agent is related to my declaration. We informed the agent to make a letter to get the ship alongside. As I told in my declaration, the ship was refused to enter the port because the port authorities said it had dangerous cargo on board. It was gasoil and it was very difficult for the ship to stay outside. I think also they take this fax, or maybe it was a telex – I do not know - the anchor chain he is talking about was the one they cut, the new chain bought in China the year before.

MR AIELLO: Do you remember how many yachts did you supply during the year 1998?

MR MORCH: That has been presented before. I think Silvio also sent the three logs from Italy in the position, designated position, between Ibiza and Mallorca, in a position 24 nm south-west of Ibiza.

MR AIELLO: Three?

MR MORCH: No, no, no, no. I do not remember. Maybe it was up to 20. We have presented this list here before.

MR AIELLO: Okay. Thank you. With your permission, I leave the floor to Mr Busco.

MR ARVE MORCH
CROSS-EXAMINED BY MR BUSCO (ITALY)
[ITLOS/PV.18/C25/2/Rev.1, pp. 3-11]

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

Good afternoon, Mr Morch. Good afternoon, delegation of Panama.

Mr Morch, on what date did you learn about the existence – and I stress the existence – of the decree of seizure against the *"Norstar"*?

MR MORCH: I think I learned first this when the captain sent the telex and that was probably 25 September. I think that telex was dated 24 September 1998, and I think I received a copy of that telex the day after.

MR BUSCO: So you were, if I understand correctly, informed about the existence of the decree of seizure on the same date as the date when the decree of seizure was enforced?

MR MORCH: Sorry. I did not have a copy of the decree of seizure. It was given later. I was informed on the 25th about the arrest.

MR BUSCO: You were informed on the 25th?

MR MORCH: I was informed from the ship on the 25th.

MR BUSCO: Do you know the date when the decree of seizure was enforced?

MR MORCH: No, I cannot remember any more. In fact, I think it took some time before we got that document. I just remember that it was dated on 11 August 1998 but it definitely took some time before we received that document. The first thing I received was the telex from the ship on 25 September.

MR BUSCO: Let us stick to my question. When did you learn about the existence of the decree for the first time? I understand correctly that you learned about it on 25 September.

MR MORCH: I learned about the arrest. I did not see the decree.

MR BUSCO: Yes, but with the arrest I am sure you were told that a decree of seizure existed, a decree of arrest.

MR MORCH: If the contents say something about the decree, that was the date.

MR BUSCO: So can we say that you learned about the existence of an order of arrest against the *"Norstar"* on the 25th?

MR MORCH: On the 25th, yes.

MR BUSCO: And you do not remember when the order was enforced?

MR MORCH: No, I do not remember. I do not remember the date.

MR BUSCO: I will remind you. It was enforced on the 25th, the same day. Mr Morch, can you tell me exactly where the *"Norstar"* was on 11 August 1998?

MR MORCH: No, I cannot. This is in the logbooks, which were kept on board the ship on the bridge. I do not have any records at that time. It might have been in Palma.

MR BUSCO: It may have been in Palma.

MR MORCH: It may have been in Palma – I am not sure. It could have been in the position, even by the port authority, for bunkering operation because it had recently – I think – it was not sure – it came back from Algeria.

MR BUSCO: In other words, on 11 August 1998 you do not recall exactly where the ship was.

MR MORCH: No.

MR BUSCO: But it may have been in Palma, according to what you said.

MR MORCH: It may have been in Palma – it may have been in the destination position for bunkering.

MR BUSCO: Do you know on which date the decree of seizure against the *"Norstar"* was issued by the prosecutor?

MR MORCH: I think it was issued on 11 August 1998, and after that we also realized that the same decree was issued for the *"Spiro F"* because we got a copy. It was exactly the same contents.

MR BUSCO: So on the basis of what you have just said, would you agree that on 11 August 1998 you cannot tell for sure where the *"Norstar"* was?

MR MORCH: No, I cannot. I cannot.

MR BUSCO: You cannot say where the *"Norstar"* was.

MR MORCH: No, I cannot say. It could have been in the designated position or it could have been in Palma Bay.

MR BUSCO: Thank you very much. Mr Morch, I realize that 11 August 1998 is a very specific date, so I did not expect you to recall exactly where the ship was, but do you recall where the ship was between, let us say, 1 August 1998 and 25 September 1998 – that is the date of the execution of the decree?

MR MORCH: No, I do not. I do not. We had the continuous operation and we had changed the captain, so I am not sure.

MR BUSCO: I will rephrase the question slightly. Between 10 August, or let us say 1 August 1998 and 25 September 1998, could you tell that the *"Norstar"* was on the high seas?

MR MORCH: We had this bunkering operation and Mr Rossi sent down ships from Italy. He had definitely also a certain problem due to the illegal arrest of the *"Spiro F"*. I think he has – I think at that time, maybe it was a commitment for delivering a bunker, and the ships went to the designated position – maybe south of Ibiza. So I am – that is probably the situation.

MR BUSCO: Right. I am afraid I have not quite understood, so I will go with this question once again. You said first that you do not know exactly where the *M/V "Norstar"* was between 1 August and 25 September 1998 – is that correct?

MR MORCH: No. That is correct.

MR BUSCO: Right. So what I am asking you is: can you tell for sure that at any given time between 1 August and 25 September the ship was on the high seas? I am asking you, can you tell for sure?

MR MORCH: No, I can't tell for sure – it is depending on the bunkering operation.

MR BUSCO: That's okay. Mr Morch, I would like, with the permission of the Tribunal, to hand over a document to you *(handed)* and I would like to read from this document. I am sorry that the paragraphs are not numbered, but we have not altered the text. For your benefit, I am reading at the first stage ---

THE PRESIDENT: Mr Busco, what document is this?

MR BUSCO: I beg your pardon, Mr President. It is annex 16 to Panama's Memorial. It is a document that Panama has submitted to these proceedings.

THE PRESIDENT: Thank you.

MR BUSCO: You are welcome, Mr President.

The first page at around paragraph 5, the document reads: "The ship of Panamanian flag entered Palma in March 1998. The rust, the excrement of the gulls and the dust have been taking possession of the ship, contributing thus to the bad state, proof of the passage of the years."

I would like you to focus on one point. "The ship of Panamanian flag entered Palma in March 1998."

MR MORCH: That is probably correct.

MR BUSCO: That is probably correct. I would like you now to go to the last but one paragraph at the end of the document. It says: "The withdrawal [of the vessel] after 17 years in the dock of the port of Palma comes after years of judicial disputes."

The document from which I am reading, and that you are reading, is dated August 2015. The document says that from March 1998 to the date of the article, so August 2015, the *"Norstar"* never left once the port of Palma da Mallorca.

MR MORCH: That is a very interesting issue. How is it then possible to call the port of Algeria to load the cargo and supply the vessels?

MR BUSCO: But this document says "The withdrawal after 17 years in the dock of the Port of Palma".

MR MORCH: Yes.

MR BUSCO: So it is giving a specific location. So what this document is saying is that the *"Norstar"* never went to the high seas from March 1998 until August. Now, we know that at some point it was seized, in September 1998; but what I am asking you is: do you agree that in March 1998 the ship was in the port of Palma?

MR MORCH: I think it is right, yes, because we had rebuilding of the cooling room for the transport from Algeria, before the ship left for Algeria.

MR BUSCO: Clear. What do you think of the document that then says "After 17 years in the dock of the port of Palma". Do you agree that the ship never left for 17 years?

MR MORCH: No. I do not even know who wrote this document. It is not signed and there is no date here.

MR BUSCO: Yes, it is signed and it is dated.

MR MORCH: It is produced by somebody.

MR BUSCO: This is a document that Panama has submitted to the proceedings, and it is dated and it is signed. It is signed by Miriam Barchilón. It is dated 8 August 2015, and it is a record from a newspaper, the Panama Gazette or the *Diario de Palma*, something like that.

MR MORCH: That is right.

MR BUSCO: So what do you think ultimately about this document? Do you consider it a reputable –

MR MORCH: This is an article from a newspaper.

MR BUSCO: It is an article from the *Diario de Palma* which Panama has submitted –

MR MORCH: It is definitely wrong.

MR BUSCO: It is definitely wrong?

MR MORCH: Definitely.

MR BUSCO: About what?

MR MORCH: Both the situation that if you tell me that the ship never left the port of Palma, I would say it is impossible to load something in Algeria, and is definitely impossible to go to the high seas. It is definitely impossible for Silvio Rossi to send the ships from Italy and then to the position –

MR BUSCO: I do not understand.

MR CARREYÓ: I am sorry to interrupt but *(off microphone)* so I would pray that the dear delegate of Italy does not interrupt the testimony of Mr Morch. Let him finish, please.

THE PRESIDENT: Thank you, Mr Carreyó. Mr Busco, you may proceed.

MR BUSCO: Thank you, Mr President.

Mr Morch, I have not understood something. You said that you agree with this document, which says that the ship entered the port of Palma de Mallorca in March 1998.

MR MORCH: That is correct. That is correct, yes.

MR BUSCO: But then you said that you do not agree with the other part of the document, when it says that the ship never left for 17 years.

MR MORCH: I do not even believe; I know this is not the truth, and I think that has been written by some journalist.

MR BUSCO: Yes, sure.

MR MORCH: Maybe it is fake news. I don't know, but it is definitely not correct.

MR BUSCO: We know that part of this article is certain, that after the decree of seizure in September 1998, 25 September, certainly the ship has not left – right?

MR MORCH: After 25 September?

MR BUSCO: Yes.

MR MORCH: No.

MR BUSCO: Right – so we know that that part is true.

MR MORCH: That is true.

MR BUSCO: And we also know that it is true that the ship was in port in March 1998.

MR MORCH: That is also true, arriving from Malta.

MR BUSCO: Right. So what part of the document you do not believe in?

MR MORCH: I don't believe. I know the truth, and the ship left definitely during this period the port of Mallorca to load the fuel or the diesel in Algeria; and this shipment was taken back to Mallorca and given to the mega yachts on the high seas. The sad story – I think it had been important for this Tribunal to hear the testimony of the captain, but he is unfortunately dead three years ago, and I couldn't bring him here.

MR BUSCO: Right, okay. Well, I am done with regard to this document. You mentioned a moment ago that the ship went to Algeria.

MR MORCH: Yes, Algeria.

MR BUSCO: Can you tell me exactly when it went to Algeria?

MR MORCH: I can't give you the exact date, but it was definitely in July 1998.

MR BUSCO: In July 1998, right.

MR MORCH: It is a journey of about 20 hours, or something like that, each way.

MR BUSCO: The witness that was heard before you here, Mr Rossi, said a little while ago that for the most part of 1998 the *"Norstar"* was in the port of Palma and that he only resupplied two or three ships.

MR MORCH: From Mr Rossi, it was correct. They were sent by him. The other ships came directly through the agent in Palma.

MR BUSCO: Right, but what we understand from Mr Rossi's testimony is that for the most part the ship was in Palma, and that it only resupplied two or three boats – and I take it on the high seas.

MR MORCH: Yes.

MR BUSCO: That is correct? That is what he said.

MR MORCH: He sent two or three boats to the high seas for bunkering –

MR BUSCO: Well –

MR MORCH: And the rest of the ships came from the local agent in Palma de Mallorca.

MR BUSCO: Right, but am I correct in understanding that those two or three ships would have been on the high seas?

MR MORCH: They were on the high seas.

MR BUSCO: Right, so according to Mr Rossi, at least from what we have understood, the ship probably at some point in 1998 went to the high seas to resupply two or three ships?

MR MORCH: From him, yes.

MR BUSCO: Yes, from him.

MR MORCH: The other come from the local agent.

MR BUSCO: Right, from him – two or three times. Okay. Mr Morch, you said that the ship went to Algeria at some point in July.

MR MORCH: Mm.

MR BUSCO: But that is before the decree of seizure was issued. Do you recall if it went anywhere after 11 August?

MR MORCH: High seas.

MR BUSCO: After 11 August?

MR MORCH: After – you mean after the 11th?

MR BUSCO: After 11 August.

MR MORCH: No, I don't remember the dates any more. I don't even remember when Silvio sent these two or three vessels, and I don't remember the dates for the other vessels coming from the local agents.

MR BUSCO: Understood. So your testimony here about Algeria in any event pre-dates August 1998. You just said that it went in July.

MR MORCH: I think it was before 10 August.

MR BUSCO: Before 10 August?

MR MORCH: Yes.

MR BUSCO: It went to Algeria before 10 August?

MR MORCH: Yes, I think so.

MR BUSCO: Thank you. Mr Morch, before 10 August did the ship suffer any interference with its freedom of movement? Did it navigate normally? Did it go to places?

MR MORCH: Except for these supplies on the high seas, and then the trade – I mean the cargo taken from Algeria, I would say it was quite normal.

MR BUSCO: It was quite normal. I understand. Please tell me if I am wrong: we know that in March 1998, you agreed, the ship was likely in the port of Palma.

MR MORCH: Yes.

MR BUSCO: That it went to Algeria probably in July.

MR MORCH: Yes.

MR BUSCO: Then we know for a fact that the decree of seizure was issued on 11 August 1998. Then, your recollection as to the whereabouts of the *"Norstar"* are not precise – is that correct?

MR MORCH: Yes, that's correct.

MR BUSCO: Mr Morch, I will just go back to one last point, here to the diary from Palma de Mallorca, the document that I gave you earlier. It reads that the ship was abandoned from 14 April 1998, and that its state of abandon was such that the port police found on several occasions people sleeping inside – even some of those occasional overnight showers have been found in the boat – and in addition the doors of some cabins were shattered and the bridge was full of documents. This is supposed to have happened in April 1998.

Mr Morch, how could a ship in this stage go to Algeria in July, if it was in a state of abandonment in April?

MR MORCH: I think this journal is writing about the situation in 2015 – then the ship already had been detained by Italy for many, many, many years. But we had in fact an inspector or a

guide down there in 2014, who was talking to the people involved locally, and he didn't have access to the ship; but we knew there was cracks in the window. We knew of course that during the detention nobody took care of the ship, because we did not even have access for this. It was impossible to come in there.

But what I would like to say and confirm is that when the arrest order was presented to the captain, the telex or the report from the police, having been given to this Tribunal, said that it was handed over to the captain in September. How could the ship, then, be abandoned in March? It is impossible. The crew was still on board when the ship was arrested – and why should the crew stay there during the period from March to September? The ship was never abandoned before the arrest.

MR BUSCO: I take your answer. That is not what I asked but –

THE PRESIDENT: Mr Carreyó?

MR CARREYÓ: Sorry, this is the fourth time that –

THE PRESIDENT: Mr Carreyó, this examination is under my control and I do not think counsel for Italy is excessively intervening with the witness.

Witness, are you uncomfortable with this examination?

MR MORCH: I have no objection.

THE PRESIDENT: Thank you.

Mr Busco, you may continue.

MR BUSCO: Thank you, Mr President. In fact, I will release Mr Morch and Mr Carreyó especially from the hook because I am done with my examination. Thank you very much.

THE PRESIDENT: A witness who was cross-examined by the other Party may be re-examined by the Party who had called the witness. Therefore, I ask the Agent of Panama whether Panama wishes to re-examine the witness, and, if yes, who will be conducting the re-examination?

MR CARREYÓ: I will, sir.

THE PRESIDENT: Then I give the floor to Mr Carreyó to re-examine the witness. Once again, I wish to emphasize that re-examination shall not raise new issues, but limit itself to the issues dealt with in cross-examination.

MR CARREYÓ: Thank you, Mr President.

MR ARVE MORCH
RE-EXAMINED BY MR CARREYÓ (PANAMA)
[ITLOS/PV.18/C25/2/Rev.1, pp. 11-13]

MR CARREYÓ: Out of the 20 ships that you were referring to in your previous answers, who was the person helping you to obtain those clients? Was it Silvio Rossi?

MR MORCH: Yes, Silvio Rossi obtained some of them, and he also sent some of them to the designated position directly, maybe two or three; the rest came through the local agent in Palma de Mallorca.

MR CARREYÓ: Do you know what happened to the books that you just referred to in one of the answers that you gave to the questions of Italy, the books of the ship?

MR MORCH: The books ...?

MR CARREYÓ: The logbooks.

MR MORCH: The logbooks were still on board in 2015 under Italian detention, so we do not know anything. Everything was stored there. I think that even Captain Tore Husefest later can explain what happened on the high seas in Italy. He had the same system. Everything was stored in crew lists, sales, whatever, all final certificates, documents, everything.

MR CARREYÓ: Do you think that we would have any doubt about the position of the vessel or the dates that you have just been asked about by the Italian delegate if the books of the ship would have been available?

MR MORCH: No, definitely not. We would have any kind of information.

MR CARREYÓ: In the document that you just read, there are some references to the condition of the vessel. Is there anything that you do not agree about that particular document?

MR MORCH: No. I am actually surprised that the condition could be like this after 17 years' detention. It should be much worse. I have seen new ships not looking like this one; and even after 15 years the condition was not too bad.

MR CARREYÓ: Do you know the source of information of the journalist who wrote that news?

MR MORCH: No, I do not know anything. I just saw it on the Internet, so I do not know anything. He is in Mallorca but I do not know the journalist and I do not know anything about the sources.

MR CARREYÓ: Thank you, Mr Morch.
Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Carreyó.
Pursuant to article 80 of the Rules of the Tribunal, the President and Judges of the Tribunal may also put questions to the witness. I was informed that Judges Lucky, Kittichaisaree and Heidar wish to put questions to Mr Morch. I therefore give the floor first to Judge Lucky to put his question.

MR ARVE MORCH
QUESTION FROM JUDGE LUCKY
[ITLOS/PV.18/C25/2/Rev.1, p. 13]

Thank you, Mr President.

Good afternoon, Mr Morch. For the purpose of my question, I would like to read what you said from the transcript this morning. In answer to learned counsel, you said: "The owners were working hard to retrieve the vessel after the detention in September 1998. I believe that it was for Italy to deliver the vessel and to allow us to confirm its condition as well as the existence of the effects and ship's papers that were there at the moment of arrest." Mr Morch, are you aware that the *"Norstar"* was a *corpus delicti* in criminal proceedings?

MR MORCH: Yes, I was.

JUDGE LUCKY: Did you or the other owners make any effort to visit the vessel and inspect it during that period while it was a *corpus delicti*?

MR MORCH: No. The area was completely closed after the detention in Palma de Mallorca. We had no access to anything; it was denied. We could not pass the gate because it was closed, so when the ship was brought alongside by the port authority to the mega-yacht yard it was impossible to go on board the ship. Everything was closed. The keys were taken and everything was closed. I know that it was closed.

JUDGE LUCKY: Finally, do you know that a custodian was appointed to oversee the ship during that period? Do you know that there was a custodian and who appointed the custodian?

MR MORCH: No, it was never told. We had no communication later. Nobody informed us about anything.

JUDGE LUCKY: Thank you very much.

THE PRESIDENT: Thank you, Judge Lucky.

Now I give the floor to Judge Kittichaisaree to put his questions.

MR ARVE MORCH
QUESTION FROM JUDGE KITTICHAISAREE
[ITLOS/PV.18/C25/2/Rev.1, pp. 13-14]

Mr Morch, in answer to Ms Cohen's question 12 this morning, you said that representatives of the flag State Panama should have been included during the proceedings before Italian courts; and in answer to Ms Cohen's question 15 you mentioned that Panama was involved in the year 2000, but I did not hear any answer regarding the role of Panama before or after that. My first question to you is: since when did you find a need to seek help from Panama as the flag State, and since when was Panama actually involved in helping you in this case?

MR MORCH: I contacted the Panamanian Consulate in Venice; Ms Neslin Arce was the consul. We discussed the possibility to get support from the Panamanian State due to the fact that the Italians used the Montego Bay Convention.

JUDGE KITTICHAISAREE: When was that?

MR MORCH: That was probably or could have been in October/November 1998, just a few months after the detention. I had continuous communication with the Panamanian Consulate in Venice.

JUDGE KITTICHAISAREE: Yes, but was Panama ever informed by Italy regarding the arrest of this vessel?

MR MORCH: No, never.

JUDGE KITTICHAISAREE: Thank you.

THE PRESIDENT: Now I give the floor to Judge Heidar to put his questions.

MR ARVE MORCH
QUESTION FROM JUDGE HEIDAR
[ITLOS/PV.18/C25/2/Rev.1, p. 14]

Thank you, Mr President.

Mr Morch, I refer to your testimony this morning. The second part of question 26 from counsel Ms Miriam Cohen was: "More specifically, why was the vessel not retrieved after the Italian court issued the release order in 2003?" Here there is reference to the unconditional release of the vessel, but in your answer you referred to the conditional release in 1999 and did not really answer the question put to you. I therefore seek your answer to the question that was put to you regarding why the vessel was not retrieved after it was released in 2003.

MR MORCH: I would say that my opinion was that of course I then knew about the order from the Italian court, but I also thought that they had a responsibility to execute that order. I mean that order could be anything, but who knew that the release had been executed? I think that even Mr Carreyó later had been asking for this letter from the Spanish authorities. The Italian delegation never presented this letter, because I do not think they ever got it. Nobody told us about the release. They told us about the order for release. I got that document twice, first in a registered letter in April or May – I do not remember – and later presented by the police at the beginning of July, but then I think even at that time in July the ship had not been released; it has not been executed. How should we know, and who should tell us? Who was responsible for this detention?

JUDGE HEIDAR: Thank you very much.

THE PRESIDENT: Thank you very much for your testimony, Mr Morch. Your examination is now finished and you may withdraw.

(The witness withdrew)

Mr Carreyó, I understand that Panama wishes to examine the third witness now. Could you please confirm that?

MR CARREYÓ: Yes, Mr President.

M/V "NORSTAR"

MR TORE HUSEFEST
EXAMINED BY MS KLEIN (PANAMA)
[ITLOS/PV.18/C25/2/Rev.1, pp. 15-19]

THE PRESIDENT: Thank you, Mr Carreyó.

The Tribunal will then proceed to hear the witness Mr Tore Husefest. He may now be brought into the courtroom. I call on the Registrar to administer the solemn declaration to be made by the witness.

(*The witness made the solemn declaration*)

Thank you, Mr Registrar.

I understand that the examination of the witness will be conducted by Ms Mareike Klein.

I therefore give the floor to Ms Klein.

MS KLEIN: Distinguished President, Members of the Tribunal, it is an honour for me to appear before you today, representing the Republic of Panama in the *M/V "Norstar" Case*.

With your permission, Mr President, I will now examine Panama's next witness, the former captain of the *"Norstar"*, Mr Tore Husefest.

Mr Husefest, please introduce yourself and explain your role in relation to the *M/V "Norstar"*.

MR HUSEFEST: My name is Tore Husefest. I was born on 12 January 1949. My job on the *"Norstar"* was captain. I had been captain on this ship during bunkering operations in Libya for Brega Petroleum and offshore bunkering in international waters off Italy and France in 1994-1995 and 1996-1997 and onwards, also during bunkering service in Gibraltar for Texaco Oil.

MS KLEIN: Can you tell us the approximate dates you were in command of the *M/V "Norstar"*?

MR HUSEFEST: I was in command of the *"Norstar"*, formerly named "*Norsupply*", from spring 1993 on a four-months-on-and-off agreement with Mr Morch.

MS KLEIN: On which dates did you disembark the ship and why?

MR HUSEFEST: I got sick and unfortunately I cannot remember the date, but I was taken by an ambulance boat into Imperia in Italy and hospitalized there. Maybe Mr Rossi can help with this as he was visiting me at the hospital several times.

MS KLEIN: Can you describe in more detail your role as a captain on the *M/V "Norstar"* – for example, your responsibilities, tasks and daily routine?

MR HUSEFEST: The captain's duty and responsibilities are first of all to see that the vessel is operated in a safe manner, and of course the crew's safety is a mandatory issue. Personally, I was on watch duty from 6 a.m. until 12 noon and from 1800 hours until midnight. If any operations were going on in my off time, I had to oversee these operations as well.

MS KLEIN: Before your position as captain with the *M/V "Norstar"*, did you occupy similar roles in other vessels?

MR HUSEFEST: Yes. I was captain on board the *M/T "Nortrader"* from 16 February 1992 with continuous employments in the capacity of captain on other ships managed by Mr Morch.

MS KLEIN: Have you been in contact with the other crew members or Mr Morch since the relevant incidents?

MR HUSEFEST: Only with Mr Morch via email over the last few months.

MS KLEIN: I will ask you some questions about the activities of the *"Norstar"* prior to the arrest and your experience also with the Italian authorities. What activities was the *M/V "Norstar"* involved with during the period you were in command, and can you describe in your own words the nature of these activities?

MR HUSEFEST: The activities were bunkering yachts in international waters. When we were empty, we had to sail to Malta to load more diesel oil and return to our position 20 nautical miles off the Italian coast.

MS KLEIN: How would you describe the conduct of Italy's authorities?

MR HUSEFEST: Prior to the arrest, I observed that Italian gunships were visually scrutinizing our operation and on several occasions harassing us by moving in tight circles around the *"Norstar"* and the customer alongside at high speed in order to create high waves. These actions forced us to abort ongoing bunkering operations in order to prevent hose breakage and subsequent oil spills into the sea.

MS KLEIN: Can you tell us when exactly prior to the arrest you observed that, as you said, the Italian gunships were visually scrutinizing your operation and the occasions of harassment?

MR HUSEFEST: I cannot give –

THE PRESIDENT: Excuse me. I am sorry to interrupt you, Ms Klein. Would you confine your examination to the dispute before the Tribunal? You may now proceed.

MS KLEIN: Those questions were related to the activities of the *"Norstar"* and his experience with the Italian authorities, Mr President.

THE PRESIDENT: You may proceed.

MS KLEIN: Thank you, Mr President.

Can you tell us where exactly you were conducting the bunkering operations when the Italian gunships harassed you by moving in those tight circles around the *"Norstar"* and the customer?

MR HUSEFEST: We were located at our usual position 20 nautical miles off the Italian coast.

MS KLEIN: So you were located on the high seas, in international waters?

MR HUSEFEST: Yes, that is correct.

MS KLEIN: Did you receive any communication from the Italian gunships?

MR HUSEFEST: No, I never had any communication with them.

MS KLEIN: How did you know it was an Italian gunship? Can you describe it?

MR HUSEFEST: Yes. The vessel was flying the Italian flag and the vessel was painted white. It looked to me like a ship from the *Guardia di Finanza* – that means the fiscal police of Italy. But they never showed up unless there were customers around so I think they were listening to our communication.

MS KLEIN: Did you report these incidents?

MR HUSEFEST: No, I never did, because I did not want to interfere with the Italians' games.

MS KLEIN: Who else witnessed these actions?

MR HUSEFEST: All the crew of the *"Norstar"* was watching this. The name of the customers I have forgotten. Sorry.

THE PRESIDENT: Ms Klein, I am sorry to interrupt you. You said this incident is related to the dispute before the Tribunal.

MS KLEIN: Yes.

THE PRESIDENT: Can you explain to me how this incident is related to the dispute before the Tribunal?

MS KLEIN: Yes, Mr President. Thank you for your question. These incidents Mr Husefest refers to happened prior to the arrest of the *"Norstar"* when he was in command, and since Mr Husefest was also one of the wrongfully accused and this addressed the time in which these incidents were happening, they were relevant to this examination.

THE PRESIDENT: Is this incident referred to in the written pleadings submitted by Panama?

MS KLEIN: No. This is just Mr Husefest's statement.

THE PRESIDENT: Ms Klein, would you refrain from referring to this incident in this examination. I do not find it relevant to the dispute before the Tribunal.

MS KLEIN: Okay, so I will proceed with the questions related to the arrest and after the arrest. Were you present during the court proceedings that took place after the arrest in Italy?

MR HUSEFEST: No, I was not, but I was interrogated by Norwegian police on behalf of the Italian authorities.

MS KLEIN: When and how often were you interrogated?

MR HUSEFEST: I was only interrogated once, and I believe that was in the early months of 1999. My memory – I am not 100 per cent sure of that.

MS KLEIN: Did you suffer material damage as a result of the accusations and the long criminal proceedings that took place after the arrest in Italy?

MR HUSEFEST: Well, I lost my job, so there was a hard time after that to find money to support my daily life, because it took several months to find new, suitable employment.

MS KLEIN: Have you received any type of compensation?

MR HUSEFEST: Not at all.

MS KLEIN: Thank you. I would now like to move on to ask you questions about the condition of the vessel at the period preceding the arrest. As former captain of the vessel *"Norstar"*, what can you tell us about the physical condition of the ship at the time preceding or prior to the arrest?

MR HUSEFEST: Prior to the arrest, the *"Norstar"* was always kept in a very good physical condition.

MS KLEIN: In your experience as captain, would the *M/V "Norstar"* be carrying out its commercial activities in the state it was at the time? In other words, was it seaworthy?

MR HUSEFEST: Yes. I always found the *"Norstar"* in a very good, seaworthy condition.

MS KLEIN: Italy contended that the *"Norstar"* was not seaworthy. In your opinion, was the vessel seaworthy at the time preceding the arrest, and, more specifically, how would you make such assessment?

MR HUSEFEST: Well, we did always carry out all necessary maintenance in co-operation with the class society. I took during the years responsibility and was attending the work on the shipyard in co-operation with the class society named *Det norske Veritas*, which the vessel had all certificates required by class society in Panama, otherwise we would have problems with port authorities. But this was never the case. I had always kept on board the vessel the logbooks, charts, the records of customers, how much each received and how much they paid on behalf of the charterer. I also gave a copy of these documents to the charterer's Maltese agent.

MS KLEIN: Can you provide more details on the maintenance work required by the class society and the seaworthiness of the vessel?

MR HUSEFEST: We had to keep machinery and nautical equipment and to see the stability was adequate at all times. The class society performed inspections at intervals but the only recommendation we ever got was to change the anchor chains. This was done at the Malta dry docks.

MS KLEIN: In describing its seaworthiness, how would you compare the *M/V "Norstar"* to other, similar vessels at the time of the arrest?

MR HUSEFEST: The seaworthiness of the *"Norstar"* was as good or better than other ships of similar age and type. This was towards the end of 1997.

MS KLEIN: Thank you very much, Mr Husefest. I have no further questions, Mr President.

THE PRESIDENT: Thank you, Ms Klein.

Pursuant to article 80 of the Rules of the Tribunal, a witness called by one Party may also be examined by the other Party. Therefore, I ask the Co-Agent of Italy whether Italy wishes to cross-examine the witness.

MR AIELLO: Yes, Mr President.

THE PRESIDENT: Who will be conducting the cross-examination? Yes, Mr Aiello.I give the floor to Mr Aiello to cross-examine the witness.

MR TORE HUSEFEST
CROSS-EXAMINED BY MR AIELLO (ITALY)
[ITLOS/PV.18/C25/2/Rev.1, pp. 19-20]

MR AIELLO: Good evening, Mr Husefest. Also you were reading a text in replying to counsel.

MR HUSEFEST: Yes.

MR AIELLO: Who wrote your answers?

MR HUSEFEST: What answers?

MR AIELLO: To the question of your counsel.

MR HUSEFEST: I did.

MR AIELLO: You did? By yourself?

MR HUSEFEST: Yes.

MR AIELLO: When?

MR HUSEFEST: I have done this three times over the last two weeks.

MR AIELLO: Do you remember where the *"Norstar"* was on 11 August 1998?

MR HUSEFEST: No, I cannot, because I was not on board.

MR AIELLO: You asserted that you had suffered damage out of the arrest, referring to the fact that you were never compensated by Italy.

MR HUSEFEST: That is correct.

MR AIELLO: Did you ever start a case to get compensation against Italy?

MR HUSEFEST: No, I did not.

MR AIELLO: Why?

MR HUSEFEST: Why? Because I did not even know the ship was arrested till long after.

MR AIELLO: Thank you. I have no more questions.

THE PRESIDENT: Thank you, Mr Aiello.

A witness who was cross-examined by the other Party may be re-examined by the Party who had called the witness. Therefore, I ask the Agent of Panama whether Panama wishes to re-examine the witness.

MR CARREYÓ: No, sir, Panama does not, thank you.

THE PRESIDENT: Thank you, Mr Carreyó.

I understand no Judge wishes to put questions to the witness, therefore Mr Husefest, thank you for your testimony. Your examination is now finished. You may withdraw.

MR HUSEFEST: Thank you very much, sir.

(The witness withdrew)

THE PRESIDENT: Thank you.

I now give the floor to the Agent of Panama, Mr Carreyó, to make his statement.

STATEMENT OF MR CARREYÓ
AGENT OF PANAMA
[ITLOS/PV.18/C25/2/Rev.1, pp. 20–38]

MR CARREYÓ: Thank you, Mr President.

I will start by approaching the first main issue of our first round, main part, which is the breaches of article 87 and the distortion of Panama's arguments.

Panama has submitted that by arresting and confiscating the *"Norstar"* in Spanish waters, as a result of applying its customs laws and its jurisdictional powers for activities performed on the high seas, Italy breached the *"Norstar"*'s right to navigate freely, without justification, therefore breaching article 87 of the Convention.

That the *"Norstar"* was confiscated has been proved by the decree of seizure, where Italy referred to the *"Norstar"* as "subject to mandatory confiscation".

As a result, the Norstar was appropriated and forfeited.

Italy confirmed its intention in its Decree refusing the release of the *"Norstar"* issued by the Savona Court on 18 January 1999 which described this vessel as a "confiscated good".

In that document, the prosecutor again referred to the *"Norstar"* as follows: "The ship-owner is one of the persons under investigation: his full knowledge that the *confiscated* vessel was used for contraband …".

Panama contends that the confiscation of the *"Norstar"* confirms the violation of its freedom of navigation protected by article 87.

Panama's description of the events as they occurred and its subsequent legal task to gain restitution for the Italian international unlawful conduct are both undoubtedly and inextricably related to the location where the activities for which the *"Norstar"* was arrested were performed. This is the first of the two main arguments of Panama concerning the breach of article 87.

The locus of activities for which the *"Norstar"* was arrested and confiscated:

Italy has argued in paragraph 48 of its Rejoinder that Panama has not explained "in any way to the point of not even engaging with this issue at all" how the arrest order and the request for execution breached freedom of navigation.

Therefore, all the Italian references – and there were many – to the difference between issuance, request, and enforcement of the arrest, including those that have intended to portray the idea that article 87 was not breached because the *"Norstar"* was not on the high seas when the arrest was executed, are of no relevance to the present discussion.

Panama would like to address this issue immediately, even though Italy has characterized it as a "secondary or subordinate" argument in its Counter-Memorial.

Italy has misleadingly described in paragraph 8 of its Counter-Memorial the locus of the *"Norstar"*'s activities by saying

> 8. Secondly, and subordinately, Italy will also demonstrate that the Decree of Seizure did not entail an extraterritorial application of Italy's territorial jurisdiction, since it did not target the activities carried out by the *M/V "Norstar"* on the high seas, but rather crimes that the *"Norstar"* was alleged to have been instrumental in committing within the Italian territory.

One of the primary lines of defence against Panama's charge that Italy breached article 87, paragraph 1, has been to change the location of the activities for which the *"Norstar"* was arrested.

On the other hand, Panama's position is that the arrest was carried out based on activities performed by the *M/V "Norstar"* on the high seas, and not for any conduct carried out within Italy.

Although Italy has stated that Panama has relied exclusively on the argument that Italy applied its legal system extraterritorially, the truth is that the claim of Panama is based on the impact that one, the Italian arrest, two, the exercise of its jurisdiction, and, three, the application of its criminal legal system all had on the free movement of the *"Norstar"*.

In paragraph 13 of its Rejoinder Italy has stated that the *"Norstar"* was arrested "within the framework of criminal investigations for the alleged offences of smuggling and tax evasion **in** Italy".

Panama does not have any objections to Italy conducting investigations.

What Panama strongly objects to is to describing the actions of the *"Norstar"* in this way, because, firstly, it operated in international waters, not within Italian territory, and, secondly, because all of its operations had been conducted within the framework of legality.

In fact, this Italian characterization only serves to confirm the extraterritorial application of Italy's jurisdiction.

Italy contends that it arrested the *"Norstar"* to use the vessel as evidence that bunkers were being bought in Italy, taken to the high seas, and sold and transferred to smaller vessels which came back to Italy, thereby implying that the *"Norstar"*'s activities were illicit. This distorts both the facts of the case and Panama's argument.

What Panama has always proclaimed is that bunkering on the high seas has never constituted smuggling or tax fraud.

Panama has proved that the respective Italian authorities ruled that no crimes were ever committed by the *"Norstar"* because it operated on the high seas, the arrest being ordered only under the basis of the suspicion of the existence of such crimes. It is obvious that there was an error of judgment when the arrest of the *"Norstar"* was ordered, something that Italy has not yet seemed to accept.

Therefore, the basis for Panama's invocation of article 87's application is that the arrest of the *"Norstar"* for the alleged offences of smuggling and tax evasion was enforced in spite of the fact that it was transacting business solely in international waters.

The evidence presented by Italy confirms that all of its representatives involved in this case, including four different judges, and even the public prosecutor himself, not only knew the *locus* of the *"Norstar"*'s operation, but also knew that this indicated that no crime had been committed. Nevertheless, Italy has been continuing to press its non-existent case even now, as if it could be valid to reopen before this Tribunal the criminal case proceedings in Italy.

Throughout these hearings, Italy has decided to ignore the reason for the acquittal of all accused and for the revocation of the arrest, namely that no offence had been committed by the *"Norstar"* either on the high seas or in Italy.

Instead, Italy has continued to insist, as it did in paragraph 128 of its Counter-Memorial that "the crimes considered by the Prosecutor, were crimes committed within the territory of Italy".

With this proposition, Italy is confirming its violation of article 87 because despite previously allowing the *"Norstar"* to conduct its activities on the high seas, it is persisting in claiming the right to suddenly detain a vessel outside its territory.

If the prosecutor had respected the Convention, he would have not rashly arrested the *"Norstar"*. Moreover, if Italy had respected this international agreement, it would not be contesting Panama's action in this case after it has been proved that the arrest order was invalid.

It is then very important to note that throughout its pleadings Italy has been forced to base its arguments on, in Italy's words, "[p]otentially[1] suspected, alleged crimes, or to 'crimes that it was thought to be instrumental on committing.'"

The fact that the *"Norstar"* and the persons therein connected were not charged with these crimes, much less convicted of them, requires the Italian delegation to avoid all such references to the *"Norstar"* in terms of criminal behaviour with which Italy has been grounding its arguments such as that of paragraph 128 of its Counter-Memorial.

To suggest otherwise is to distort the facts of this case and misrepresent the evidence before this Tribunal, because it has been proved that the competent authorities of Italy have decided that the Prosecutor was wrong in arresting the *"Norstar"* and that for this reason the judges of Savona and Genoa ordered its release and return.

Panama insists that it is illicit for Italy to have continued to deprive the vessel, and thereby Panama, of its freedom of navigation, after its order to do so had been held illegal as we have proved its own courts held.

It is clearly unlawful to use, in this proceedings, the same arguments with which Italy grounded its original order, because, according to the standards of international conduct, no one can take advantage of their own wrong.

Panama's position is that the prosecutor knew, or should have known, that no offence occurred because Italy did not have a contiguous zone, as the Italian Ministry of Foreign Affairs had warned, but he arrested the *"Norstar"* anyway.

If the bunkering activities of the *"Norstar"* had been actual crimes, as Italy has been alleging, Panama would not have had anything to say before this Tribunal. Yet, this is not the case. Panama has proved that the crimes for which the *"Norstar"* was arrested have been left unsubstantiated to this day.

In paragraph 24 of its Rejoinder, Italy has tried to counter the Panamanian argument that the lifting of the arrest was a consequence of the finding that the *"Norstar"* only operated on the high seas, by raising the presumption that the lifting was ordered because there was no need to hold the vessel any longer for probative purposes.

However, Panama notes that it has not been possible for Italy to locate the order of conditional lifting, so the Italian position regarding this aspect of the case remains unsupported.

On the contrary, this line of reasoning directly contradicts the actual reasons for revoking the order of arrest given in paragraph 6 of the Tribunal of Savona judgment about the *locus* of the activities on the high seas, and that no duties were to be paid.

In other words, Italy itself ruled that the provisions of supplies, i.e., bunkering, was conducted outside the Italian territorial sea, and for that reason the arrest was revoked.

In the interim, the right of the *"Norstar"* to freely navigate was breached in violation of article 87; and this shall no longer be in doubt particularly when we analyse two documents to which Italy has not referred at all.

That Italy lacks a contiguous zone is an issue that we will deal with immediately.

However, Panama has been surprised that Italy has failed to refer to the letter (*telespresso*) dated 4 September 1998 issued by the Service of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy and filed as Annex 7 to the Memorial, because it has been proved that this letter was addressed to and received by the office of the same prosecutor that issued the arrest order in the present case.

In this letter such foreign affairs office head stated that the *"Spiro F"* had been arrested "21 miles away from the Italian coast" and cited the prosecutor's grounds for arrest as follows: "The arrest of the boat has been done in the contiguous zone subject to the full jurisdiction of the State regarding fiscal and customs crimes."

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[1] "potentially in breach of Italian criminal law", para. 37, Counter-Memorial; "alleged" was used around 15 times.

Regardless, the prosecutor did not take this into consideration, allowing the enforcement of the arrest order of the *"Norstar"* on 25 September 1998 to continue, and keeping it under arrest *sine die.*

Therefore, it would also be wrong to assume that bunkering operations within such non-existent contiguous zone were subject to the full jurisdiction of Italy regarding fiscal and customs crimes; Italy completely treated the bunkering operations as carried out within the contiguous zone subject to the full jurisdiction of the State regarding fiscal and customs crimes.

In the last part of paragraph 127 of the *M/V "SAIGA"* Judgment, this Tribunal has stated that

> in its exclusive economic zone, a coastal State has jurisdiction to apply its customs laws and regulations in respect of "artificial islands, installations and structures" but that the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone.

If that was the case concerning the exclusive economic zone, this is even more true concerning the high seas.

If we examine the grounds for the decree of seizure, it is easy to confirm that Italy grounded this decision in the doctrines of constructive or presumptive presence and genuine link, determining that the seizure had to be performed beyond the territorial sea and the contiguous vigilance zone.

Yet the actual arrest took place in Spain.

As this decree has shown, the prosecutor grounded his order of arrest on the understanding that the *"Norstar"* was operating "inside the contiguous zone", something which Italy did not have, and because it was "affecting Italy´s financial interests".

This is contrary to the case law that this Tribunal has used to hold that the Convention does not empower a coastal State to apply its customs laws to the high seas.

It demonstrates Italy's misconception of zonal management. By referring to "actual contacts" and the "genuine link" Italy is relying on presumptive presence, on the idea that the activities of the *"Norstar"* on the high seas were affecting those maritime zones over which it indeed had jurisdiction.

The scholar Tanaka Yoshifumi defines zonal management as the law of the sea regulating human activities in the ocean according to the legal category of ocean spaces. Italy's misconception of zonal management, as demonstrated in its decree of seizure, can be illustrated by comparing it to the *M/V "Virginia G" Case*.

In the *M/V "Virginia G" Case*, the vessel was also carrying out bunkering activities. However, it was supplying oil to fishing vessels in the exclusive economic zone. As the tribunal found, a coastal State has the right to regulate bunkering of foreign vessels fishing in the exclusive economic zone.

The *"Norstar"*, on the other side, was bunkering leisure boats on the high seas, which would then continue to the Italian coast. Despite these cases having the parallel of both the vessels involved in bunkering activities, and by having bunkered vessels return to waters under jurisdiction of the coastal State, and through this affecting or coming in contact in one way or another with a maritime zone regulated by the coastal State – they are distinct matters.

In the *M/V "Virginia G" Case*, the Tribunal specifically emphasized the difference between the general right to bunker, which is inherent in the freedom of navigation, and the right to bunker vessels fishing in the EEZ.

This is without prejudice to the finding in the *M/V "SAIGA" Case* mentioned before. Italy grounded its decree of seizure on the suspicion that the activities of the *"Norstar"* on the

high seas are affecting the maritime zones which are under its jurisdiction or affecting other interests.

However, that mere suspicion, even if it were true, as a reason for the arrest and detention, is by far not in conformity with UNCLOS, and a clear misconception of zonal management as foreseen by the Convention and the Tribunal's jurisprudence.

THE PRESIDENT: Mr Carreyó, I apologise for interrupting you. It may not be the most convenient place for you to stop, but we have reached four thirty five, so the Tribunal will withdraw for a break of 25 minutes. We will continue the hearing at 5 p.m.

MR CARREYÓ: Thank you, Sir.

THE PRESIDENT: Thank you.

(Break)

THE PRESIDENT: The Tribunal will now resume its hearing.

Mr Carreyó you may continue your statement.

MR CARREYÓ: Thank you, Mr President, dear Members of the Tribunal.

As we were examining the location of the activities for which the *"Norstar"* was arrested, and after revisiting some case law at this Tribunal and the Italian misconception of zonal management and its lack of contiguous zone, we only have to add on that subject that Italy cannot rely on its ignorance of the law. The law itself imputes the fact of having knowledge as a *presumption juris et de jure.* However, if there is still any doubt about the fact that Italy grounded the arrest on an erroneous assumption that the *"Norstar"* committed criminal offences within its territory, let us reconsider the following documentary evidence in chronological order:

First, on 24 September 1998 the Fiscal Police of Savona (as stated in the Counter-Memorial when citing page 1 of the Criminal Offence Report Communication, at Annex A), this report referred to the offshore bunkering activities conducted by the *"Norstar"*, saying "that positions itself in international waters… that traded in international waters … and that its product was … transported in international waters off the coast of San Remo".

Second, on 11 August 1998 the decree of seizure reiterated this by saying that "the *M/V "Norstar"* positions itself beyond the Italian … territorial seas … inside the contiguous … zone and supplies with fuel (so-called "offshore bunkering") mega yachts".

In this piece of evidence, Italy also referred to "the repeated use of adjacent high seas by the foreign ship".

Third, in the decree refusing the release of confiscated goods on 18 January 1998, Italy stated that the "*"Norstar"* was stationed outside the territorial waters, refueling yachts ... the mother ship was stationed in international waters."

Fourth, in the letter rogatory dated 11 August 1998, Italy stated that "[the *"Norstar"*] exclusively conducted … offshore bunkering activity".

Fifth, in a particularly important piece of evidence, the Tribunal of Savona concluded on 13 March 2003 that the *locus* where bunkering activities were carried out by the *"Norstar"* was of the essence in arriving at its judgment and specifically stated at its second paragraph 5 (there are two paragraphs numbered 5) that "the purchase of fuel intended to be stored on board by leisure boats outside the territorial sea … shall not be subject to payment of import duties".

The "*elements of the conduct*" of the *"Norstar"* acknowledged by this Italian tribunal were that whoever "… organizes the supply of fuel offshore … for its subsequent introduction

into the Italian territory … does not commit any offence, nor is there any offence when fuel sold or transshipped offshore has been purchased on Italian territory."

Sixth, at page 3 of the Public Prosecutor's Appeal dated 18 August 2003, he accepted that

> tankers … placed themselves beyond the Italian territorial waters ... This appeal is also of particular importance because Italy's counsel in this Tribunal has agreed that the activity of the *"Norstar"* was … bunkering ... fuel which was sold in international waters [free] from … custom taxes and duties.

Although counsel for Italy has acknowledged the existence of the judgment of the Court of Appeal of Genoa issued on 25 October 2005, it has not addressed its substance, suggesting that it would prefer to ignore its conclusions. What Panama underlines is that this ruling accepted evidence that the *"Norstar"* was "anchored beyond the Italian territorial sea … supplying recreational vessels …", and in its last page it clearly affirmed that the Italian rules made a distinction according to the place where the vessel is located, i.e., within the customs borderline or in the territorial sea; that "the purchase by recreational vessels intended to be used as ship's stores outside the limit of territorial sea and its subsequent introduction inside it"; that "no offence is committed by anyone who provides bunkering on the high seas, even in full knowledge that the gasoil will be used by leisure boats bound for Italian coast"; and that "when the gasoil … has been transshipped on the high seas, such goods are to be considered foreign goods once the vessel ... has gone beyond the limit of territorial waters".

This final and definitive judgment by the Italian Judiciary confirmed that the activity for which the prosecutor investigated the *"Norstar"* was merely "bunkering on the high seas", as Panama has repeatedly characterized them, and for which it has been insistently criticized by Italy over the course of these proceedings.

In other words, all of the Italian judges that have ruled on this case have confirmed that the arrest of the *"Norstar"* was based on the *suspicion* of having been involved in the crimes of smuggling and tax evasion for supplying bunkers to other vessels, but that this suspicion was unfounded.

This certainly explains why Italy chose not to rely on their decisions as evidence but instead on the prosecutor's erroneous thesis. However, the upshot of this piece of evidence is that it negates the value of the other several documents that Italy is continuing to rely on during these proceedings.

An analysis of the evidence listed above shows that Italy has been unable to demonstrate how article 87 has been complied with. The so-called criminal acts were not carried out *within* Italian territory but, on the contrary, on the high seas. This is confirmed by the final Italian judgments themselves. If the acts had been carried out within Italy, Italy would not have revoked the arrest nor ordered the return of the *"Norstar"* to its owners.

In its Letter Rogatory of 11 August 1998, Italy even graphically explained the bunkering operations as follows.

This is in Annex J. I do not have the page number but it will be quite easy to find because it is a graphic that was filed by Italy in its Counter-Memorial. It is probably not a very good graphic because I scanned it and presented it as a slide, but it is easy to see that Italy itself placed the *"Norstar"* in the middle and referred to and identified the areas as international waters and mega-yachts in the European Union, and, outside of that, European ports.

Panama has proved that the acts for which the arrest was ordered were not performed within Italy but on the high seas, and that the arrest of the *"Norstar"* and subsequent criminal proceedings for the alleged offences of criminal association aimed at smuggling and tax fraud were established to be unfounded.

Although Italy originally could have honestly believed – and I might also agree with this – that it had the right to exercise its jurisdiction and apply its internal legal system over the *"Norstar"* for acts performed within its territory, it would still have to explain why it maintained jurisdiction over the *"Norstar" sine die (*for ever*),* even after finding that such an arrest had been revoked by its courts and the vessel had been ordered to be returned to its owner.

By continuing to pursue the argument that the arrest of the *"Norstar"* was justified before this Tribunal, Italy is going against its own internal decisions in violation of the doctrine of *venire contra factum proprium non valet*.

It is also to be noted in this respect that when a party has created a legitimate expectation on the part of another party about certain facts, it may not be able to further raise contrary facts in evidence.

This rule, known as estoppel, concerns matters of evidence here and states that if certain points are wrongly presented as facts, the party liable for this misinformation is debarred from presenting an otherwise divergent state of affairs to the judges, even if materially true, because it will be bound by the principle of procedural estoppel. If it chooses to do so, the judge will ignore the evidence presented on account of estoppel.

Panama has shown that Italy had been maintaining that the *M/V "Norstar"* bunkering operations were carried out on the high seas and now it has been wrongly presenting as a fact that the activities for which the *"Norstar"* was arrested had been performed within its territorial waters.

Italy shall then be held liable for this misinformation and debarred from presenting an otherwise divergent state of affairs because it is bound by the principle of procedural estoppel.

Mr President, we will now turn to the second main argument that Italy has been using, namely the locus of the arrest.

The Italian argument in paragraph 7 of its Counter-Memorial was: "Since the "*M/V Norstar"* was within Spanish internal waters at the time when the Decree of Seizure was issued and executed, article 87 of the Convention would not even be engaged, let alone breached, by Italy's conduct."

This other argument put forward by Italy is, in short, that since the *"Norstar"* was in Spain, rather than on the high seas, when it was arrested, there has been no breach of article 87.

In paragraph 74 of its Reply, Panama responded to such argument that

> Freedom of navigation means not only the right to traverse the high seas but also the right to gain access to it, and that this freedom would mean little to the international community if the vessels in port could not enjoy the same protections as those already on the high seas, and that similarly, this freedom would be meaningless if States could indiscriminately arrest vessels in port without justification.

Before getting into the details of this argument, it is important to refer to a couple of aspects of the Italian Rejoinder.

The first is closely related to the Italian argument stating that article 87 was not breached because the arrest was a "prejudgment measure" and that its nature did not allow Panama to have knowledge of it before its enforcement.

According to Italy, the evidence that it filed through the judgment of its Cassation Court in Annex P confirms the *fumus* as "the mere possibility of a relationship between the good and the offence."

However, we should then ask if issuing such an order was necessary to prove, without any doubt, that an offence actually existed. The answer is no, and the Italian high tribunal itself agreed that the existence of the offence needed to have been proved beforehand.

The second aspect is that it should be noted that an arrest, as a precautionary measure, can only be adopted if there is the serious likelihood that the defendant has committed a crime, and if it is necessary in order to prevent that defendant from fleeing, because no one attempted to flee or was ordered to stop and did not obey such order, or from committing another crime, or from destroying or creating false evidence. In fact, none of these were the case.

Italy seems to have ignored the fact that while claiming that it did not breach article 87, because the *"Norstar"* was in Spain, it is simultaneously admitting the extraterritorial exercise of its jurisdiction.

Italy has expressly accepted that it knew that arresting the *"Norstar"* on the high seas would be a clear and open infraction of article 87, as has been held across a very wide spectrum of the case law presented to this Tribunal as evidence. Italy, thus, decided to order the arrest in another location, i.e., in the territorial waters of a third State, though still for the activities performed by the *"Norstar"* on the high seas.

This decision was probably adopted under the dangerous misconception that such a forceful action would be interpreted in accordance with the law of the sea. However, Italy was then and is still wrong. The right to freedom of navigation governed by article 87 does not only involve the sailing through, but also the sailing towards the high seas.

Panama's position is that if a vessel is not allowed to sail towards the high seas, without justification, the right to freedom of navigation is seriously compromised. No State is allowed to hinder the movements of foreign vessels without justification, even when they are in port.

Panama accepts that a State has the right to enforce its decisions to seize a vessel; but not if those decisions are contrary to international law. The forceful measures used when arresting the *"Norstar"* clearly breached the right to freely navigate on the open seas. This has been proved in the present case, particularly by the revocation of the arrest order by the arresting State itself, as we have clearly learned from the judgments of the Italian courts presented as evidence.

In short, there is no question as to whether the arrest order breached that vessel's right to freedom of navigation protected by article 87 of the Convention for not allowing it to proceed to the high seas.

In the *Oscar Chinn* case, the PCIJ ruled that

> According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels, freedom to enter ports, and to make use of plants and docks, to load and unload goods, and to transport goods and passengers. Series A/B No 63 (1934), p. 65 et seq., at 85.

As we have already shown, in paragraph 60 of its Rejoinder, Italy stated that Wendel, who Panama quotes, "acknowledges that the right to gain access to the oceans can be limited subject to regulations supported by a general consensus among states".

Yet, in the present case Italy does not give a single example of any such limiting regulations supported by a general consensus to support its reference to this source. We have already considered the other indirect Italian reference to this issue in paragraph 7 of its Counter-Memorial stating that "an extraterritorial exercise of jurisdiction that does not determine any physical interference with the movements of a ship on the high seas" does not breach article 87.

And, as we have also demonstrated, while claiming that it did not breach article 87, because the *"Norstar"* was in Spain, Italy is simultaneously admitting the extraterritorial exercise of its jurisdiction.

On paragraph 61 of its Rejoinder, Italy cited Kohen, who explains that states cannot

> impede the freedom of navigation of foreign vessels by arbitrarily preventing them from leaving their internal waters. An arbitrary detention of a foreign vessel by a coastal State, after having

> allowed it to enter its internal waters and/or call a port, cannot but be a blatant breach of the freedom of navigation in other maritime areas.

This supports Panama's arguments.

However, Panama humbly believes that this passage supports its argument rather than Italy's because the facts of this case show precisely that Italy as the coastal State arbitrarily hindered the *"Norstar"*'s freedom of navigation after this vessel had entered the internal waters of Spain at the port of Palma de Mallorca.

Panama contends that any arrest of a vessel is arbitrary, and therefore without justification, if it is not supported by the law of the sea, and this is precisely so under the circumstances of the present case, because the arrest was executed in a foreign State for bunkering operations on the high seas in the context of criminal proceedings that revoked the arrest and ended in the acquittal of the persons charged.

Panama's position is that article 87 preserves the right to freedom of navigation not only of vessels that are already on the high seas but also of those, such as the *"Norstar"*, that are in the port of a third State. The right to freedom of navigation not only refers to the possibility of sailing through the high seas but also to having access to them from the internal waters of any State.

If this were not the case, then any State could unlawfully, and without any consequence, arrest foreign vessels in port, thereby compromising one of the main principles of the law of the sea as it pertains to the freedom of navigation, and allowing damages to be caused without any possibility of recovery.

The other Italian argument to support the arrest in Spain was given in para. 63 of its Rejoinder as follows:

> The *M/V "Norstar"* was not prevented from gaining access to the high seas arbitrarily, but in the context of proceedings governed by law that required its arrest and detention. Therefore, no breach of article 87 has occurred due to the *M/V "Norstar"'s* inability to take to the high seas.

This argument conflicts with international law since it approves an arrest that transgresses the right to the freedom of navigation protected by the Convention.

Furthermore, it is completely irrelevant because, as Italy itself has argued, the facts of this case have to be analyzed through the prism of the Convention and not the Italian criminal law system.

Whereas Italy proposes that any detention of a ship to prevent it from leaving the internal waters of a third State would be lawful because it would be in the context of its criminal law proceedings, Panama answers that according to the international law of the sea, any such detention without legal justification is unsupported and, therefore, arbitrary.

Italy may have suspected the commission of a crime. However, how long had Italy been holding such a suspicion? Did the suspicion exist at the time of the arrest? After the investigation, it should have been clear that there was no reason to arrest, much less to keep the order of arrest in force. How long was it necessary to keep the *"Norstar"* under arrest as *corpus delicti*? Panama will come back to this question.

For the time being, let us only say that Italy has not provided a single shred of truth, or even a basis for its argument, apart from the decree of seizure, the document at the source of this very conflict, and one at odds with the international law of the sea, to justify its actions as lawful. To put it bluntly, Panama finds this strategy to be wanting.

In its Rejoinder, Italy has again argued that the *"Wanderer"*, the *"Arctic Sunrise"*, the *"Volga"*, and the *M/V "SAIGA"* cases are comparable to this one. However, none of those ships were in port at the time of their detainment. If those vessels were on the high seas, rather

than in port, when seized, Panama does not understand how such cases can support Italy´s thesis.

Italy has also insisted on citing the *M/V "Louisa"* Case in its Rejoinder in spite of the fact that, contrary to the *M/V "Norstar" Case*, the *"Louisa"* was arrested in the port of the coastal arresting State for activities performed within the territorial waters of the same coastal State. In the present case, the vessel was arrested in the port of a foreign State for activities carried out beyond the territorial waters of the coastal State.

Referencing Judge Cot's comment regarding the *M/V "Louisa" Case* in its Rejoinder, Italy has assumed that the exercise of its jurisdiction over the *"Norstar"* within the territory of Spain was a right permissible for it as a coastal State. However, this does not apply to the case of the *"Norstar"* because the *"Norstar"* was not within Italy's coastal jurisdiction when it was in a foreign port.

Panama has considered the *locus* of the acts for which the arrest was ordered, those acts being the bunkering operations of the *M/V "Norstar"* while on the high seas, in the context of criminal proceedings for the alleged offences of criminal association aimed at smuggling and tax fraud. These operations have been the primary source of conflict which led Italy to investigate and order the arrest of the *"Norstar"*, thereby breaching article 87.

If in the exercise of its jurisdiction, Italy denies the right of a foreign flag vessel to its freedom of navigation by an arrest, so that such vessel can no longer gain access to the high seas, the State whose vessel has been arrested has the right to claim and be accorded a fair compensation for the damages caused by such order, because such arrest order targeting the activities on the high seas has breached article 87.

Panama wants to reassure this learned Tribunal that it does not question the right of any coastal State to arrest foreign vessels as long as the vessels are within its territorial waters. In fact, this is currently done in Panama by its Admiralty codes that govern private international law provisions and levy bonds for possible damages inflicted on arrested vessels.

However, when we refer to the criminal law provisions applied by any State, such arrest orders have to pertain to vessels under the direct jurisdiction of that State, and for acts carried out inside the territorial waters of such State, unless duly authorized by the international law of the sea.

However, the *"Norstar"* was not operating in the territorial waters of Italy, as we have seen, nor were the alleged criminal acts for which Italy arrested it presumed to be carried out within its territorial waters.

The international law of the sea does not authorize arrests by coastal states of foreign vessels in foreign ports for lawful acts performed on the high seas. This prohibition has been verified by the judges of the coastal State itself.

We move on now to the third theme, titled an arresting State seizes at its own peril.

Italy has arrested the *"Norstar"* within the territorial waters of a third State, and has done so at its own risk. As was long ago decided by the US. Supreme Court,

> the party seizes at his peril, and is liable to costs and damages if he fails to establish the forfeiture….The party in such case seizes at his peril. …if condemnation follows, he is justified; if an acquittal, then he must make compensation. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

This was a case tried in 1826 called *"The Marianna Flora"*, which I am sure you all know.

The decision to arrest was made on 11 August 1998, and on the same date it was sent to Spain for its enforcement. This should not be taken lightly. Why did Italy decide to execute

the arrest in a foreign country? Panama does not want to believe that Italy's intention was to cause damage, but damages have indeed accrued. Furthermore, it is clear that these damages could have been diminished and completely prevented if Italy had adopted another course of action.

All of the evidence presented by Italy merely confirms the international invalidity of the decree of seizure precisely because the arrest of the *"Norstar"* was ordered for activities carried out on the high seas. This raises the issue of Italy's responsibility.

In the case *Lauritzen v. Larsen* (1953), the US Supreme Court observed that

> Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. …This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it "is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty."
>
> On this principle, we concede a territorial government involved only concurrent jurisdiction of offenses aboard our ships. Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.
>
> It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law.

I am sorry for such a long quotation, Mr President.

This was also held in *United States v. Flores*, and reiterated in *Cunard S.S. Co. v. Mellon*:

Moving on, Mr President, we will touch now upon the theme *corpus delicti: until when?*

The other platform that Italy has used in the present case is that the *M/V "Norstar"* was seized "as *corpus delicti*" for its alleged criminal offences. The Latin term, which comes from Roman law, *corpus delicti,* refers either to the proof that a crime has been committed before a person can be convicted of having committed that crime, or to the object upon which the crime was committed, which itself proves the existence of that crime.

Panama would like to respectfully ask Italy to abstain from referring to or alleging that the *"Norstar"*'s activity has been criminal. This allegation is no more valid now than it was in 2003, when the arrest order was revoked. Fully 15 years ago, Italy first acknowledged that there was no crime. How, then, can Italy continue to pretend that the material acts of the *"Norstar"* could still be considered as alleged criminal conduct by describing it as a *corpus delicti*?

The contrary has been expressed by the documents containing the judgments issued by four different judges representing two different Italian courts, all of whom decided that no criminal offence had been committed either by the *"Norstar"* or by any person interested therein, precisely because its bunkering activities were on the high seas.

The Genoa Appeal Court judgment could have been subject to a Cassation recourse before the Supreme Court of Italy, but the Italian Prosecutor chose not to use this available procedural instrument, thus making the acquittal and lifting of the arrest order final.

Therefore, any attribution of crimes, even alleged ones, to the *"Norstar"*, or to any of the persons connected to it, is inappropriate because this would lead to revictimization and aggravation of the damages already caused and this, Mr President, should be prevented.

It is deeply disturbing to continue seeing Italy referring to the *"Norstar"* as a *corpus delicti*, because it continues not only to disregard its own judicial authorities, but rather relies

on the Public Prosecutor who issued the order of seizure in the first place. By doing so, Italy has adopted a line of reasoning that does not hold up when viewed through the lens of the Convention.

It is important to bear in mind that the totality of the evidence produced in the proceedings against the *"Norstar"* and the persons therein connected had been obtained before the arrest of this vessel, thereby putting in doubt the existence, before that time, of sufficient information to decide to arrest, as we will discuss when approaching the issue of *fumus commissi delicti, fumus boni iuris*.

There are other rules of the Convention, part of the right of freedom of navigation. This is our fifth main issue.

Panama recalls that while this Tribunal only considered articles 87 and 300 of the Convention relevant to these proceedings, this does not preclude the Parties from addressing other provisions of international law that are closely related to the issue at hand. Article 92, paragraph 1, article 97, paragraph 1, and article 97, paragraph 3 of the Convention fall under this description. I will not cite those articles verbatim.

Article 87 governs the right to freedom of the high seas, stating that not only shall such freedom be "exercised under the conditions laid down by this Convention", but also under "other rules of international law".

Panama contends that since articles 92 and 97 are also under Part VII of the Convention, they also govern the activities on the high seas and their relevance should not be treated so dismissively. By requesting their consideration, Panama is neither enlarging the dispute, nor making new claims, because the references to them still pertain to the Italian infringements of article 87, complementing the interpretation of this provision.

That ships on the high seas are subject to the exclusive jurisdiction of the flag State, and that any criminal proceedings on the high seas can only be initiated by the flag State, or the State granting nationality to the person charged, are principles of the law of the sea so enshrined to ensure the right to freedom of navigation.

The Italian exercise of its jurisdiction against the *"Norstar"*, its master, and other persons in its service on the high seas is contrary to the limitation of such authority to the flag State, the only State having control over matters of criminal responsibility under these circumstances.

If, in the process of applying its jurisdiction, Italy arrested the *"Norstar"* while the vessel was in the internal waters of a foreign State, rather than active on the high seas, it is still certain that Italy failed to respect the authority of the flag State over any investigation into its conduct.

Furthermore, according to the principle of *iura novit curia*, courts are presumed to know the law, and agents are supposed to contribute to the right of adjudication of the Tribunal when examining provisions inextricably related to articles 87 and 300.

There is no question, then, that, while on the high seas, the *"Norstar"* was under the exclusive jurisdiction of Panama, the nature of the claim not having been changed at all by Panama's request to the Tribunal to consider this right.

The links of the other provisions analyzed here to article 87 are so strong that together they contribute to the regulatory protection of the right to freedom of navigation on the high seas. Articles 92 and 97 are integral parts of this protection. Thus, it would be remiss for Panama to neglect these norms when constructing its argument.

Panama makes a contextual reading of provisions such as article 293 where the Convention and other rules of international law not incompatible with it are applicable. In this regard, articles 92 and 97 should be considered in light of the purpose and object of the Convention as a whole.

On the other hand, Italy has not offered any concrete reason why these provisions concerning criminal jurisdiction should not be considered germane, apart from referring to the Preliminary Objections Judgment in which the Tribunal declared that only articles 87 and 300 may be viewed as breached by Italy.

Panama argues that the relevance of these additional provisions is implicit in the Tribunal's ruling because they are directly related to the subject-matter of this case arising straight out of the extraterritorial criminal jurisdiction exercised by Italy over a foreign vessel by means of the enforcement of an arrest in the territory of a foreign state, based on activities carried out on the high seas.

Panama contends that the character of the dispute is not transformed in any way by the consideration of these provisions, and does not expect that Italy will be judged on the basis of these additional provisions, but rather that they will complement the application and interpretation of articles 87 and 300 of the Convention, hence contributing to the sound administration of justice.

Is article 87, paragraph 2, only binding on Panama?

Italy has stated that the obligation to have due regard to the rights of other States under article 87, paragraph 2, only binds States that exercise their freedom of navigation under article 87, paragraph 1, and that only the flag States as Panama are bound by this norm, not coastal States as Italy.

However, article 87, paragraph 2, states that "Freedom of navigation shall be exercised by all States with due regard for the interests of other States".

In the *Fisheries Jurisdiction* case (*UK* v. *Iceland*), the Court found that "[t]he principle of reasonable regard for the interests of other States enshrined in article 2 of the Geneva Convention on the High Seas of 1958 requires Iceland and the United Kingdom to have due regard to each other's interests, and to the interests of other States in those resources."

In other words, this provision and the Court's finding do not distinguish between flag and coastal States. Instead, such freedoms are to be implemented and upheld by all States with respect to the interests of other States, regardless of their status.

Italy is certainly not exempt from this provision. Consequently, both its reasoning and its interpretation of article 87, paragraph 2, are without merit.

Italy's suggestion that article 87, paragraph 2, is only binding on Panama is evidence that Italy has only been considering its own interest. However, the obligations of the Convention demand a high degree of cooperation from all State Parties, not only some of them, as Italy proposes. This Italian proposition that legal positions should be adopted only when they suit its own ends, once more shows little concern for its co-signatories and further evidence of its lack of good faith.

The last issue to be analyzed in this first part of our oral arguments, Mr President, is that of *effet utile*.

Mr President, due to the time I would rather you allowed me to stop here and continue tomorrow.

THE PRESIDENT: Thank you, Mr Carreyó. We have reached almost six o'clock. This brings us to the end of this afternoon's sitting. Your statement will have to be continued tomorrow morning when the hearing will be resumed at ten o'clock. The sitting is now closed.

(The sitting closed at 5.56 p.m.)

PUBLIC SITTING HELD ON 11 SEPTEMBER 2018, 10 A.M.

Tribunal

Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

For Panama: [See sitting of 10 September 2018, 10 a.m.]

For Italy: [See sitting of 10 September 2018, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 11 SEPTEMBRE 2018, 10 HEURES

Tribunal

Présents : M. PAIK, *Président* ; MM. NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, Mme KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mme LIJNZAAD, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 10 septembre 2018, 10 h 00]

Pour l'Italie : [Voir l'audience du 10 septembre 2018, 10 h 00]

THE PRESIDENT: Good morning. I wish to welcome you to the second day of the hearing of the Tribunal on the merits of the *M/V "Norstar" Case*.

Yesterday Mr Carreyó was speaking before the sitting was closed. I therefore give the floor to Mr Carreyó to continue the statement begun yesterday.

First Round: Panama (continued)

STATEMENT OF MR CARREYÓ (continued)
AGENT OF PANAMA
[ITLOS/PV.18/C25/3/Rev.1, pp. 1–9]

Good morning, Mr President, dear Members of the Tribunal, Mr Registrar, dear delegates of Italy and members of the staff.

Yesterday, Mr President, we had an opportunity to go over the two main counter-arguments of Italy, i.e. the location of activities for which the *M/V Norstar*" was arrested, the location of the arrest, and the influence on the breach of article 87, as well as the witnesses to the Italian arguments.

We also revised the concept that an arresting State seizes at its own peril and how improper it is to continue to refer to the *M/V "Norstar"* as a *corpus delicti*. We also went over the other rules of the Convention that form part of the right to freedom of navigation and how article 87, paragraph 2, was also binding on Italy.

The final issue to be analysed in the first part of our oral arguments is that of the *effet utile*.

In its Rejoinder, Italy claims the disqualification of the entire argument on *effet utile* that Panama has brought forward. Italy thereby relies on four points, which, when looked at closely, are unsubstantiated:

a) using article 300 in order to substantiate the breach of article 87;
b) being confused about the meaning of good faith;
c) mistakenly identifying UNCLOS's main purpose as freedom of navigation; and
d) mistakenly believing that *effet utile* authorizes a broad interpretation of article 87.

Panama is merely asking for an interpretation that gives effect to the object and purpose of the treaty.

Panama wishes to respond only briefly to those allegations, simply stating, first of all, that Italy once more mischaracterizes Panamas statements; and, second, that Panama does not disagree with the citations that Italy has provided.

Panama does not misinterpret the Convention, as Italy claims. In fact, Italy fundamentally mischaracterizes Panama's statements and plays with words. Panama claims that there is a violation of the freedom of navigation, that freedom is one of the objects and purposes of the Convention and that this freedom has been frustrated in this case.

Italy has deduced from this that Panama finds that the "Convention promotes the freedom of navigation above any other value", which Panama does not. Italy states that

> Establishing a link between article 87 and article 300 requires ascertaining first that article 87 has been violated and then, if this violation has occurred in breach of article 300. The proper approach is exactly the reverse of what Panama tries to do.

However, this is not what Panama has been proposing. What Panama has proposed is that article 300 does not differentiate between obligations under the Convention so as to oppose good faith as a standard of hermeneutical importance, and as a substantive standard of conduct.

Therefore, Panama does ask the Tribunal to interpret article 87 in a broad manner, and in the light of *effet utile*. Italy believes that Panama is mistaken and, for this purpose, provides a citation from the International Law Commission in paragraph 80, which, however, does not make Panama's argument invalid; it rather strengthens it.

STATEMENT OF MR CARREYÓ – 11 September 2018, a.m.

According to the textual statement of the ILC cited by Italy, an interpretation that does enable the treaty to have appropriate effects should be adopted, which is precisely what Panama has been arguing. It also points out that no "liberal" interpretation is called for in the sense of an interpretation going beyond what is expressed or necessary to be implied in the terms of the treaty.

However, Panama has never asked for an interpretation going beyond this. In fact, Panama is merely asking for an interpretation that gives effect to the object and purpose of the treaty. A broad interpretation is to be understood as not just looking at the expressed terms of the treaty, but what is implied by it.

A narrow interpretation would render the provision on freedom of navigation meaningless. In this part again, Italy mischaracterizes Panama's arguments and again plays with words because Panama is not confusing articles 87 and 300 of the Convention.

Italy spends a lot of sentences on reciting what Panama has stated before and agrees in paragraph 73. Panama does not deem it necessary to rearticulate every point of its position and will briefly touch upon another point.

Of course, Panama agrees that articles 87 and 300 are connected, and that good faith is used as a substantive standard in article 300. That does not mean that article 300 cannot be used as a substantive standard and *effet utile* as an interpretative tool. To sum up, Panama is arguing that Italy has not acted in good faith and, for that purpose, has availed itself of both the substantive standard and *effet utile* as interpretative tools.

Mr President, this brings us to the end of the first part of our oral arguments in this first round.

The second main issue that Panama would like to address is the violations of the duty to act in good faith.

We have proved that Italy abrogated the right of Panama to enjoy the freedom of navigation in the case of the *M/V "Norstar"*. However, after carefully analysing its conduct in this case, we have concluded that Italy has also breached its duty to act in good faith and, thus, has failed to meet its responsibilities as described by article 300 of the Convention.

Panama has duly articulated all of Italy´s violations in its past filings with the Tribunal and has linked these to the principle of freedom of navigation by enumerating the obligations contained in article 87 to show how Italy did not fulfil these in good faith. What follows is an enumeration of Italy's actions that failed to meet good faith standards:

1. Delaying the arrest, thus involving both acquiescence and estoppel.
2. Waiting until the M/V *"Norstar"* had left the high seas and entering the territory of a third State, before executing the arrest.
3. Executing a premature order for the arrest as a precautionary measure.
4. Intentionally refusing to reply to the numerous communications from Panama concerning this case.
5. Continuously withholding relevant information.
6. Mischaracterizing the locus of the activities for which the vessel was arrested, thereby violating the rule that no one may set himself in contradiction to his own previous conduct.
7. Blaming others, including the shipowner and Spain, for its own negligent actions such as
   7.1. keeping the M/V *"Norstar"* under its absolute jurisdiction and control for an excessive period, rather than promptly taking positive steps to return it; and
   7.2. concerning its maintenance; and, finally,

8. Maintaining that article 87(2) is only binding on Panama violating the rule that no one can derive an advantage from his own wrong.

The links between article 87 and article 300.

We will next show how Panama has linked the above list of conducts to the principle of freedom of navigation by reminding the Tribunal that in Section III of its Rejoinder, titled "III. Conduct related to article 87", Italy confirmed that in its Counter-Memorial it had explained that "out of all the conducts that Panama claims are evidence of Italy's bad faith in breach of article 300, only two bear a possible connection with article 87".

These two conducts, recognized by Italy as having a link with article 87, were described as follows:

> First, that even if Italy had long known that the *M/V "Norstar"* was active in the bunkering activities, Italy waited until 1998 to arrest the vessel; and
>
> second, that Italy waited until the *M/V "Norstar"* was in the port of Palma to arrest the vessel, so as to make the arrest easier.

Since Italy has only admitted that the above two conducts have a connection with article 87, let us deal with them first.

Delaying the arrest, thus involving both acquiescence and estoppel.

Italy arrested the *M/V "Norstar"* without raising even the slightest suspicion that they constituted a crime in spite of the fact that the activities for which this vessel was suspected of had been known to the Italian authorities for several years.

Witness Mr Rossi has confirmed that the Italian police officers who carried out the arrest of the *M/V "Norstar"* had been conducting inspections of the *M/V "Norstar"* during the three years prior to the arrest without finding anything amiss. Nevertheless, the *M/V "Norstar"*'s operations were suddenly stopped in spite of its understanding that its activities had been completely permissible.

Italy has agreed that the bunkering activities carried out in the high seas had not been raising any suspicion for several years, when at paragraph 151 of its Counter-Memorial it stated that: "If anything, Panama's argument only demonstrates that the bunkering activities of the *"Norstar"* were not as such of concern to the Italian authorities and proves the diligent attitude of its investigative authorities."

When Panama argued in paragraph 252 of its Reply that Italy had not offered any explanation for this, Italy responded in paragraph 82 of its Rejoinder that it had, and that in the interest of brevity it would refer the Tribunal to the relevant parts of the Counter-Memorial, except to stress that

> the fact that Italy was not concerned by the bunkering activities of the *M/V "Norstar"* confirms that the *M/V "Norstar"* was not arrested for the bunkering, but only when the prosecuting authorities started to suspect that the activities carried out were quite different from actual being bunkering and they consisted in criminal activities under the Italian Criminal Code, and that they occurred in Italy.

Panama would like to draw attention to two aspects of this passage.

First, contrary to what the documentary evidence has indicated, namely that the *M/V "Norstar"* operated only on the high seas and that Italy was not any more concerned with the bunkering activities, Italy has now stated that the reason for the arrest of the *M/V "Norstar"* was the alleged crimes of smuggling and tax fraud inside of Italian territory.

STATEMENT OF MR CARREYÓ – 11 September 2018, a.m.

As we have already demonstrated, it is obvious that Italy has intended to substantially modify the facts of this case concerning the *locus* of the *M/V "Norstar"*'s activities and their relationship with the arrest order.

The second aspect worthy of attention concerns the moment "when the prosecuting authorities started to suspect", as Italy now states, that the *M/V "Norstar"* was not merely bunkering but was engaging in criminal activities under the Italian Criminal Code within Italy.

However, the *M/V "Norstar"* operated only on the high seas.

Naturally, Panama has to wonder when and why the Prosecutor started to suspect that the transactions conducted for three years in international waters were actually crimes of smuggling and tax evasion in Italy. However, Italy has never given us a clue, nor even an approximate date for this decision, thus failing to account for its delay in bringing charges against the *M/V "Norstar"* without any objective evidence. Italy's absence of objections to Panama's description of events in this regard represents acquiescence in circumstances which generally call for an overt reaction as a formal claim.

This delay may have lasted as early as 1994 to 1998. Panama has discussed this matter at length before this Tribunal and has elucidated that the activities of the *M/V "Norstar"* only involved the legitimate acts of buying bunkers in Italy, transporting them to the high seas, and selling them to pleasure boats there. These acts were the only conduct for which the *M/V "Norstar"* could have been investigated, and ultimately arrested. Again, this demonstrates Italy's misconception of zonal management.

Panama would also like to know why Italy continued to allow the *"Norstar"* to sell bunkers on the high seas, as well as why there was a sudden change in Italy's stance, redefining the *M/V "Norstar"*'s actions as criminal behaviour. In short, why did Italy wait such a long time to arrest the *M/V "Norstar"*?

The tacit recognition of the legality manifested by the previous conduct of Italy was interpreted as consent, which led the *M/V "Norstar"* and all the persons therein interested to believe that all its bunkering operations were perfectly legal.

Acquiescence materially follows from the fundamental principles of good faith and equity. The delay in considering the bunkering activities of the *M/V "Norstar"* as crimes is equivalent to tacit recognition that such conduct was licit. Thus, the sudden change of policy of the Italian authorities concerning the *M/V "Norstar"* certainly reflects lack of good faith.

Having allowed the bunkering operations without interference confirms Italy's application of estoppel as already accepted by international law in the *Shufeldt* case, where it was stated that

> The Government never having taken any steps to put a stop to a practice which they must have known existed … thus making themselves *particeps criminis* in such breach (if any) of the law cannot now in my opinion avail themselves of this contention.

Italy diverted attention from the bunkering operations of the *M/V "Norstar"* on the high seas the moment the Prosecutor started to suspect the occurrence of smuggling and tax fraud. By doing so, Italy's conduct deviated significantly from that applied in good faith.

The second Italian act constituting a lack of good faith that Italy has accepted as having a connection with article 87 is its decision to wait until the *M/V "Norstar"* was in a foreign port to arrest her.

In paragraph 152 of its Counter-Memorial, Italy said that its decision to arrest the *M/V "Norstar"* in Spain was to avoid breaching article 87, which it has confirmed in paragraph 83 of its Rejoinder by saying that this "was necessary precisely in order to be sure not to breach article 87".

However, this stated intention has not been supported by the evidence. The Decree of Seizure itself proved the real intention of Italy by saying: "Having noted that the seizure … must be performed also **in international seas**, and hence beyond the territorial sea and the contiguous vigilance zone."

No document could more clearly show the reasons why Italy ordered the arrest of the *M/V "Norstar"* in another country's jurisdiction.

It is difficult to understand how Italy felt it would not breach article 87 when the arrest was still based on the activities the *M/V* "Norstar" was carrying out on the high seas. More importantly, as Captain Husefest of the *M/V "Norstar"* has stated, Italian gunships threatened the *M/V "Norstar"* in international waters. Such an action clearly exhibited bad faith.

Since Italy has admitted that arresting the *M/V "Norstar"* on the high seas would have constituted a violation of its freedom of navigation, Panama would then like to ask: is it good faith on the part of a coastal State to avoid arresting a vessel when traversing its own territorial waters or international waters, for acts carried out there, but rather wait until it sailed into the port of another State to do so? Clearly, the answer is no, since such behaviour is deceptive in nature.

Italy has been unable to answer those questions because there is no good faith explanation for its actions.

The Italian Prosecutor knew that the activities carried out by the *"Norstar"* were on the high seas, so that arresting it there would clearly amount to a breach of article 87. Consequently, the decision to detain this vessel in the internal waters of a third foreign State was a clear intentional attempt to circumvent both the letter and the spirit of this provision of the Convention.

Panama's argument is that the *locus* where the *M/V "Norstar"* was arrested does not have any bearing on the lawfulness of the order because what matters is where the vessel's business operations were actually performed, in this case on the high seas.

In addition to the above discussed two acts that Italy has acknowledged as lacking good faith and having a link to article 87, Panama also submits that since no *fumus commissi delicti, fumus boni iuris*, or *periculum in mora* applies, Italy's arrest order violated its duty to act in good faith.

Was it necessary, justified, urgent and/or reasonable to arrest the *M/V "Norstar"*?

According to the UNCLOS commentary by Proelss, "[a]rticle 300 is limited in its effect to an auxiliary function of acting as "a catalyst between the facts and the norm" along the lines of the notion of reasonableness".

An indicator of the meaning of reasonableness and the factors to be demonstrated in the *"Camouco" Case* before this Tribunal in determining whether the bond imposed by a French court was reasonable. The Tribunal considered a number of factors, including the gravity of the alleged offences, the range of penalties that could be imposed, the value of the detained vessels and cargos seized, and the amount of the bond imposed by the detaining State, amongst others.

Those factors led the Tribunal to find that the bond imposed was unreasonable. Likewise, the present case can also be examined to determine whether Italy acted in a reasonable manner, in good faith. For instance, was the amount of the security proposed by the Italian Prosecutor as a condition for release of the vessel reasonable?

On 11 August 1998, the arrest order was issued and it was sent to Spain the very same day. However, the Italian Prosecutor based his decision only on Italian jurisdiction and legal regime, despite the fact that the *M/V "Norstar"* was a foreign flag vessel representing another State. This led to the wrongful belief that, since the vessel was not on the high seas, no breach of article 87 could be attributed to Italy.

However, there has never been any principle, precedent, nor piece of evidence to support this belief. The right to freedom of navigation applies just as much to vessels in the internal waters of a foreign State as it does to their normal commercial operations on the high seas, simply because such business depends upon their ability to return to open water. Freedom of navigation encompasses freedom of movement of ships, as was expressly mentioned by Judge Wolfrum in his statement of ITLOS on 8 January 2008.

In paragraph 133 of its Counter-Memorial, Italy gave another reason for arresting the *M/V "Norstar"*, stating that it was acting "to secure evidence which was necessary in order to ascertain whether the defendants had committed certain crimes on the Italian territory".

Yet, the law of the sea does not support the hindrance of the movements of foreign vessels to "ascertain" the existence of suspected crimes. In fact, when we carefully analyse all the Italian pleadings in this case, we can easily see that Italy has grounded all of its arguments in potential, alleged suspicions, thought of, or imagined crimes or offences.

Was the commission of a crime objectively proven to support an order of arrest based on a precautionary measure? No, because the arrestor State has not shown the existence of the necessary *fumus boni iuris* or *fumus commissi delicti* and *periculum in mora*, which are conceptually at the root of any such action.

However, precautionary or interim measures may be ordered only if it has been established that they are, one, justified *prima facie* in fact and in law (i.e. *fumus boni iuris* and *fumus commissi delicti*), and that they are urgent (i.e., *periculum in mora*).

In addition, *periculum in mora* implies that there had to be a risk of imminent and irreparable harm to the interests of an arresting State, to be avoided by means of an arrest as a precautionary measure. Italy has not demonstrated any *periculum* nor any risk of suffering serious and irreparable damage.

In fact, as of yet, no such risk has ever been raised during the proceedings in Italy, or before this Tribunal. Panama considers it pertinent to recall that on 4 September 1998, the diplomatic service of its Foreign Office in Rome rightly warned the Italian Prosecutor of the international law implications of arresting another vessel, as it did in the case of the *"Spiro F"*, but, despite such warning, Italy went ahead with the arrest.

If Italy had been acting in good faith in its international dealings concerning freedom of navigation, it would have taken the time necessary to determine the validity of this warning.

If Italy had also considered the interests of Panama, it could have waited to determine how its judiciary would assess the viability of the Prosecutor's suspicions before going ahead with the arrest. In this event, no breach of article 87 would have ensued, and no claim would have been presented before this Tribunal.

The acts or omissions complained of by Panama are all based on the abuse of Italy's public authority (*acta jure imperii*). When such authority is wrongfully exercised, and the force of legal proceedings is used to submit innocent persons to criminal trial, the confiscation of their property, or other damage, an abuse of rights based on a lack of good faith inevitably ensues.

Even if the interpretation of the Italian customs laws had given rise to concerns regarding the possible commission of a crime in this case, such concerns would not have constituted probable cause for seizure.

Probable cause implies that a seizure will be made under circumstances which warranted suspicion. However, there were no such circumstances. If some doubt as to the application of the Italian jurisdiction had arisen, it would have been clear that further action by Italy would be at its own risk. Since the Italian judicial authorities themselves have held that Italy's pursuit of the *"Norstar"* was wrongly executed, international liability clearly arises, just as it did in the *"Coquitlam"* case.

Panama's position is that before arresting a vessel, the arresting State must establish the existence of a probable cause to believe that an offence has truly been committed and that the defendant is likely to have committed it.

On 18 December 1920, the International Arbitral Award found that the officer ordering the arrest acted in the *bona fide* belief that revenue laws had been breached in the case of the *"Coquitlam"* between Great Britain and the United States. In other words, the good faith of the arresting officers was unquestioned.

However, even though this was taken into account as an explanation given by the same officers for their actions, it could not absolve the liability of the Government of the United States to Great Britain. At that time, the interpretation of the US customs statutes gave rise to some doubt, which negated the notion that there was probable cause for seizure.

Probable cause for seizure was defined by United States Chief Justice Marshall in that case as something that

> in this case there was no doubt as to the circumstances of fact under which the seizure took place, but, … since it has been decided by the United States judicial authorities that this application was wrong, liability clearly arises.
>
> The arresting State must establish the existence of probable cause to believe that an offense has truly been committed and that the defendant is likely to have committed it.

Along the same lines, Panama concludes that in this case Italy has not proved it had a probable cause for the arrest. In any case, there was no urgency for Italy to enforce it. Ultimately, no crime, alleged, suspected, or thought of, could have justified the conduct resulting in the wrongful arrest of this vessel.

I will now ask you, Mr President, to give the floor to Ms Mareike Klein who will continue with the next issue, titled "Intentional Silence".

STATEMENT OF MS KLEIN
ADVOCATE FOR PANAMA
[ITLOS/PV.18/C25/3/Rev.1, pp. 9–14]

Distinguished President, Members of the Tribunal, it is an honour for me to appear before you today, representing the Republic of Panama in the *M/V "Norstar" Case*. I will now move to our next point on intentional silence.

Although during the Preliminary Objections phase of this trial, Panama has had opportunity to observe the consequences for Italy due to its failure to answer any of Panama's communications concerning the arrest of the *M/V "Norstar"*, Panama still believes that there is more to say about this issue of silence. Panama contends that by keeping intentionally silent when confronted with the claim that article 87 was breached, Italy acted in a manner contrary to its duty of good faith.

In the *Pedra Branca* case between Malaysia and Singapore Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (*Malaysia* v. *Singapore*) [2008], the ICJ held that: "Silence may also speak, but only if the conduct of the other state calls for a response."

Italy excuses its inaction by citing its belief that the prospects of a settlement were non-existent. If Italy knew that such prospects were "non existent", why did it not communicate this immediately to Panama? Instead, Italy decided to hide its true beliefs by refusing to reply at all. This exemplifies a further failure to fulfil the good faith expectations of article 300.

The Italian refusal to answer has cost Panama a great deal of time, efforts and also resources.

Panama submits that such silence is the basis for a material finding of conduct contrary to the duty of good faith primarily because Italy still has not provided any valid justification for such behaviour.

On the contrary, Italy persists in claiming that its silence did "not mean that there was no reason for Italy other than bad faith".

But what is that "other reason" that Italy has continually failed to identify? All of Panama's efforts to obtain a response regarding this claim have been unsuccessful, yet in spite of this Italy now simply suggests that Panama is only presuming Italy's bad faith without evidence.

In fact, by making unsupported charges about what is presumed, Italy has continued to act contrary to its good faith duty. Panama will confirm this when we examine the Italian conduct with reference to its duty to maintain the *M/V "Norstar"* while it was under its jurisdiction and control and its duty to take positive steps to return it to the shipowner as had been ordered by Italian courts.

I will continue with Panama's next point: the continued withholding of relevant information.

In addition to the letter (Telespresso), dated 4 September 1998, included in Annex 7 of the Reply, warning the Italian Prosecutor of the non-existence of a contiguous zone, Panama has also shown in Annex 12 of its Reply, that on 18 February 2002 the Prosecutor received another letter (apart from the one dated 12 February 2002) from the same Service of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy, which expressly referred to the Panama agent's claim for damages.

However, it was not until 2016 that Italy, for the first time, disclosed the existence of these very important documents; and, as of now, Italy has not provided any of the letters sent from its own Ministry of Foreign Affairs that Panama has requested through the intervention of this Tribunal.

Panama contends that Italy has always been opposed to disclosing all of the public documents concerning the criminal proceedings against the *M/V "Norstar"*. As a result, it has withheld vital information relevant to this case.

This is certainly evidence of the lack of compliance on the part of Italy with its duty to act in good faith because the refusal to respond described above not only shows that Italy had taken due notice of this claim, but also that it had been investigating it in a confidential manner since at least September 2001 – and this is important – without engaging directly with Panama as it should have done from the very first instance that Panama attempted to open a dialogue.

If Panama had been informed in 2001 by Italy that all its efforts to find answers to its formal requests would have been in vain, it would have proceeded accordingly.

By withholding relevant information, Italy breached its duty to cooperate in the resolution of this conflict – there would have been opportunities before coming to this Tribunal – and therefore failed to act in good faith as expected by the international community of sovereign States.

Further grounds for requesting this Tribunal to hold Italy in breach of its responsibility to act in good faith concern the contradictory reasons it used to support its order of arrest.

I will now move to *non concedit venire contra factum proprium* (estoppel).

Italy has admitted that the arrest of the *M/V "Norstar"* was executed while it was within the internal waters of Spain due to its belief that arresting it on the high seas would amount to a breach of article 87. On the other hand, Italy also based its order of arrest on the constructive or presumptive presence doctrine, which may only be applicable for seizures on the high seas. This represents a clear contradiction.

With respect to those grounds concerning the location of the activities for arresting the *M/V "Norstar"*, Italy initially stated that the arrest order was given for offshore bunkering that the *M/V "Norstar"* had been carrying out. Later, however, it argued that the *locus* of activity was within Italian territory, without giving any further explanation or justification as to how it reached this conclusion. It now seems apparent that Italy was trying to suggest that article 87 was not violated in this case.

It is highly contradictory for Italy to first admit that the arrest order was issued based on conduct on the high seas, beyond its territorial waters, and then claim that the basis for the arrest order had been criminal operations within Italy.

As such, Italy's conduct may hardly be considered to exemplify good faith, since this contradiction in light of the facts implies that Italy sought to mislead by revising its justification for the arrest. Panama contends that the conduct of Italy constitutes procedural estoppel because a State is not allowed by the law to state something and then pretend that this statement had no importance. Panama has relied, from the very beginning, on the veracity of the original statement, and has acted accordingly prior to and during these proceedings.

The rule *non concedit venire contra factum proprium* also concerns the location of the activities for which the *M/V "Norstar"* was arrested, as well as the fact that Italy kept the *M/V "Norstar"* under its jurisdiction for an excessive period rather than promptly taking positive steps to return it.

Since Italy had once determined that the *M/V "Norstar"* had transacted its business beyond its territory, it is disingenuous for it to contend now that the *M/V "Norstar"* "was arrested to secure evidence for crimes on the Italian territory".

Italy's denial of its own reasons is itself a breach of its duty of good faith. Although Italy did take into account the Savona judgment confirming that the *M/V "Norstar"* transacted its business extraterritorially, it did so only in a footnote, showing that it has not yet sufficiently considered that the Savona court said that,

> before asserting any kind of criminal liability, a preliminary test is needed as to where the provision of supplies occurred because if it took place outside the line of territorial waters no one of the offences charged does actually exist.

It is inconsistent, then, for Italy to subsequently allege otherwise, as it has in paragraph 135 of its Counter-Memorial, when it stated that the reason for the arrest of the *"Norstar"* was for "a crime that it was suspected of having [been] committed in Italy".

As a consequence, Panama requests the application of the principle of *non concedit venire contra factum proprium* because, if Italy had originally stated that the *M/V "Norstar"*'s conduct had taken place outside its territorial waters, no offences were actually committed. The law forbids Italy to now argue in direct opposition to the conduct it itself had stated was responsible for this case being brought before the Tribunal.

With regard to the fact that Italy kept the *M/V "Norstar"* under its jurisdiction for an excessive period of time without taking positive steps to return it, it is ironic that after suddenly rushing to arrest the *M/V "Norstar"* as we have demonstrated before, Italy did not show the same interest or the same sense of urgency when it came to returning it. Despite knowing that the order of arrest was revoked, Italy did not take any operative measures to promptly return the vessel to its owners or to Panama.

This was proved on 21 March 2003, when Italy told the shipowner that

> the deadline to withdraw the vessel was 30 days from receiving the communication and that in case of nonwithdrawal, the judge would order the sale.

> In an attempt to profess its good faith, Italy has stated in para. 264 of its Counter-Memorial that it tried to return the *"Norstar"* claiming that "only about 5 months passed between the shipowner's request for release and the actual knowledge by him of the release", considering this to be "hardly a long detainment able to deprive a shipping company of all of its income".

However, Italy has only referred to the timeframe between the shipowner´s request and its actual knowledge of the release. With this argument Italy has, again, intended to divert the discussion from the issue of the excessive period of detention and its failure to take positive steps to return the vessel.

In fact, the *M/V "Norstar"* has never been returned. Even after considering the Italian comment on this matter *in arguendo*, Panama has concluded that Italy has not shown good faith because it has distorted reality. In addition, five months is certainly long enough to destroy the financial viability of a shipping business as the one that was conducted by Intermarine.

Whereas five months has been considered by Italy to be "hardly a long detainment", Panama´s position is that damages started from the very first moment that the vessel was actually detained.

Thus, the material period of delay is from the date of the execution of the arrest (25 September 1998 or 5 September 1998, as it has been accepted by Italy as well) to the date when the vessel was ultimately sold in 2015. Yet, what is even more important is that the productive capacity of the ship ceased, and the shipowner lost access to its property.

Since the procedure to return or release the *M/V "Norstar"* was never effectively initiated, and despite all the efforts from Panama to communicate, Italy never showed any interest in discussing this issue with Panama or its shipowner. The lifting from the arrest was never effectively enforced. Due to Italian inaction, and its avoidance to communicate, Panama now expects to be compensated since this is the only possible form of reparation that remains viable.

Although Italy has suggested that by ordering "the definitive release of the vessel", it has been released of its liability, the truth is that there has been no such effective release and

delivery at all, and its liability continues until it has fully compensated Panama for all the losses that it has caused.

Italy has admitted that on 13 November 2006 the vessel was still under the jurisdiction of the Savona Tribunal. Since then, Italy has not showed any concern about the fate of the *M/V "Norstar"* but a complete avoidance of communication. Therefore, it is totally disingenuous for Italy to now suggest that the burden of responsibility falls on the owner, because he failed to retrieve the vessel in either 1999 or 2003.

The Italian reference in paragraph 60 of its Counter-Memorial to "the Tribunal of Savona requesting the Spanish Authorities to inform the custodian of the ship of the release and return to the shipowner, and then confirm the release to the Italian authorities" represents another example of a conduct far from the requirements of good faith, because Italy has attempted to absolve itself with a letter "dated 17 April 2003, saying that the Spanish Judicial Authorities instructed the Provincial Maritime Service to lift the detention ...." and that "on 21 July 2003 the detention was consequently lifted ... with Order No 84/03", continuing by adding in paragraph 60 that the following day "the Captain of the Provincial Maritime Service informed the competent Spanish Judicial Authorities that the detention of the *M/V "Norstar"* had been lifted, and attached the relevant documentation as evidence" and adding that "[t]he document withdrawing the seizure and custody No 84/03 dated 21 July 2003 is attached".

However, no such document referred to as "Order No 84/03" was included with the Counter-Memorial, nor has it ever been presented by Italy into evidence in this Tribunal.

Nevertheless, even if such a release order had been attempted to be executed, it would not have been effectively enforced without an actual and formal delivery and receipt by the shipowner or authorized persons.

Italy argues that by ordering the "definitive release", the responsibility for its actions shifted to the shipowner who "failed to retrieve it" without noting that damages had already been incurred, and that this does not rectify the situation.

Although the Italian courts ordered the release, this decision was never executed and Italy has not taken any further steps to comply with it, or even to show that it has ever had the intention to do so. One single example will suffice: Where are the documents of the *M/V "Norstar"*? Where are the logbooks of the *M/V "Norstar"* of the deck and the engine, which were always kept also on the deck of the vessel? If Italy had truly desired to show the condition of the *M/V "Norstar"* or its sincere wish to return it, it would have taken care of this important document, as well as others, because they were on the vessel when the vessel was seized. However, if we asked Italy about it, the most probable answer would be that it should be in Spanish hands and therefore no responsibility should be attributed to Italy for it in this case.

Mr President, I would now respectfully ask you to call Mr Carreyó to continue with Panama's pleadings.

THE PRESIDENT: Thank you, Ms Klein.

I then give the floor to Mr Carreyó to make a further statement.

STATEMENT OF MR CARREYÓ
AGENT OF PANAMA
[ITLOS/PV.18/C25/3/Rev.1, pp. 14–20]

Thank you, Mr President.

Continuing with the analysis of the violations of the duty to act in good faith, Italy believed that it was not actually responsible for the return of the *M/V "Norstar"*, but rather that it was up to the Spanish authorities and the shipowner to make sure that the vessel was returned.

We will remind the Tribunal that when, during the Preliminary Objections phase, Italy referred in its Reply to the Panamanian complaint that the *M/V "Norstar"* had been "held longer than sensible for purposes of a lawful investigation", Italy responded that "it was not the Italian authorities that held the vessel" and that since the seizure was not enforced by the Italian authorities, nor was it enforced in Italy, "the Panamanian claim had been addressed to the wrong respondent."

Italy has now again intended to blame Spain, not only for the release order enforcement but also for failing to maintain the vessel and to inform the relevant parties to ensure the return of the vessel.

Although this Tribunal has already held that this argument lacks legal support, Panama would like to refer to it again only to show Italy's lack of compliance with its duty to act in good faith.

Concerning Italy's promise to ensure the return of the *M/V "Norstar"*, it is to be recalled that in its Counter-Memorial Italy stated that it had ordered the unconditional and immediate return of the *M/V "Norstar"* by transmitting the release order to the Spanish authorities, requesting them to inform the custodian of the vessel and ensure its actual return to the shipowner.

Again, Italy believed that it was not actually responsible for the return of the *"Norstar"* but rather that it was up to the Spanish authorities and the shipowner to make sure that the vessel was returned.

Despite the grave responsibility that Italy has had as the arresting State, it has not shown any concern as to whether the *M/V "Norstar"* was returned, safely or not.

Panama contends that Italy should have done much more to comply with the standards of international conduct reflected by the law of the sea. Failing to meet these standards while pretending otherwise is hardly evocative of good faith.

Meanwhile, no evidence has been presented by Italy to show that the *M/V "Norstar"'s* owner ever failed to fulfill his obligations. Italy could and should have instituted proceedings and/or contacted the Government of Panama to facilitate the *M/V "Norstar"'s* return. This would certainly have then shifted the burden of proof to the shipowner and there would have been certitude about Italy's intention to return the vessel.

Italy has inverted the natural order of things. Instead of stating that it was its duty as the arrestor State, to provide for the formal delivery of the vessel, the Italian allegation has been that neither Panama nor the shipowner were complying with "the obligation to retrieve the vessel".

The retrieval of the vessel was not an obligation but a right of the shipowner. However, Italy could have provoked the legal existence of such an obligation on the part of the shipowner by instituting proceedings giving rise to determine the validity of the apparent Italian intention of delivery, to show that it was truly interested in returning the vessel.

This is known as *mora accipiendi*. The *mora accipiendi* is the delay of the creditor, or the delay in performance on the part of the creditor. This might then have been the basis of a valid Italian defence in this Tribunal. However, this has not been the case. On the contrary,

Italy has always shown how disengaged it was from the *M/V "Norstar"*'s fate, as we will see later on.

On the other side, Italy was and indeed still is under the onus to first prove that it has done what was incumbent upon it, in this case ensuring that the *M/V "Norstar"*'s release was fully executed, before advancing negative aspersions that the shipowner was actively refusing to take back its vessel without any valid reason.

In fact, the *M/V "Norstar"*'s owner had valid reasons for not agreeing to Italy's terms for recovering the vessel – the excessive bond on the one hand and unacknowledged communications in this regard on the other.

The rule *negativa non sunt probanda* means that Panama is freed of the duty to establish the absence of a fact. Instead, the burden of proof is placed on Italy to show that fact's existence. In this case Italy has failed to provide such proof, so its defence has not been validated. There is no legal duty to establish the absence of a fact.

The Latin maxim *in majore minus inest* (who can do more may also do less) also applies to this case. In this context, since the *M/V "Norstar"* was under absolute Italian jurisdiction and control, as has been proved by the answer of the Genoa Court of Appeal to a 2006 Spanish request to scrap the vessel, Italy would have been expected to start proceedings. Instead, it was Panama who proved to have been very diligent in communicating with Italy despite the latter's intransigence.

Under these circumstances, Italy would also be expected to present evidence showing that Panama was not complying with its right to retrieve this vessel.

However, this has not been the case.

If Italy really wanted to comply with its duty first to minimize damages and, secondly, to act in good faith, it could have simply ordered the sale of the *M/V "Norstar"*, as it had threatened to do, at any stage of the proceedings. Instead, Italy has chosen to blame Spain and the shipowner for not taking back a vessel that was under its absolute control rather than either of theirs.

Despite its attempt to justify its lack of compliance with its duty to return the vessel, Italy has never acknowledged that, after keeping the *M/V "Norstar"* under its jurisdiction and authority, it has not acted in good faith by blaming Spain and the shipowner for something that was not under their control.

Concerning the maintenance as its absolute duty, Panama recalls that Italy has stated at paragraph 278 of its Counter-Memorial that

> it was not for Italy to provide for the essential maintenance works to keep the *"Norstar"* operative, nor to update the ship's class certificate and designation. Any complaint concerning the modalities of the enforcement of the Decree of Seizure, and possible damages ensuing from it, should not be addressed to Italy.

It then cited the Separate Opinion of Judge Ndiaye in the Preliminary Objections Judgment of this case using the part where he stated that

> [I]t is Italy which is responsible for the actions of the Spanish authorities, carried out in its name … . Spain was accountable only for the manner in which the seizure was carried out; that is for the protection of the integrity of the vessel and crew when seized.

However, Judge Ndiaye did not only state the above part. He also added, on the following page 26:

> [Therefore] it is for Italy to assume the consequences attaching to its order, as the communication between the two States shows. It indicates that not only did Italy assume full responsibility for

> the seizure, but also that the two States had assessed the question of Italy's responsibility in the matter....
>
> It is Italy which assumes responsibility for its actions since it based its request for judicial cooperation on an alleged offence which was not committed.

As can be easily seen, contrary to what Italy claims, Judge Ndiaye would hold Italy entirely responsible for the *M/V "Norstar"*'s well-being. Panama objects to the tactics that Italy has used to evade responsibility when it comes to the *M/V "Norstar"*.

Panama contends that if Italy had complied with its duty to act in good faith in the first place, it would have put forward the entire argument that Judge Ndiaye made in his judicial statement and, consequently, would have accepted its responsibility for the maintenance of the *M/V "Norstar"*.

In order to show conduct in accordance with its duty to act in good faith, Italy should not have portrayed Spain as the party responsible for the condition of the vessel. Yet, Italy is still using Spain, as it did during its Preliminary Objections, as a means of evading its own responsibility. This does not correspond to good faith conduct in any way.

If the vessel had been returned within a reasonable length of time in the same condition that it was in when the arrest was enforced, far fewer damages would have ensued and no proceedings would have been initiated.

Furthermore, if the vessel had been well taken care of, or even maintained in a basic manner, it could even have been sold before its public auction for a reasonable price, In other words, Italy has had several opportunities to limit damages. Its failure to do so is its sole responsibility as the State with jurisdiction and control over the vessel, and this constitutes a clear failure to comply with its duty to minimize and mitigate damages inherent in the good faith expectations of signatories to the Convention.

While more than willing to allot Spain a portion of the blame, Italy has continued to insist that the lion's share of responsibility for maintaining the *M/V "Norstar"* falls on Panama and the shipowner whom it considers to be the culpable parties when it comes to any damage caused.

But how could either the shipowner or Panama have maintained the ship when neither had access to the vessel which has been under the exclusive jurisdiction and control of Italy? Clearly the answer is that they could not and, thus, for Italy to suggest otherwise is yet another example of its lack of good faith over the course of this case, even if, as Panama contends at this point, it no longer makes sense to argue about the condition of the vessel or its maintenance when the main issue is that the *M/V "Norstar"* was never returned, either damaged or undamaged, Moreover, Italy has completely forgotten about the *M/V "Norstar"* since its arrest.

It is Italy which has never provided access to evidence about the condition of the vessel. Italy is the State under whose jurisdiction the vessel was kept after 5 September 1998, when we first learned that the *M/V "Norstar"* had become the subject of a provisional measure.

Since the *M/V "Norstar"* has been under the absolute jurisdiction and control of Italy since that time, it is unreasonable to ask the flag State to provide evidence about the vessel's condition when all indicators of such evidence, such as the log book, the engine log book, the crew list, and any list of goods on board – any accountability of the commercial aspects of the vessel – have been withheld from both Panama and the shipowner even after the arrest was revoked.

The vessel was effectively confiscated from its owner, forcing a perfectly legal and successful business to go to ruin. It has been shown that there was no obligation for the shipowner to seek redress through the Italian domestic judicial system and that article 292 of the Convention would only apply if there had been a violation of the provisions of the

Convention regarding prompt release, upon the posting of a bond or other financial security. Since no bond was posted, this was clearly not the case.

Italy was the arresting State, and the party upon whom rested the responsibility for taking care of the vessel under arrest as soon as such arrest was enforced. Italy should have, then, promptly taken the appropriate steps to preserve the ship, as well as pay for port fees, fuel, victualling, crew wages, and other necessaries. However, Italy has never shown that this was done – not even care about the custody of the vessel.

On the contrary, it has become evident that Italy completely abandoned its duty to provide for the maintenance of the vessel in order to prevent its decay, therefore confirming its liability for the claimed damages.

Thus, Panama feels entirely justified in describing Italy's actions, both during the period between 1998, with the breach of article 87, and 2015, when the vessel was auctioned, and over the course of these proceedings, as being conducted in bad faith.

The only Italian defences when it comes to the issue of good faith have either been that Panama's claim "falls outside the jurisdiction of the Tribunal" and that this issue has only been raised as a "general reference to Italy's obligations under the Convention". Neither of these defences is valid.

The reality is that Italy has completely forgotten about the *M/V "Norstar"* since its arrest, only remembering that that ship existed when Panama instituted these proceedings.

This negligence was further demonstrated by Italy in paragraph 71 of its Counter-Memorial when it expressly admitted that it had not even known the fate of the *M/V "Norstar"* until it had "learnt from Panama's Memorial that the M/V Norstar was removed from the harbour of Palma de Mallorca in August 2015, following a public auction".

This confirms that Italy was not complying with its duties of maintenance and care of a ship under its jurisdiction and control.

Is it good faith when Italy, having jurisdiction and legal control over the *M/V "Norstar"*, did not even know that the vessel had been the object of an auction sale? If Italy had taken care of the *M/V "Norstar"*, as it was legally supposed to do, this vessel would have been returned with only the standard wear and tear.

Approaching the last section of our oral presentation, Mr President, as part of the violation of acting in good faith, we would like to deal with the legal principle that no one is allowed to take advantage of its own wrong.

It has been shown that Italy has decided that the arrest of the *M/V "Norstar"* should not have been kept in force, the Italian judiciary having held that "because the fact did not exist, the seizure of motor vessel *M/V 'Norstar'* shall be revoked".

Panama contends that Italy is still taking advantage of its own wrong with its position during these proceedings. For example, in spite of the fact that it decided to revoke the arrest, Italy has now stated in paragraph 151 of its Counter-Memorial that the *M/V "Norstar"* "was arrested and detained because it was allegedly part of a unitary criminal plan concerning the commission of the crimes of tax evasion and smuggling in the Italian territory".

By invoking its own illegal conduct in an attempt to diminish its own liability, Italy is breaching the rule of *nullus commodum capere de sua injuria propria*.

Bin Cheng, in his well-known *General Principles of Law as applied by International Courts and Tribunals,* cited the *"Tattler"* case, where the arbitration tribunal held that "[i]t is difficult to admit that a foreign ship may be seized for not having a certain document when the document has been refused to it by the very authorities who required that it should be obtained".

This case is analogous to the present one, in the sense that Italy has now been constructing an entirely new rationale, without considering that it is based on the arguments that led to the revocation of the arrest order and the acquittal of all the persons therein involved.

Italy has already concluded that no crime existed. Therefore, all current Italian references to "crimes committed within its territory" are, without question, evidence that Italy is attempting to take advantage of its own wrong.

This exemplifies yet another breach by Italy of its duty to act in good faith.

Due to a lack of good faith when arresting the *M/V "Norstar"*, Italy frustrated the object of the UNCLOS treaty, namely, the freedom of navigation. All of the Italian conduct leading up to and during the period of detainment has been in violation of article 87, while its conduct since the arrest, including the examples cited by Italy in its Counter-Memorial, has demonstrated a lack of good faith, thereby contravening article 300 of the Convention.

It has been proved that the courts of Italy held that no crimes had been committed either by the *M/V "Norstar"* or by the persons involved in its operation because the activities performed by this vessel were conducted on the high seas. Since then, however, Italy has been defending itself by stating that the *M/V "Norstar"* was not arrested for having carried out bunkering operations on the high seas but for smuggling and tax evasion. It is illegitimate for Italy to now pretend that it did not know what its own courts had decided.

Italy has only itself to blame for its own errors of judgment in this regard because the principle of fairness clearly demands that a State is not allowed to act inconsistently, especially when it causes prejudice to others.

Nevertheless, Italy has insisted on using its own wrong to counter Panama's claim regarding article 87.

By continuously asserting that it did not arrest the *M/V "Norstar"* due to its bunkering operations, but rather in connection with the suspected crimes of smuggling and tax evasion, Italy has been taking advantage of its own wrong.

This has been proved, with the Italian courts' judgments ordering the release due to the fact that no crime had been substantiated because the place of operations of the *M/V "Norstar"* was the high seas, in direct contravention of article 87.

It is not juridically logical for a State to order the deprivation of freedom, particularly after such order has been held to be unlawful, only to rely on this same order to defend its legitimacy.

In conclusion, it is more than evident that, by arresting the *M/V "Norstar"* for legal activities on the high seas, Italy breached article 87 of the Convention, and is taking advantage of its own wrong by claiming otherwise. The good faith and fair conduct of the Prosecutor are questionable, and do not prevent his action from being an error in judgment for which Italy is liable. All current references to "crimes committed within its territory" are evidence that Italy is attempting to take advantage of its own wrong.

Throughout these proceedings, Italy has been relying on the very order that deprived the *M/V "Norstar"* and Panama of freedom on the high seas in the first place.

Honourable Mr President and Members of this Tribunal, I have now finished with my oral presentation on this first round of the oral hearings and would appreciate if you may call on Ms Miriam Cohen, who will address the next issue on the violation of the duty not to abuse rights.

THE PRESIDENT: Thank you, Mr Carreyó.

We have reached 11.30. At this stage the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at noon.

(*Break*)

THE PRESIDENT: I understand that the next speaker is Ms Cohen. I now give the floor to Ms Cohen to make a statement.

STATEMENT OF MS COHEN
ADVOCATE FOR PANAMA
[ITLOS/PV.18/C25/3/Rev.1, pp. 20–31]

Thank you, Mr President. Mr President, Members of the Tribunal, it is an honour for me to continue Panama's submission in the first round. In the interests of time, this morning I will focus on four points: the first one, the alleged influence on the damages quantum; secondly, the non-compliance by Italy with its own order to execute the release of the *M/V "Norstar";* thirdly, the onus of proof; and then the alleged contributory negligence.

Starting with the alleged influence on the damages quantum, I will start with the condition of the *M/V "Norstar"*.

Italy has devoted a great deal of attention to speculating on the condition of the vessel, intending to rebut Panama's claim concerning the reparation for damages and the quantification of damages suffered.

Italy has simultaneously declared that the *M/V "Norstar"* was in a state of abandonment, with one engine not working and with other broken parts, while being used as a makeshift shelter for homeless people. To this end, Italy relied on a story published on a Spanish website in 2015 that Panama had presented to show the auction sale of this vessel.

In its Counter-Memorial, Italy stated that the *M/V "Norstar"* had been in such a derelict condition since 14 April 1998, months before the arrest, because "the port police ha[d] found on several occasions people sleeping inside" and because "the unmade beds, cereals on the table, and towels hung on the door hanger indicated the crew's rapid flight [and that] the sailors who were on board disappeared leaving the boat in the middle of the night".

It added that the *M/V "Norstar"*'s condition made it unfit for navigation outside the internal waters of Palma, stating that a fax, dated 7 September 1998, recounted the bad condition of the chains, a broken anchor, and the breakdown of one generator, as well as the lack of any fuel.

Panama contends that this third-hand evidence used by Italy is not only unreliable, but also riddled with inaccuracies and contradictions. Please allow me to explain.

First, while Italy states that the vessel was in a totally decrepit state, it is noteworthy that in the Statement of Detention, the Lieutenant of the Provincial Maritime Service of Palma did not depict such a disastrous condition at the time of the arrest, even noting that the captain "resides in the *M/V 'Norstar*'".

An officer of the Spanish Civil Guard, in a signed document, also stated that the captain could be located "at the vessel where he lives" without describing any squalor or abandonment.

In any case, it cannot be sustained that the immediate degradation of the *M/V "Norstar"* occurred while the captain was still on board, particularly since the Spanish authorities did not make any reference to such conditions on the date of the arrest's enforcement, as any reasonable arrest proceedings would require from the officers in charge.

Italy has linked the information contained in the internet publication with the date of the enforcement of the arrest, stating that at that moment the vessel "was used as a makeshift shelter for homeless people". That homeless people would immediately descend on a ship just arrested in port is a most unlikely scenario. Nevertheless, Italy has painted such a dramatic picture, which can be qualified as a desperate attempt to suggest that the amount of damages claimed by Panama should be diminished.

Secondly, while the Memorial did say that the ship entered Palma in March of 1998, Italy failed to note in its Counter-Memorial that while Panama added that "[t]he rust, the excrement of gulls and the dust have been taking possession of the ship, contributing thus to the bad state, fruit of the passage of years" it was referring to its condition in 2015, not 1998. In its arguments, Italy has not made this distinction, which means that Italy has used a

description of the vessel in 2015 to suggest that it was in such condition on the date of the arrest, 1998. This represents a gross distortion of the facts. As Captain Husefest, an experienced seaman, has declared in his testimony, it is an untrustworthy statement.

In other words, by means of deceptive reasoning, Italy has avoided taking responsibility for its extended detention of the *M/V "Norstar"*, which ultimately led to its complete deterioration.

It is true that the *M/V "Norstar"* entered Palma at the end of March 1998, but in April and May the cargo hold and derrick of the vessel were extensively upgraded for the lobster (insulated cooling room), and regular maintenance work was also carried out. This work was completed before the ship was delivered to the charterer on 20 June 1998 to fulfil a charter contract dated 10 May 1998 with a cargo of gasoil from Malta. The captain was Tor Tollefsen, who also loaded the vessel in Algeria. The vessel was then loaded with a total of 273,776 metric tons of gasoil in Algeria and was, during the summer of 1998, operating and supplying gasoil on the high seas.

The *M/V "Norstar"* had a normal bunkering operation during the summer of 1998, both before departure and after arrival from Algiers. The designated position approved by the customs authorities in Palma and the port authority was 24 nautical miles off the coast between Mallorca and Ibiza. This position was south-east of Ibiza and south-west of Mallorca, and the operation had been approved by the authorities. Contrary to Italy's 12 nautical miles, Spain had a 24 nm territorial water area. When the ship was delivered, the first cargo came from Malta and later also from Algeria. The list Petter Vadis sent in 2001 was information about names of mega yachts and quantity delivered in the above position on the high seas.

It has also been proven that in 2001, Mr Emil Petter Vadis, then managing director for the shipowner, provided a list of clients from 1998, from which it can be seen that the *M/V "Norstar"* was not in a bad condition, but rather in very good working order and performing her usual operations until its arrest.

THE PRESIDENT: Ms Cohen, I was informed that our interpreters are having difficulties in following your statement. Could you slow down a little bit, so that your statement is accurately interpreted.

MS COHEN: Certainly, Mr President. Thank you.

The vessel could have never been delivered on a time charter without certificates or class nor without being fully seaworthy.

It is also pertinent here to refer to the fax dated 7 September 1998, in which it is shown that the Port Authority of Palma had never given permission to berth the *M/V "Norstar"* since it was in the bay. Furthermore, after the seizure, the Port Authority refused to grant entrance to any berth, the reason being that the vessel carried "dangerous cargo" as it considered the gasoil on board.

The fax of 7 September 1998 intended to make it clear to the port authority that the ship would be seriously damaged if it remained at anchorage in the bay, and that, therefore, it was urgent to find it a suitable berth. This is why Transcoma Baleares SA, acting on behalf of the shipowner, presented such a distorted picture of the *M/V "Norstar"*, i.e., in order to obtain a berth for the vessel.

The execution of the decree of seizure was carried out by the Spanish authorities on 25 September 1998, following a request from the competent Spanish judge on the previous date. It would appear, however, that already on 5 September, the same authorities had started the process of arrest of the *M/V "Norstar"*, moored off the port of Palma de Mallorca. It appears that they did so with the assistance of Transcoma Baleares SA, a service provider operating in the ports of Spanish islands.

Thus, the manner that this document has been used by Italy, in addition to the fact that it could, at best, be considered as only hearsay evidence, does not constitute a formal description of the vessel at that time. The photos of the *M/V "Norstar"* presented to prospective clients show an entirely different vessel.

In short, the fax used by Italy does not prove that the *M/V "Norstar"* was in bad condition when the arrest was made. On the contrary, Panama has shown that up until that date, the vessel had been operating with complete normalcy. Thus, Panama submits that it can only be concluded that the damage that befell the *M/V "Norstar"* occurred subsequent, rather than prior, to the arrest.

I move on now to the non-compliance by Italy with its own order to execute the release of the *M/V "Norstar"*.

Italy has argued that the damages suffered by Panama do not bear connection with the breach of the Convention because the shipowner did not retrieve the *M/V "Norstar"*, either in 1999 or in 2003.

Italy is trying to place a blame for damages on the owner, characterizing it as the most significant event in the history of this case. This is a blatant distortion of the facts.

Furthermore, even if Italy's version were true, neither of the moments Italy refers to had significant weight to break the causative link between the arrest and the damages Panama claims, as it proposes.

The Italian interpretation portrays a shipowner who voluntarily did not retrieve the vessel, making him responsible for the damages when the onus was on Italy to comply with its own order to execute the release of the *M/V "Norstar"*.

Panama takes issue with the Italian assumption, because no evidence of this has been supplied. Not only was the damage caused by lack of maintenance, but neither the shipowner nor Panama ever declined to take back the vessel on either occasion. But allow me to elaborate.

The pretext that the shipowner did not retrieve the *M/V "Norstar"* in 1999.

The retrieval of the *M/V "Norstar"* in 1999 cannot be at the expense of Panama or the owner of the vessel because the request to put down security was not supported by a legal arrest.

In addition, this is particularly true because the shipowner was conducting a business which was cut short by the illegitimate confiscation of its sole asset, an action which deprived it of all of its income from the very moment that the arrest was enforced.

Italy has claimed that such an assertion "was not supported by any evidence" and that "only five months passed between the shipowner´s request for release and the actual knowledge by him of the release," this hardly being a "long detainment". We have already referred to this erroneous characterization of its financial status that Italy has implied.

If the *M/V "Norstar"* could not continue its commercial activities, according to the *res ipsa loquitur* doctrine, it follows that he would likely be unable to put down security; nor did the owner have the option of providing security through his bank, which had announced by fax dated 16 September 1998 (I refer to Annex 2 of the Reply) that this was not possible.

Finally, even if the owner had had the financial means to post the bond, this payment would not have been reasonable because once the *M/V "Norstar"* would be released, there was no assurance that it would not have been arrested again as the witness Mr Morch has stated in his declaration.

If Italy truly believed that the shipowner was not complying with its duty to take possession of the vessel, Italy should have conveyed this concern without delay. It could have instituted proceedings to reveal the alleged lack of interest of the shipowner, and/or Panama, in the fate of the vessel, if this indeed had been the case.

Since this suspicion is unfounded, however, it is unsurprising that there is no evidence that either Panama or the shipowner actively refused to take possession of the *M/V "Norstar"*, either in 1999 or in 2003. Thus, the causative link has remained in effect.

The damages incurred were proximate and foreseeable by Italy. Panama will demonstrate that the causal link exists factually and legally.

Italy has claimed that the quantum of the bond was entirely reasonable, but Panama contends that by simply characterizing the bond in this way does not eliminate its original illegitimacy in the first place. The legal principle that applies here is that an accessory thing does not lead but rather follows its principal. Since the arrest order was revoked, there is no point in discussing anything related to that order, including the bond that ensued.

On the one hand, Italy claims that at the time of the arrest the vessel "was in anything but good condition" while, on the other, it demanded a security of 250 million lira. If the ship was only scrap, as Italy has stated, the required guarantee is disproportionate and, for that very reason, unlawful.

In addition, when the arrest was revoked Italy should have released the *M/V "Norstar"* without any security. The demand for a bond for an arrest that was eventually revoked, was therefore unlawful, regardless of its amount.

I turn to the pretext that the shipowner did not retrieve the *M/V "Norstar"* in 2003:

Neither the shipowner nor Panama were ever contacted to discuss any steps to be taken to deliver the *M/V "Norstar"* in 2003, as we heard during Mr Morch's testimony yesterday. Therefore, it is difficult to imagine how this retrieval could have taken place. This lack of contact further exemplifies the lack of the Italian interest in the ship's fate.

Furthermore, the shipowner could not take possession in 2003 if it has been shown that the *M/V "Norstar"* had not received any maintenance and had not been surveyed, an entire responsibility of Italy, as Panama established.

Since there was not an effective return, Panama's position is that all the damages claimed in this case remain the responsibility of Italy, particularly when taking into account that it has admitted that as early as 15 August 2001 Panama began claiming damages.

Neither the shipowner, Panama, nor the charterer could have retrieved the vessel without the knowledge and consent of the Italian and Spanish authorities, neither of which ever developed or coordinated an orderly procedure for the *M/V Norstar"*'s transfer of control.

On the contrary, it has been shown that the Italian attitude towards the situation has been to avoid any communication with Panama or the shipowner's agent.

We have already discussed how Italy has always tried to place its own fault on others. This time Italy blamed the shipowner. In this regard, Italy made available the letter 415/02, dated 18 March 2003, requesting Spain to execute the release order and inform the custodian of the outcome of such request.

The judgment of 13/14 March 2003 contained an order to revoke the seizure and return the *M/V "Norstar"*. This was received on 26 March 2003 by Mr Arve Morch, through registered mail, dated 21 March 2003.

In its Rejoinder, Italy stated that it informed "the Spanish authorities about the order of release so that it could be executed."

Italy is again attributing to Spain the responsibility "to execute the release order" when it was its own duty, as the arresting State, to do so.

Despite the name, address, and all the particulars of the shipowner's manager having been on file with Italy, neither of these parties ever received a copy of this message.

On 3 April 2003, by means of a note dated 21 March 2003, the Ministry of Justice in Rome made a request to the Ministry of Justice in Oslo for international judicial co-operation. This note contained the same information (i.e., the 13 March 2003 judgment of the Tribunal of

Savona), and stated that Italy was waiting "to receive receipt of the act demonstrating the communication, or to be informed of the reasons for a failure to communicate".

This document was sent out again on 2 July 2003 by the police to Intermarine´s representative, Mr Arve Morch, and this time it was received on the very same day. However, this was the last message from Italy that reached Mr Morch, and did not provide any details about how the *M/V "Norstar"* would be returned.

Italy has simply assumed that since the shipowner was informed about its judiciary's decision to return the *M/V "Norstar"* this knowledge was tantamount to actual delivering the vessel; yet, clearly, the return of the ship never occurred.

In its Counter-Memorial, Italy referred to a document entitled *Notification of the Release by the Spanish authorities 22 July 2003*. In turn, this document mentions a letter dated 21 July 2003 that was written by the Captain of the Provincial Maritime Service in Spain and sent on 22 July 2003 to the judge in Palma de Mallorca. However, this letter has not been placed into evidence by Italy, so we have been unable to assess its value or even its veracity.

In any case, it is obvious that a document dated 21 July 2003 could not have been included with the documents Mr Morch received on 2 July 2003. Therefore, the shipowner was not duly and timely informed of this decision in any message sent after that date.

Italy has not presented any other documentation showing there was further communication regarding this matter after 21 July 2003. Therefore, it is completely improper, under the circumstances of this case, to pretend that the vessel was delivered by simply producing the release order.

If Italy had effectively and truly decided to execute the release of the vessel, it could have easily sent an official communication to Panama or the shipowner to coordinate this, particularly taking into account that Panama had been intending to communicate with Italy since 2001 through its agent.

Italy has also argued that the shipowner is responsible for not maintaining the *M/V "Norstar"* – but how could he? It is important to note that the *M/V "Norstar"* needed to undergo a special survey every five years in order to renew its classification certificate and maintain its navigation licence, the last inspection having taken place in June 1996. Due to the detention by Italy, the *M/V "Norstar"* would have needed extensive upgrading in preparation for the next survey in 2001.

The vessel had also to undergo annual surveys, as well as an intermediate survey between two special surveys. The last special survey and dry docking was performed in Valletta, Malta in 1996, where frames and some plating in the lower forepeak and the floor between upper and lower forepeak were changed, and new chainlockers were made. Both propellers, the two main engines and both auxiliary engines were opened for inspection by *Det Norske Veritas*, and all equipment checked, before the vessel was submitted to an extensive upgrading.

Also, a number of heating coils not in use for gasoil were removed in early 1997 during operation for the major oil company, Texaco, in Gibraltar. In addition, as a result of a recommendation from *Det Norske Veritas*, during the annual survey in 1997, a new anchor chain was ordered from China and delivered in Malta the same year.

Panama would like to stress, for the burden of proving considerations, that all the documentation concerning the above maintenance records was stored in the vessel's files onboard and, thus, accessible only to Italy while it held the *M/V "Norstar"* under its authority and control. This was made clear by Mr Morch yesterday during his testimony.

Just before the arrest and during its bunkering operations off Mallorca the ship had never been alongside in port but anchored in Palma bay. While the cooling room (cargo hold) was being upgraded after the *M/V "Norstar"*'s arrival from Malta, the *M/V "Norstar"* was berthed to a barge in the Palma de Mallorca bay.

How could Italy expect the shipowner to take possession of his vessel in 2003, five years after the seizure, when it has been shown that it had not received the necessary maintenance work and had not been the subject of the corresponding mandatory surveys? The answer is it shouldn't, because the responsibility for its maintenance, as we have established, during that period fell entirely on the shoulders of Italy, since it was Italy that had custody of the vessel.

If the ship had been issued a valid class and the appropriate certificates in 1999 or any time afterwards, the shipowner would have had to be in a position to have access to the vessel in the port of Palma. Unfortunately, this was not the situation. Italy has never shown any acknowledgement of the surveys required to maintain its class and, thus, should be held to account for this.

As already mentioned, neither the shipowner, the charterer, or the flag State, has ever received any confirmation that the ship was ready to be delivered, despite Italy's obligation, as the State having the *M/V "Norstar"* under its sole jurisdiction and control, to do so.

Furthermore, neither the Spanish chief engineer living in Palma, the shipowner, nor the flag State were ever informed about any intention to execute the order of release.

Instead, only upon a request from its owner to bring the *M/V "Norstar"* alongside after several months in the Palma bay, did the port authority request a tug with welding equipment to cut a new anchor chain bought from China, and brought the vessel alongside, which the port authority had been refusing, adducing that the ship had dangerous cargo (gasoil) on board.

The chief engineer was the only authorized person to start the *"Norstar"*'s two main engines and two auxiliary engines and generators. This was the reason for using the tug with welding equipment to cut the anchor chain after the decision from the Port Authority to bring the ship alongside.

Despite being in possession of the particulars (name, address, telephone number) of the chief engineer, to be found on the documents stored in the captain's office, however, he was never asked to help start the engines or the alternator or to lift the anchor chain with the ship's winch. This is probably why the owner never received any invoice from the Palma Port Authority.

The most widely used test, the but-for test or, as it is more often encountered in civil law countries, the *sine qua non* test, posits that the act or omission of the defendant is the cause of the harmful outcome if the outcome would not have occurred without that act or omission.

The aforementioned examples demonstrate that Italy's omissions caused the harmful outcome or the damages.

The anchorage in Palma Bay was free. The chief engineer was at his home in Palma, and by the time he arrived at the port the crew on the tug explained to him that they had cut the anchor chain and brought the ship alongside upon request from the port authority.

Since Italy did not answer any of the communications from Panama, which initiated contact in 2001, how can it seriously state that the duty to retrieve it fell largely on the shipowner? After all, Italy admitted that on 15 August 2001 a letter was sent to the Italian Government asking Italy "to lift the seizure within a reasonable time and to compensate the damages thereto".

I now turn to the onus of proof.

Panama requests that the Tribunal take into account its difficulties in trying to obtain evidentiary documents located in either Italian or Spanish territory. Importantly, Panama stresses that it has requested Italy to give access to their criminal process files. Italy denied it, stating that Panama had to particularize the documents requested. Panama asks: how can it be so specific about documents when we do not have an opportunity to review the files. Panama even used diplomatic means and no answer was received, as Panama has informed the Tribunal by means of a *note verbale* recently submitted.

Panama thus hopes that the Tribunal will adjust the standard of proof placed upon it, as was done in the *Corfu Channel* case, where the Court allowed recourse to indirect evidence for the same reason, namely that the United Kingdom could not secure sufficient evidence because the relevant facts were within the territorial sphere of Albania, to which it had no access.

In the *Parker Case*, between the United States and Mexico, the principle of cooperation of the parties was also affirmed by the Claims Commission (United States/Mexico) precisely because certain evidence was much easier to obtain by Mexico, the defendant, than by the United States, the plaintiff, because this evidence was located in its home territory.

The *probatio diabolica* rule states that the ratio inherent in the rules of burden of proof for negative facts applies to cases where an actor faces problems establishing the evidence, provided such problems are beyond its reach and no fault is imputable to it. This principle is applicable to Panama in the present case because it has requested evidence from both Italy and Spain without success.

Panama has never denied having knowledge of the release order. What Panama has always argued is that simply informing the shipowner of the judgment ordering the release of the vessel was not sufficient and did not relieve Italy from its duty to take the necessary, positive and effective steps to enforce this order and place the *M/V "Norstar"* at the disposition of the shipowner so that he could appraise its condition through the intermediation of a competent authority.

Panama reiterates that if the *M/V "Norstar"* has always been under the jurisdiction and control of Italy, the burden of proving its condition at the moment of the arrest rests upon Italy because all the documents which could be used to prove this fact may only have been presented by Italy. It is impossible for Panama to present documentary evidence that Italy has had under its control and governance.

In the present case, Italy is still relying on the impetus for an arrest that was revoked by its own courts. This action, found to be unsupported when legally tested within Italy, cannot be expected to yield a different outcome when analysed in light of articles 87 and 300 of the Convention.

Even if the *M/V "Norstar"* had been arrested within Italian territory, this would have still have entailed the violation of article 87 because Italy would have still hampered the freedom of navigation of a vessel conducting lawful activities in international waters and would have had to rely on the same evidence.

Freedom of navigation includes activities ancillary or related to this right. There is the presumption that this freedom not only applies to navigation but to new or as yet unnamed lawful uses of the sea that do not compromise the rights of other states or individuals.

When Italy bases its defence on describing Panama as one who simply "portrays the bunkering activity on the high seas as the reason for the seizure", Panama replies that the proved facts in this case refute this characterization. For instance, the Tribunal of Savona judgment itself stated:

> The purchase of fuel intended to be stored on board by leisure boats outside the territorial sea line and its subsequent introduction into the territorial sea shall not be subject to the payment of import duties as long as the fuel is not consumed within the customs territory or unloaded on the mainland.

And that

> whoever organizes the supply of fuel offshore – it does not really matter whether this occurs close to, or far from, the territorial waters line – does not commit any offence even though he/she is aware that the diesel fuel is used by leisure boaters sailing from the Italian coast … . Nor is there an offence … when diesel fuel, either sold or transshipped offshore, has been

purchased on the Italian territory with a relief from the payment of excise duties because the fuel was regarded as a store. These goods are then considered to be foreign goods once the ship leaves the port or at least the territorial waters line.

It has also been proved that in his appeal the Prosecutor himself stated that he was "not contesting whether the vessels seized could carry out bunkering operations, but rather that the activity carried out was quite different from actually being bunkering".

However, Italy has not been able to explain what was this activity "quite different from actually being bunkering" that the *M/V "Norstar"* was involved in which led to its arrest.

Therefore, every time that Italy refers to the arrest of this vessel as if it were "in connection with the suspected crimes of smuggling and tax evasion", we are in the presence of the use of evidence whose roots have been deeply affected by its illegitimacy and which Panama requests this Tribunal to appraise, because a coastal State is not empowered by the Convention to treat bunkering, either in its contiguous zone or even less on the high seas, as amounting automatically to the unlawful import of goods into its customs territory, without further proof.

I now move on to the alleged contributory negligence and duty to mitigate damages claims.

By proposing the existence of contributory fault and the duty to mitigate damages on the part of Panama, Italy has sought to offset or reduce the amount of compensation for damages.

Italy has not established any proportionate share of causation. Therefore, Panama would like to reaffirm that Italy itself has shown that the damages claimed by Panama are well founded because it has tacitly acknowledged that damages have indeed arisen. Without damages having been caused, no contributory fault or duty to mitigate damages could be invoked.

The fact that Italy has stated that its arguments are being articulated in the alternative and in another line of defence does not change the logical consequence of such argumentation because if there were no damages, no active defences concerning damages could have been articulated. Furthermore, the fact that Italy has articulated arguments in this regard is only possible and logical if concerns regarding damages were valid.

Italy has not in any of its pleadings specified any tally or percentage of contributory negligence or damages that Panama should have mitigated. This makes it impossible for Panama to argue against such a defence.

To briefly conclude, because Italy wrongly seized and held on to a foreign vessel, Italy forced the collapse of a legitimate business and its defence to the contrary has neither validity nor legal standing.

Thank you, Mr President, Members of the Tribunal, for your attention this morning. This concludes my presentation. With your permission, Mr President, I would like to give the floor to my colleague Dr von der Wense.

THE PRESIDENT: Thank you, Ms Cohen.

I now give the floor to Mr von der Wense to make a statement.

STATEMENT OF MR VON DER WENSE
COUNSEL FOR PANAMA
[ITLOS/PV.18/C25/3/Rev.1, pp. 31–36]

Thank you, Mr President. Distinguished President and Members of the Tribunal, it is an honour for me to appear before you today on behalf of the Republic of Panama.

In the following statement I would like to address the matter of the amount of reparation by way of compensation.

Italy has accepted that "the damages that would bear a direct connection to Italy's conduct … would be only the direct damages concerning the loss of the vessel … and the loss of the cargo … by the charterer". However, Italy does not offer any reasons why the rest of the damages are not to be considered direct damages.

The lost profits resulting from the detention and the consequential inability of the *M/V "Norstar"* to conduct further business, as well as all of the damages caused to the persons connected therewith have one and only one root cause – the arrest enforcement.

After supplying bunkers on the high seas for many years, the *M/V "Norstar"* was suddenly detained and, as a result, the bunker remaining on board was no longer available, thereby curtailing the *M/V "Norstar"*'s profitability. The ultimate demise of the ship is clearly a direct consequence of the arrest and its subsequent detainment. The shipowner could not have complied with his duty to pay wages to the crew while the *M/V "Norstar"* was detained.

If it were not for its wrongful arrest, neither the *M/V "Norstar"*, the persons interested therein, nor Panama would have had to institute proceedings. Because the *M/V "Norstar"* was arrested, the owner was unable to pay the taxes and fees owed to the Panama Merchant Marine; and, if it were not for the unlawful arrest of the *M/V "Norstar"*, the natural persons therein connected would not have been subjected to criminal proceedings in Italy and now have to appear in front of this Tribunal. These proceedings have entailed expenses and legal fees, causing significant pain and suffering. It is not to be considered lightly that by not responding to its claims, Italy has forced Panama to hire legal counsel, at significant expense, to obtain appropriate redress.

It is essential to distinguish between direct and indirect damages, and to constrain Italy from exaggerating our demand, as it has when it stated in paragraph 164 of the Rejoinder that Panama was attempting "to extend the scope of compensable damages also to damages that are speculative, not proximate by time and logic and not naturally connected to the alleged illegal act".

Italy's example, according to which the cause of a homicide could be traced back to the birth of the murderer yet a future murderer being born not being attributable to a mother as a causal link is entirely unfitting in this case. For a child born later to become a murderer is statistically very unlikely and depends on many other factors, of course. By contrast, the fact that the owner and the charterer of a vessel that is being seized will suffer a loss of profit is the norm and a logical consequence.

The same applies to the other damages claimed by Panama, for which Italy denies a causative link. The owner of a vessel being seized typically has to continue paying the wages of the crew as well as fees and taxes to the Maritime Authority despite no longer drawing revenue. Unless the responsible State releases the vessel, he will typically seek legal counsel to regain possession of the vessel and will therefore incur attorney's fees. Those wrongly accused of a criminal offence will typically retain legal assistance and will subsequently suffer financial damages in the amount of the lawyer's fees. Those who had to endure a seven-year criminal case will usually suffer a significant psychological burden for years, even though being innocent and acquitted at the end of the trial. If a vessel in a port is prevented from leaving the port due to seizure, it will typically incur additional fees to the port authority.

All this shows that the damages claimed by Panama are by no means abstruse, improbable damages which cannot be attributed to Italy. Rather, Italy must have been aware at all times that the seizure of the *M/V "Norstar"* would in all likelihood cause the damages. This establishes a causative link for all damages claimed by Panama.

Furthermore, in paragraph 166 of the Rejoinder, Italy claims that the taxes due to the Panama Maritime Authority do not constitute damages, as the owner could have used other resources to pay these, for example by revenues generated in other manners: by taking out a loan or from savings of the shipowner or by selling any asset of the company. This of course is no convincing argument. After all, in each of these examples the owner would incur an equal loss of assets elsewhere, as this would reduce his savings, his other assets or revenues generated in other manners by the respective amount or would have incurred other costs.

Italy's suggestions that the owner could have drawn on other assets would logically only have resulted in shifting the damages to a different area of the owner's assets. However, they would not have compensated for the damages incurred. The damages could and, in fact, can only be compensated by the injuring party, in this case Italy, compensating the damages, thus adding this sum of indemnity to the assets of the injured party. This is precisely what Panama is claiming in these proceedings.

Apart from this, Italy's suggestions, further, would have been impracticable. Panama has already pointed out that the owner was unable to draw on other assets after the arrest of the vessel and was unable to produce any other revenues, as the vessel was its only one. Even the bank was unwilling to provide a security. The owner was therefore in no way able to pay the taxes due to the Panama Maritime Authority from other assets.

Even if the owner was able to pay some of the costs, for example the wages of the crew, this does not change the fact that these costs constitute a financial loss, as a payment eliminated the owner's debt and reduced his assets by the respective amount.

After all, compensation for damages can, in the present case, only be made through a compensation payment from Italy.

In its Rejoinder, Italy further argued that only those damages derived from the Decree of Seizure or from the request for execution as such could be claimed, but not from the actual enforcement of the order of arrest. Italy is quoting paragraph 122 of the Judgment of 4 November 2016 and in paragraph 159 of the Rejoinder claims that the Tribunal "limited its investigation to the compatibility with Article 87 of the Decree of Seizure and the Request for its Execution, as opposed to their actual execution".

This argumentation of Italy of course is not convincing in any way. Italy is once again trying to deny its responsibility for the enforcement of the arrest by shifting all responsibility to Spain, although Italy itself has given the order for that enforcement.

In addition, Italy cited the Judgment of 4 November 2016 deliberately incompletely. After all, further down in the Judgment, in paragraph 165, the Tribunal states:

> In the view of the Tribunal, the above facts and circumstances indicate that, while the arrest of the *M/V "Norstar"* took place as a result of judicial cooperation between Italy and Spain, the Decree of Seizure and the request for its enforcement by Italy were central to the eventual arrest of the vessel. It is clear that without the Decree of Seizure, there would have been no arrest.

In paragraph 166 of the Judgment, the Tribunal further stressed it

> does not consider relevant to the present case the reference made by Italy to the distinction between a State's conduct that completes a wrongful act and the State's conduct that precedes such conduct and does not qualify as a wrongful act, stated in the Gabčikovo-Nagymaros Project case.

But rather: "The present case, which involves the action of more than one State, fits into a situation of aid or assistance of a State in the alleged commission of an internationally wrongful act by another State".

Therefore, not Spain, but Italy is responsible for the enforcement of the arrest, even if Italy sought assistance from Spain. After all, as the Tribunal accurately stated, without the Decree of Seizure and the request for its enforcement, there would have been no arrest.

As a result, it is not a matter of distinction whether the damages incurred were caused by the Decree of Seizure, the request for execution as such, or by the actual enforcement of the order of arrest. After all, Italy is responsible for all three proceedings, thus all damages caused by these. In other words, the enforcement of the arrest is only the third step in the causal chain initiated by Italy alone.

Italy therefore cannot dispute that there is a causal link between the Decree of Seizure and the request for execution on the one hand and all damages claimed by Panama on the other hand.

I would now like to address the individual heads of damages.

First, I would like to address the value of the *M/V "Norstar"*. Based on the examinations of the witnesses, I draw the following two conclusions.

Firstly, Italy's claim of the estimation of value from C M Olsen A/S not being based on a physical inspection is false. The inspection might not have occurred at the actual time of the arrest – how could it? – which was also stated in the estimation of value. However, C M Olsen A/S inspected the *M/V "Norstar"* prior to signing the charter contract. C M Olsen A/S also had pictures showing the *M/V "Norstar"* during its use by the charterer. Since the charter contract took effect on 20 June 1998 and expired on 24 September 1998, the pictures were three months old at the most. After all, the *M/V "Norstar"* also had the required class records, although CM Olsen A/S was unable to verify this personally, as the papers were aboard the *M/V "Norstar"*. However, the witness Arve Morch confirmed the existence of the class records and that the vessel was in good physical and seaworthy condition. This was also confirmed by the witness Tore Husefest.

This all leads to the conclusion that the estimation of value is very sound and realistic and reflects the actual value of the *M/V "Norstar"* at the time of the arrest. The estimation of value is therefore of very evidential value. Nevertheless, if Italy considers that the estimation cannot be accepted against all these considerations, the burden of proof for contradicting facts lies with Italy.

Secondly, Italy's claim that the estimation of value confuses the criteria used for estimation of the damage for the direct loss with the criteria used for estimation of *lucrum cessans* is also not convincing. As calculated by the expert Mr Estribí, it is a matter of fact that the value of a vessel particularly also depends on whether it can be chartered out for a profit.

Both of these aspects are not mutually exclusive. Had Italy immediately refunded the US$ 625,000.00 for the loss of the vessel, the owner would have been able to purchase and charter out an equivalent replacement vessel and would not have incurred further loss of revenue, but the loss would have remained US$ 625,000.00. However, since Italy did not promptly compensate the loss of the vessel in the amount of US$ 625,000.00, further damages in the form of loss of revenue were incurred.

The fact that these additional damages were incurred cannot retrospectively affect the value of the vessel at the time of the arrest. Therefore the value of the vessel of US$ 625,000.00 was a correct estimate. Whether or not an additional loss of revenue was incurred does not affect the value of the vessel. After all, there is no confusion of criteria, as falsely alleged by Italy.

Based on this, the estimation of value is compelling evidence of the value of the *M/V "Norstar"*. Panama has sufficiently demonstrated that the owner suffered financial damages of US$ 625,000.00 due to the loss of the *M/V "Norstar"*, to be compensated by Italy.

Next I will address the damages for loss of revenue to the owner.

In this regard, Italy alleges Panama is unjustly applying interest to loss of potential revenue, incurring twice in double recovery. Italy cites Professor Stephan Wittich in this respect, who stated "if lost profits are to be awarded, they may not be the basis for an award of interest … because the capital sum cannot be simultaneously earning interest and generating profits".

However, this argument does not apply in this case. After all, for each year Panama is claiming the loss of profit, the owner suffered for the respective year for being without the ship. However, this loss of profit is not included as a cost item in the following year. In fact, no damages are claimed for that the previous year's lost profits could have generated profits.

Thus, Panama – according to Professor Stephan Wittich – can (at a minimum) demand interest for the respective loss of profit for each single year, namely until the respective loss of profit is compensated by Italy, which it has not done to date. Interest can therefore be rightly be demanded to this day and beyond, until damages have been compensated. Therefore, the allegation of double consideration of loss of profit is not valid.

Italy furthermore argues that the charter contract does not justify a loss of revenue for a period of more than six years. This argument was refuted in the present oral proceedings. The witnesses confirm that the *M/V "Norstar"* could have been chartered for bunkering activities or similar purposes to date, earning profits calculated by Mr Estribí. The calculation is therefore also correct from this aspect.

Italy further argues that damages for loss of revenue require that the claimed profits must not be merely speculative, but reasonably foreseeable at the time of the breach, which Italy believes is not the case. Italy thereby repeats its contemplations on the causative link, which I have already addressed. I therefore repeat: the fact that the owner of a seized vessel will suffer a loss of profit is in no way speculative or unforeseeable but, rather, the usual consequence. It would have been Italy's burden of proving that this case is deviating from this rule. A causative link therefore clearly exists in this case.

With respect to the period during which the loss of profit arises, the following applies: an object which can be profitably chartered or rented being withheld from the owner will cause the owner a continued loss of profit. This is the case until the object is returned to the owner or the loss is compensated to allow him to acquire an object of equal value, and to charter or rent it out. Since Italy never released the *M/V "Norstar"*, the loss of profit continues to exist until Italy replaces the loss of the vessel by paying the US$ 625,000.00.

Of course, the period over which the loss of profit was suffered can basically also be limited to the durability of the respective object. As confirmed in the testimonies, however, the *M/V "Norstar"* was in an excellent condition at the time of its arrest and could have been chartered out to this day. Therefore, in this case the period of loss of profit is not limited by the lifespan of the vessel.

So, in summary, the full loss of profit to the owner was foreseeable and obvious, and is therefore anything but speculative.

Lastly, with respect to the quantification of loss of profit, Italy argues that Panama has not taken into account expenses associated with the use of the vessel and – where these were taken into account – Panama did not provide evidence about the sources and methods of this calculation. However, as to be shown at a later stage, the calculation considers the operational costs as, for example, the crew wages or other operational expenses.

Based on all this, the total loss of profit has been calculated clearly in every aspect and established.

I would now like to address the question of continued payment of wages and payment due for fees and taxes to the Panama Maritime Authority.

THE PRESIDENT: Mr von der Wense, I am sorry to interrupt you but we have reached 1 p.m., which brings us to the end of this morning's sitting.

The statement of Mr von der Wense will be continued this afternoon, when the hearing is resumed at 3 p.m. The sitting is now closed.

(*The sitting closed at 1.05 p.m.*)

PUBLIC SITTING HELD ON 11 SEPTEMBER 2018, 3 P.M.

Tribunal

Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

For Panama: [See sitting of 10 September 2018, 10 a.m.]

For Italy: [See sitting of 10 September 2018, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 11 SEPTEMBRE 2018, 15 HEURES

Tribunal

Présents : M. PAIK, *Président* ; MM. NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, Mme KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mme LIJNZAAD, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 10 septembre 2018, 10 h 00]

Pour l'Italie : [Voir l'audience du 10 septembre 2018, 10 h 00]

THE PRESIDENT: Good afternoon everyone. Before the lunch break Mr von der Wense was speaking. I therefore give the floor again to Mr von der Wense to continue his statement.

First Round: Panama (continued)

STATEMENT OF MR VON DER WENSE (continued)
COUNSEL FOR PANAMA
[ITLOS/PV.18/C25/4/Rev.1, pp. 1–3]

I would now like to address the question of continued payment of wages and payment due for fees and taxes to the Panama Maritime Authority. In paragraph 204 of its Rejoinder, Italy referenced the Judgment in the *M/V "SAIGA" Case*, where the Tribunal did not recognize the expenses incurred by Saint Vincent and the Grenadines in respect of its officials as damages, as these expenses "must be borne by it as having been incurred in the normal functions of a flag State".

However, this only shows that expenses which the injured party also would have incurred in the absence of the loss cannot be claimed as damages. In the present case, however, we are talking about something completely different, namely the correction within the damage calculation. As we heard, the calculation of the loss of profit was based on the lost revenue and the expenses not incurred were deducted from this. Notably, the wages of the crew were deducted as of the time of the arrest.

However, the owner did have to continue paying these wages for a brief period following the arrest, as the employment contracts could not be terminated immediately. This fact along with the exact amounts were confirmed by the witness Mr Arve Morch. So these wages cannot be deducted from the lost revenue as they were in fact not eliminated; so they must therefore be added as an adjustment item.

Based on all this, a comparison with the *M/V "SAIGA" Case* does not hold in this case.

I will now address "costs and legal fees".

Panama is aware the Tribunal can only deviate from the convention of article 34 of its Statute and order a party to compensate the other party for its expenses under special circumstances.

However, Panama believes these special circumstances apply in the present case. At this point I will reference the statements of Mr Nelson Carreyó, who stated in detail that Italy breached its duty to act in good faith in several blatant ways, further increasing the loss for Panama, particularly also with respect to costs and legal fees, notably by stalling any attempt by Panama to resolve the matter in a reasonable amount of time and achieve reparation or limit damages. As a result, Panama and the owner and other parties involved had to hold prolonged litigation requiring extensive legal assistance. This probably could have been avoided had Italy at least responded to Panama's attempts to resolve the matter and also concluded the criminal proceedings within a reasonable amount of time. Having said this, Panama is petitioning the court to order Italy to also reimburse the costs and legal fees in this case.

Apart from this, I would like to point out that article 34 of the ITLOS Statute, to be found in section 3 which, under its heading, refers to "Procedure", only applies to the costs of proceedings before the Tribunal. However, in this case Panama is also asserting costs and legal fees outside of these proceedings. This particularly pertains to the expenses for criminal proceedings before the Tribunal of Savona and the Court of Appeal of Genoa. These expenses are not covered by article 34 and therefore need to be reimbursed by Italy at any rate.

Hence Italy must in this case reimburse all costs and legal fees the owner and other natural persons incurred.

I will now address the loss and damages suffered by the charterer of the *"Norstar"*.

Italy argues that the loss of revenue asserted is too remotely linked to the alleged wrongful conduct and that Panama further has not provided any conclusive evidence pertaining to the amount of the loss of revenue.

It should be noted that from the start, Panama has made it very clear that it can only estimate the amount of the loss of profit suffered by the charterer for lack of exact numbers, particularly since the charterer, the Nor Maritime Bunker Co. Ltd., no longer exists; and yet this fact cannot result in Italy therefore being relieved of any compensation. Instead, the compensation must be estimated in such a case.

As we will show at a later stage, the calculation followed a conservative approach by calculating annual revenue of only US$150,000. The witness Rossi confirmed that in reality the revenue was higher. He is an excellent expert in the business, although Italy attempted to question his credibility as he was involved in the operation of the *M/V "Norstar"* and the "alleged criminal plan". However, this is not at all convincing, as this was in fact not a "criminal plan" but an entirely legal and successful business model.

The loss is therefore in no way too remotely linked to the alleged wrongful conduct. My prior statement also applies here: If a vessel is removed from service, it is entirely evident, or even compelling, that the charterer will as a result suffer a loss of revenue.

Please allow me a few words on the amount of gasoil on board at the time of the seizure. Here, Italy is arguing that the email from Mr Petter Vadis does not provide any evidence, as it was written almost three years after the seizure and because of the conflict of interest of its sender. I must disagree with this. There is no such conflict of interest, because the amount of the gasoil on board was not important to the owner. Also, Italy failed to forward any argument why the amount of gasoil could no longer be established almost three years after the seizure. Companies typically keep their business records for more than three years, so exact information about purchases, sales and inventory is available during this time. It is quite evident this was also the case here. Otherwise, Mr Vadis would not have been able to provide so many details including the names of the yachts refuelled. Based on all this, there is no reason to challenge the accuracy of the information provided by Mr Vadis.

As I approach the end of my statement, please allow me a few words on the material and non-material damages to natural persons. Italy argues there is no causal connection between the criminal proceedings against natural persons and the alleged violation by Italy of article 87 of the Convention. Furthermore, the Tribunal had limited the object of the present dispute to the request of execution of the decree of seizure. The Italian domestic criminal proceedings with regard to natural persons would therefore not be an object of the present dispute. Panama's claim concerning material and non-material damage to natural persons would therefore be outside the scope of the present dispute.

This interpretation of the Judgment of 4 November 2016, however, is false. The fact the Tribunal found it reasonable that the decree of seizure and the request for its execution constitute an infringement of the rights of Panama under article 87 does not preclude Italy's other actions related to the seizure being able to constitute an infringement of these rights.

Panama believes the unlawful accusations against natural persons in connection with criminal proceedings accordingly also constitute such infringement. The rights of a state under article 87 of UNCLOS cannot only be infringed by the seizure of a vessel, but for example also by preventing the natural persons employed on the vessel from continuing their duties, whether it be by detaining these persons or through criminal charges. This too can prevent the flag State from exercising its rights under article 87.

This was certainly the case here. By prosecuting natural persons for legal bunkering activities aboard the *"Norstar"* on the high seas, Italy also infringed Panama's rights under article 87 with this action.

Now moving to the last points in my pleading, Italy's argument that, by advancing a claim for non-material damage, Panama is attempting to make up for its inability to prove actual economic damage.

This allegation is false alone due to the fact that Panama is claiming both material and non-material damages and has further provided compelling facts for both the reason for as well as the amount of the damages. After all, with respect to Mr Rossi and Mr Morch, in addition to non-material damages, material damages, namely lawyers' fees, are also being claimed.

Also, there is no rule prohibiting individual natural persons from only claiming non-material damages and abandon material damages so long as they in fact are non-material damages and not actually disguised material damages. This requirement has been met in this case, as the psychological stress of seven-year criminal proceedings is clearly of a non-material nature.

The legal action is therefore justified with respect to material and non-material damage to natural persons.

As regards the level of interest, Italy's objections are not justified. Panama's interest rates are reasonable given the expert's convincing calculation.

In closing, I would like to summarize that Italy's attempt of disputing the existence of a causative link, the amount of loss of the individual items is under no circumstances reasonable and Panama's claim is justified.

Thank you, Mr President.

THE PRESIDENT: Thank you, Mr von der Wense.

I understand that Panama next wishes to call and examine an expert. May I ask the Agent of Panama to confirm this?

MR CARREYÓ: That is true.

Examination of experts

MR HORATIO ESTRIBÍ
EXAMINED BY MR VON DER WENSE (PANAMA)
[ITLOS/PV.18/C25/4/Rev.1, pp. 4-15]

THE PRESIDENT: Thank you, Mr Carreyó.

The Tribunal will then proceed to hear the expert, Mr Horatio Estribí. He may now be brought into the courtroom.

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

(*The expert made the solemn declaration*)

THE PRESIDENT: I understand that examination of the expert will be conducted by Mr von der Wense. I therefore give the floor again to Mr von der Wense.

MR VON DER WENSE: Good afternoon, Mr Estribí. I would now like to start the questioning. Mr Estribi, would you pleae introduce yourself?

MR ESTRIBÍ: Yes. My name is Horacio Estribí. I am an economic advisor to the Ministry of Finance in Panama. I also hold a degree from Boston University and I have been a private consultant also for a number of years and been involved in several forensic examinations in Panama.

MR VON DER WENSE: Have you been, or are you, in any personal or business relationship with the companies or persons whose damage is the subject of this proceeding?

MR ESTRIBÍ: I do not have a personal business relationship with the owner of the *"Norstar"*. Through a Panamanian legal firm I was hired to estimate damages regarding the arrest of the aforementioned vessel.

MR VON DER WENSE: I now come to Panama's demands for compensation from Italy for the arrest of the *"Norstar"*. The owner of the *"Norstar"* was, until its destruction, Inter Marine & Co AS, a corporation registered in Norway. In your opinion, what damage did the owner suffer because of the arrest of the *"Norstar"*?

MR ESTRIBÍ: Okay, slide 1. As you can appreciate from the slide, the loss and damage suffered by the owner includes damage for the loss of the vessel, damage resulting from the loss of revenue, continuing payment of wages, legal fees, payment due for fees and taxes to the Panama Maritime Authority, and payment due for fees and taxes to the Palma de Mallorca Port Authority.

MR VON DER WENSE: What was the damage due to the loss of the vessel?

MR ESTRIBI: The total amount was US$ 1,641,670.06. This amount includes both the principal and the interest.

MR VON DER WENSE: Could you specify the amount again?

MR ESTRIBÍ: Yes, the total amount was US$ 1,641,670.06; and this amount included the principal, which represented US$ 625,000 plus interest, which represented US$ 1,016,670.

MR VON DER WENSE: On what are you basing this assessment concerning the value of the *"Norstar"*?

MR ESTRIBÍ: On the statement for estimation of value issued by CM Olsen A/S dated 4 April 2001. Essentially, it indicated that the *"Norstar"* at the time of its seizure was a solidly built and well-maintained product tanker, with good loading and discharging capacity. It also states that such factors were vital elements in her ability to operate as a bunker tanker.

MR VON DER WENSE: Do you consider the estimation of value from C M Olsen A/S to be convincing?

MR ESTRIBÍ: Yes, I do, because it is based on a technical analysis of the features and conditions of the vessel at the time that the value estimation was conducted. On the other hand, CM Olsen is a well-established and recognized company that specializes in the shipping industry, mainly in sales and purchase of vessels and as an agent of crude oil products and related shipping vessels.

MR VON DER WENSE: The estimation of value states that CM Olsen did not inspect the vessel and/or her class records. Does this, in your opinion, reduce the persuasive power of the estimation of value?

MR ESTRIBÍ: CM Olsen is a company that was very well-acquainted with the *"Norstar"* because it had inspected the vessel prior to the signature of the charter contract, which took place in 1988, and on that occasion it issued an estimation of value which is, in my view, sufficiently convincing and persuasive on the basis of the reasons that I mentioned before.

MR VON DER WENSE: What do you say to the objection of Italy that the estimation of value "is given under the condition that the vessel is entertained under a minimum four years' time charter at a rate of $2,850 per day for the first year and with natural/normal escalation for each additional year" and that this is why Panama confuses the criteria used for estimation of damage for the direct loss with the criteria used for estimation of *lucrum cessans*?

MR ESTRIBÍ: With all due respect, I think that the objection has no basis; it is unfounded, since the value of the ship also depends on its future commercial value or its potential use. The future revenue estimation of the vessel, on the other hand, was based on the existing charter contract, which was signed, as I mentioned earlier, in 1998. Thus, in my view, there should be no confusion regarding the criteria used for estimation of the damage resulting from the direct loss of the vessel in comparison to the loss stemming from the revenues that were foregone. In my view, neither damages would have occurred if Italy had returned the ship at an earlier time or Italy had reimbursed the full value of the ship to its owner. Under this circumstance, the loss of profits would simply have not taken place. Since Italy did not act accordingly, the ship became a complete loss, which gave place to the occurrence of both damages.

MR VON DER WENSE: I proceed now with the issue of damages stemming from the loss of revenue of the owner of the *"Norstar"*. Could you please share with us the total amount of such damage?

MR ESTRIBÍ: Certainly. The total loss of revenue pertaining the owner was $42,856,882 at future value.

MR VON DER WENSE: What are the individual factors or components of this loss?

MR ESTRIBÍ: There were several used in my model, which I will explain in more detail further, but it included gross revenue per day, operational expenses, such as crew-related expenses as well as insurance expenses. The other factors included as well the application of interest rate and the time span that we assumed for the operation of the vessel, the time that the vessel operated commercially; or the estimation that we made – I am sorry – of the time the vessel would have operated.

MR VON DER WENSE: How did you determine such calculations?

MR ESTRIBÍ: Well, the basic procedure was to deduct from gross revenue the cost of operation of the vessel. Later we applied to the net revenue the compound interest to determine the future value of the yearly cash flows.

MR VON DER WENSE: Okay. Thank you. What life or operating time span of the *"Norstar"* did you base your calculations on?

MR ESTRIBÍ: Damage estimations are based on the assumption that the vessel could have operated at least until the present day. Just for practical purposes, we assumed December 2018, for practical purposes.

MR VON DER WENSE: Why do you assume that the vessel could have been used or chartered during this period?

MR ESTRIBÍ: My assumption is based on a report issued by Mr Karsten Himmelstrup, he is director of Procurement and Logistics in Scanbio Marine Group A/S (Scanbio). They issued important information regarding the *"Norstar"* at the moment of its arrest, indicating that it had a high technical standard. The confirmation issued by Mr Karsten also indicates that, provided the vessel would have received the adequate and timely maintenance, it could have been used in their fleet, for example, even until today, the present time. This, in our view, is a reasonable proof of a high probability or likelihood of continued operations of the *"Norstar"* during the 1998-2018 period, which is equivalent to 20 years of operations.

Furthermore, this source additionally indicated that for the purpose of offshore bunkering services and provision for transport of naval provision – gasoil, for example – the ship could have been alternatively used for other purposes, which include, for example, transportation of liquid bio-products such as vegoils and even fresh water.

As explained by Karsten, the employment of the ship is based on the standard Time Charter agreement (T4). According to the same source, the revenue that the vessel could have generated would have most likely been very stable or constant throughout the aforementioned operating period.

MR VON DER WENSE: Why do you consider Karsten Himmelstrup an authoritative source?

MR ESTRIBÍ: Scanbio Marine Group is a leading producer of food ingredients for sustainable marine and aquaculture sources. The company operates also six tankers and uses these ships

for transportation of waste products for the fish farming industry in Norway and Northern Europe in general.

MR VON DER WENSE: Would the vessel have required any sort of overhaul or revamping to operate during this time span?

MR ESTRIBÍ: The vessel only would have needed an adequate and timely maintenance to operate until the present day, according to Scanbio.

MR VON DER WENSE: Have you also taken into account the times when the ship was unable to generate revenue due to periodical dry docking for maintenance and, if so, to what extent did this affect total damage estimations?

MR ESTRIBÍ: Yes, I did, in fact. Based on the information provided by the owner, Mr Morch, we took into consideration that the vessel had to receive dry docking services every five years. However, the model discounts five operating days on a yearly basis, which implies that we only estimated 360 operating days yearly, which means, yes, we did take into account the fact that the vessel needs to undergo dry docking services

MR VON DER WENSE: Have you also considered the owner's operational costs such as maintenance costs?

MR ESTRIBÍ: Yes, indeed I have.

MR VON DER WENSE: I would now like to address the continued payment of wages item. How high is this damage, in your estimation?

MR ESTRIBÍ: Total damage in this regard was US$ 19,100, and the payment period corresponds to the time elapsed between the arrest of the vessel on 24 September 1998 until the end of December 1998.

MR VON DER WENSE: Have you specialized the single items in your calculation?

MR ESTRIBÍ: Yes. In my model there is a clear segregation of the different members of the crew and the amounts that they received.

MR VON DER WENSE: How did you determine this information and why do you affirm that this damage stems from the arrest of the vessel?

MR ESTRIBÍ: The information was provided by the owner, Mr Arve Morch, to me, and it is based on the assumption that this was an outflow of cash or money that the owner had to pay from his own pocket, a situation which would not have occurred under the condition that the arrest had not taken place. Given the fact that the arrest took place, this was an obstacle for the vessel to generate revenues and therefore to finance the wages out of the abnormal operations of the vessel.

MR VON DER WENSE: I would now like to address the legal fees item. How high is this damage of the owner, in your estimation?

MR ESTRIBÍ: For the owner specifically, the total amount as of 13 June 2018 was equivalent to a total of €140,571, and US$ 102,401. There are more details in the report that I filed and the different fees that have been paid out to different firms and lawyers.

MR VON DER WENSE: How did you determine this information?

MR ESTRIBÍ: It was provided essentially by the invoices of payments issued to each lawyer.

MR VON DER WENSE: Now I proceed to address payment due for fees and taxes to the Panama Maritime Authority. What is your estimation of this amount?

MR ESTRIBÍ: We have a very recent certificate issued by the Panama Maritime Authority. In fact, it is dated 29 August 2018, where essentially they make an update and also they make a projection of the amount owed to them by *"Norstar"*. As of December 2018, the amounts are 135,111.93. I am sorry, I am going to correct that. The amount due as of December 2018 would be 136,899.49, and the amount due on 30 September 2018 would be 135,111.93.

MR VON DER WENSE: US dollars?

MR ESTRIBÍ: Yes.

MR VON DER WENSE: Thank you. How did you determine this amount?

MR ESTRIBÍ: As I mentioned earlier, the entity recently issued a certification of the amount owed, and that certification was dated 29 August. There was a previous certification as well dated 30 March 2017, but we have more recent information.

MR VON DER WENSE: As for the payment due to the Palma de Mallorca port authority, what is your estimation of this amount?

MR ESTRIBÍ: According to the information provided to me, it is not known at this time the amount that the *"Norstar"* would have to pay to the Palma port authority. However, if the authority were to demand any payments or fees, then this would represent an additional amount to the claim that we have brought today.

MR VON DER WENSE: With regard to the charter of the Nor Maritime Bunker Company Limited, a company registered in Malta, what damage did it incur because of the arrest of the vessel according to your estimation?

MR ESTRIBÍ: Namely the following: loss of cargo and loss of revenue. Other factors also obviously included the application of interest rate and the revenues that were estimated would have taken place during the operating period of the vessel.

MR VON DER WENSE: According to you, what is the damage caused by the loss of the cargo?

MR ESTRIBÍ: The value of the cargo on the date of the arrest was US$ 108,670.39. This gasoil should have been surrendered by Italy to the charterer but the fuel was recycled or disposed of. The total amount then would be US$ 285,441.48 owed to the charterer. This

amount obviously would include the above-mentioned principal of US$ 108,670.39 and interests, which would represent in this case US$ 176,771.09.

MR VON DER WENSE: How did you determine this?

MR ESTRIBÍ: It is based on the estimated price of a cubic metre of gasoil at the time, which was estimated at $612 per cubic metre on board.

MR VON DER WENSE: How many tonnes was the amount of the cargo?

MR ESTRIBÍ: It was 177,566 cubic metres of gasoil.

MR VON DER WENSE: Cubic metres or metric tonnes?

MR ESTRIBÍ: Metric tonnes, I am sorry.

MR VON DER WENSE: How did you determine the amount of gasoil on board at the moment of the vessel's arrest?

MR ESTRIBÍ: It was based on the information contained in Annex 1 of the Reply of Panama, dated 27 May 2001, and the information was contained in an email issued by Mr Petter Vadis.

MR VON DER WENSE: How did you determine the price of the gasoil?

MR ESTRIBÍ: The information was provided to me by Mr Arve Morch. He asserted that the price of the gasoil is based on a naval provision that establishes a price of between US$ 500 and US$ 600 per metric tonne. It would also be useful to provide an example of the sales price that the marina in San Remo was charging at the time for the same product, which was US$ 1,000 per metric tonne.

MR VON DER WENSE: What is your estimate of the charterer's loss of revenue?

MR ESTRIBÍ: As a consequence of the seizure of the *"Norstar"*, the charterer was unable to use the vessel to generate further business activity. Therefore, he sustained damage in the form of lost profits, foregone profits. The total loss of revenue pertaining to the owner was US$ 6,438,646. This amount would include essentially a portion of interests of US$ 3,080,547 and interests accrued in an amount of US$ 3,358,098.29.

MR VON DER WENSE: How did you determine this amount?

MR ESTRIBÍ: The calculations were made applying essentially the model and the corresponding interest rates, which I will explain in more detail in a moment, to determine the future value of the estimated cash flows during this 20-year time period. In this case such estimations reveal that the annual revenues were equivalent to at least US$ 150,000 per year as a result of the offshore bunkering activity.

MR VON DER WENSE: In relation to the material and non-material damage to natural persons, which individuals suffered this damage?

MR ESTRIBÍ: The individuals that suffered such damage would include the following: Silvio Rossi, Renzo Biggio, Arve Einar Morch, Emil Petter Vadis, Tore Husefest, Odd Falck and Tor Tollefsen.

MR VON DER WENSE: What damage did these individuals suffer?

MR ESTRIBÍ: Well, they endured, they suffered, namely, the following items: material damages, including legal fees and other professional fees, and immaterial damages, which included pain and suffering.

MR VON DER WENSE: What is the total legal and other professional fees generated in relation to their defence?

MR ESTRIBÍ: Total legal fees in this case were €56,117, of which €29,797 were principal and €26,320 corresponds to accumulated interests.

MR VON DER WENSE: How did you determine these amounts?

MR ESTRIBÍ: Essentially, the amounts were paid out to the lawyers, so I based my calculations on invoices, and also, just to simplify the calculations, I made an assumption, which is that interests were accrued as of November 2005. Although some of the invoices were paid earlier, just to simplify the calculations I took as a basis November 2005.

MR VON DER WENSE: What are your estimates of immaterial damages?

MR ESTRIBÍ: My figures indicate that total claim is for the amount of US$ 219,844, of which US$ 87,000 correspond to principal and US$ 132,844 would correspond to interests.

MR VON DER WENSE: Principal was, once again?

MR ESTRIBÍ: I will say that again. Total claim was US$ 219,844 and principal was US$ 87,000, and interests were US$ 132,844.

MR VON DER WENSE: What is the total damage you have estimated and what portions correspond to interest rates and what to principal?

MR ESTRIBÍ: In a while I will show the total figures in a slide I have but total damage was estimated to be US$ 51,882,358, of which US$ 24,873,091 corresponded to interests, and US$ 27,009,266 to principal. Also, the total damages include a portion denominated in euros and the amount would be €196,688, of which €26,320 correspond to interest and €170,368 correspond to principal.

MR VON DER WENSE: Why did you apply compound interest instead of simple?

MR ESTRIBÍ: It is slide 2. I will get to those figures in a while. Why was compound interest applied in this case? Based on essentially technical literature that states that for large periods of damage estimations, interests should be compounded because of the numerous alternatives of investment that gain benefits on a compounded basis. For this statement I used several papers that specifically address the issue of when and why compound interests are applied in cases similar to the one we are seeing today. For example, in his paper *Approaches to the Award of*

Interest by Arbitration Tribunals by Mark Beeley Richard E. Walck asserts that: "There is, then, no logical support for the awarding of simple interest, unless the time from the cause of action to the payment of the award is very short", which is not the case now. Mr Beeley is, by the way, a solicitor-advocate and barrister in the London office of Vinson & Elkins RLLP and a member of its International Dispute Resolution Group. He is also a partner in Global Financial Analytics LLC and specializes in the assessment of damages in international commercial and treaty arbitrations. By the way, his paper also contains information from other specialists, for example, in discussing *Norway* v. *United States*, F A Mann notes in his paper *Compound Interest as an Item of Damage in International Law* that "there at least is an indication that if proper reasons had been advanced, the Tribunal might have awarded compound interest."

By the way, Mann also concludes that compound interest should be the norm absent special circumstances that would dictate otherwise. Mann was an influential German-born scholar of his generation and a noted authority on international law.

Also, the literature indicates, for example, that there is a paper called *Compound Interest in International Disputes (2004)* written by Mr John Yuko Gotanda, who essentially states that up until recently the longstanding and well settled rule was that award of interests was to be on a simple, as opposed to compound, basis. Later Mr Gotanda in his paper *Assessing Damage in International Commercial Arbitration: A Comparison with Investment Treaty Disputes* states the following:

> Starting in the early 2000s, however, there was a trio of cases – *Santa Elena*, *Maffezini*, and *Wena Hotels* – in which the tribunals awarded compound interest. These decisions have been followed most recently by the tribunals in other cases such as *PSEG Global Inc*, *Siemens* and *Azurix*. As the tribunals noted in the latter two cases, compound interest "reflects the reality of financial transactions and best approximates the value lost by an investor".

MR VON DER WENSE: Why did you choose to apply US Prime rate as opposed to Libor, for example, or other rates?

MR ESTRIBÍ: Yes, in fact, Prime rate was applied as a proxy or as a variable for interest rates in our model. However, Libor was not considered because Libor, in my view, represents an interest rate applied between banks; it is an interbank rate, as opposed to Prime rate, which is essentially the amount that would be paid to a potential investor or to a final client or depositor.

MR VON DER WENSE: How did interest vary now in comparison to rates applied in chapter 4?

MR ESTRIBÍ: This is a very important question. Damage in chapter 4 was based on the *M/V "SAIGA" Case* essentially, which was also discussed and seen by this Court. Estimations in such case were based on a shorter timespan than the *M/V "Norstar" Case*, therefore we needed to apply a more realistic interest which would be more objective in the estimation of total damages caused to the owner and the charterer.

MR VON DER WENSE: Why did your estimations of damage vary with respect to original estimates presented in chapter 4?

MR ESTRIBÍ: For several reasons, but the main one is that the estimations in chapter 4 only were done on the assumption that the vessel would operate until June 2005, and therefore we needed to update this estimation.

MR VON DER WENSE: Why are you now assuming the vessel could have operated all the way until 2018 as opposed to June 2005, as assumed originally in chapter 4?

MR ESTRIBÍ: This is the essential reason why we extended the amount. It was based on Mr Karsten, information provided recently, so we did a new estimation, more technical and based on more, new assumptions. The additional element was that the *"Norstar* "could have operated until present days provided, as we mentioned earlier, that it received the appropriate maintenance, and also on another important premise, which is the fact that the *"Norstar"* could have also been used alternatively in other commercial operations, which I already mentioned earlier. So there were two basic new premises which needed to be accounted for: essentially, that the *"Norstar"* could have operated until today and, second, that the *"Norstar"* had and has several alternative commercial uses, not only to distribute and sell bunker.

MR VON DER WENSE: Why did you use the median of the interest to estimate certain future values but applied individual yearly interest rates to, for example, loss of revenue estimates?

MR ESTRIBÍ: This is a very important part of the estimations. In effect, we applied a simple average and a moving average for the 1998/2018 Prime rate time series. So what we did was we calculated a simple mean, but we wanted to be very meticulous statistically speaking, and we also calculated so-called moving average, which is a method just to smoothen the sample, especially when you have samples that are subject to variations or fluctuations, which in fact Prime rate was.

This is important, the fact that we used the moving average of 4.8 as opposed to a simple mean of 5.6. Another important issue is that the sample gave us a standard deviation of 2.8, which we would consider is a low deviation of the different samples. Why is this important? Because of the following: although to begin with the difference between the two means used was relatively small, we opted for the smallest one, to be fair in our calculations. Secondly, although standard deviation was relatively low, we followed the following method in order to minimise the impact that could derive from the fluctuations of the Prime rate we already mentioned. We did the following. In order to calculate the loss of revenue that derived from cash flows, like the loss of revenue of the owner and the loss of revenue of the charterer, we applied the Prime rate of the year to that basic year. We applied the Prime rate registered during the year to the calculation of cash flow, so cash flow estimations were based on a year to year basis. This was done in order to reduce the distortion that statistically could derive from the fact of using an average. It is not recommended to use an average if you have important variations, although variations were low in this case. We tried to correlate as closely as we could the Prime rate that prevailed that year with regard to the net revenue that was created. In a moment I will explain this more graphically.

So it is important to state that we tried to minimize the distorting impact that could result from applying an average to the time series of Prime rates. We applied the Prime rate on a yearly basis corresponding to the yearly estimated net revenue.

We took the simple, the moving mean, 4.8, and applied that to cases only where we had lump sum payments, as in the case of legal fees and so forth. We did this based on the fact that this would also have a minimum distorting impact since we were using the moving mean.

I would like to summarize. What we did was we used the series of Prime rate, we calculated the standard deviation to see if the sample presented important deviations – it did not. However, we were very meticulous in applying Prime rate on a yearly basis for the estimation of the loss of revenues on a yearly basis, and we used the moving mean to lump sum payments such as legal fees and the losses deriving, for instance, from the loss of cargo.

MR VON DER WENSE: Thank you, Mr Estribí. Is there any other parameter or proxy which you consider determines that the interest rate that you applied in the financial model is conservative and realistic?

MR ESTRIBÍ: Yes. This is very important. There was a paper we submitted as proof or evidence called *Systematic Risk and the Cost of Equity Capital in the Shipping Industry*, written by Professor Wolfgang Drobetz and Hennin Schröder – sorry for the mispronunciation of the last name – and they both teach at the Department of Finance at the University of Hamburg Business School. Why is that paper important? That paper estimates through the so-called capital asset pricing model. It is one of the methods they use. They use another alternative model but I will centre my dissertation on the capital asset pricing model (CAPM), and basically what they do is they use this method, which is widely known, to estimate what the equity capital of the shipping industry should be in European countries. He estimates the same values for other markets, but it is important that the paper contains both an estimation of the equity capital in the shipping industry, and it does it in Europe, to isolate, so to speak, the estimation of damages that would apply to the *M/V "Norstar" Case* since it operated precisely in the European market.

Why is this important? Essentially because this parameter allows us to estimate two important factors: one, the value of money as a function of time and, secondly, the value of money in terms of the risk that an investor would typically take in an industry, in the shipping industry in this case.

So what this comes down to is that they estimate the following co-efficients for the European market. They calculate an equity capital of the shipping industry for Europe of 6.53, corresponding to a June 1984 to July 2003 period; and they also calculate 8.49 for the August 2003 through November 2013 period. What is important is that both indicators are greater than the average of Prime rate we used of 4.9. I guess the point I want to stress is that we were quite conservative in the application of the Prime rate, which was below the estimated co-efficients in the above-mentioned paper.

MR VON DER WENSE: Why are interests applied on payments made by the owner or charterer such as fees?

MR ESTRIBÍ: Well, interests are applied to such outflows of cash since they represent an opportunity cost. Let me explain. Such outlays of cash could have been invested at a reasonable interest and generate returns to the owner, as opposed to allocating such resources to pay fees and legal services that stemmed or derived from the seizure of the *"Norstar"* vessel.

MR VON DER WENSE: Thank you. I am now moving to my last questions. Are there any important estimations or factors that you consider were not included in your calculations of damage, and what are the implications?

MR ESTRIBÍ: Well, yes, there is a factor which was not accounted for in the model, and essentially it is related to the impact that inflation would have on the estimated revenues and loss of profits. So we did an exercise and we took essentially the global inflation rate from information provided by the World Bank and the International Monetary Fund, and we tried approximating the impact that this would have had on our estimations – and what we obtained was that we were roughly underestimated by 2 per cent total amount of damages as a result of not correcting for inflation.

MR VON DER WENSE: Thank you. Now moving to my last question, what is the extent of such underestimation in light of, for example, the European inflation rate during the assumed operation time span of the vessel?

MR ESTRIBÍ: Well, like I mentioned, roughly what we estimate is that we underestimated total revenues in approximately 2 per cent, since we did not account for the impact of inflation on the estimations.

MR VON DER WENSE: Do you want to make any additional comments?

MR ESTRIBÍ: Well, just address the graph we have up on the screen. Can we see the other graph? Is there a previous one? Okay. These graphs essentially reflect two estimations, and the estimations are essentially the loss of revenue. First, we can observe the loss of revenue endured by the owner. I think what is interesting is that we can appreciate how interest rates, as well as principals, were accumulated or estimated along the period of analysis – and we can clearly see that, yes, there is an important impact stemming from the application of interest rates, which in turn is a result of the variations of interest rates along the different years. As you can appreciate, we had very high interest for instance during 1999, 2000, 2001; then interest rates dropped in the market during 2002 to 2003. As you can observe, after the economic crisis of 2008/2009 interest rates have been pretty much stable and low, and therefore the impact that that had on the model is much more moderate.

Also, it is important to mention that the damages are a result essentially of the time period elapsed between the seizure of the vessel and the payment of the reparation of the damages.

The next graph will basically show the same, except for the charterer's loss of revenue, but I think you can appreciate pretty much the same principles of the impact that interest rates had on the calculation of damages, and also how interest rate represented an important share or portion of the damages as a result of the time that transpired between the seizure and the reparation of the damages.

My final slide is a summary of some of the figures we have already used. I won't go into details but essentially you can see there the different items which I was asked about along the questionnaire. You can easily appreciate that the most important damage reparations stem, or are related to, the loss of revenue both of the owner and of the charterer. In this case we can see the total amount – and I mentioned this amount earlier – is US$ 51,681, the total reparations denominated in dollars. The next slide resumes the total amounts of damages that are denominated in euro. That's about it.

MR VON DER WENSE: Thank you very much, Mr Estribi.

Thank you, Mr President.

THE PRESIDENT: Pursuant to article 80 of the Rules of the Tribunal, an expert called by one Party may also be examined by the other Party. Therefore, I ask the Co-Agent of Italy whether Italy wishes to cross-examine the expert and, if so, to indicate who will be conducting the cross-examination.

MR AIELLO: Yes, Mr President, we would like to cross-examine the witness, and I would like to cross-examine him.

THE PRESIDENT: Thank you. I give the floor to Mr Aiello to cross-examine the expert.

MR HORATIO ESTRIBÍ
CROSS-EXAMINED BY MR AIELLO (ITALY)
[ITLOS/PV.18/C25/4/Rev.1, pp. 16-28]

MR AIELLO: Good evening, Mr Estribí. A while ago we heard from you that you had no relationship with the people who allegedly suffered damages from the Italian conduct. Especially you mentioned Mr Rossi and Mr Morch. But, as you know, the client is the Government of Panama. So I want to know what is your relationship with the Government of Panama.

MR ESTRIBÍ: I am an advisor, economic advisor, consultant, to the Ministry of Finance.

MR AIELLO: Economic advisor is what kind of relationship? Are you a public servant?

MR ESTRIBÍ: I am a consultant for the Panamanian Government.

MR AIELLO: But your relationship, it is not for a specific period of time – you are until your retirement a consultant of the Ministry?

MR ESTRIBÍ: Yes, it is not specified in terms of time – yes; it's not a contract.

MR AIELLO: So the most part of your earnings comes from the Ministry of Economic Finance of Panama?

MR ESTRIBÍ: I derive – yes – income from being a consultant and an advisor to the Government of Panama.

MR AIELLO: Thank you. Have you ever made evaluations of other vessels before these proceedings?

MR ESTRIBÍ: No, I haven't. Excuse me, can you repeat the question – evaluation of?

MR AIELLO: I am wondering if you are an expert on this subject, and my question is if you have ever made other expertise about the value of vessels.

MR ESTRIBÍ: I have made several expertise in my country. I have been an economic expert in several trials, and I have never made an estimation directly of a vessel case. This is the reason why I was very careful in finding papers, and specialized papers, about the subject, since in any event there aren't many cases related to evaluation of vessels. Most of them are seen by this court.

MR AIELLO: So this is your first time in which you are giving us your advice about evaluation of a vessel. It is a very specific sector.

MR ESTRIBÍ: This is my first time. In terms of a case related to a vessel, it is not my first time as an economic expert in legal cases.

MR AIELLO: Are you aware that the total amount of the loss and damages allegedly suffered by Panama has been considerably increased during this proceeding?

MR ESTRIBÍ: They have been increased with regard to – relative to the estimations made earlier in chapter 4. They have.

MR AIELLO: Have you advised Panama about the preparation of its Pleadings?

MR ESTRIBÍ: Can you please repeat the question and be more specific?

MR AIELLO: Yes, have you helped Panama in the preparation of its Memorial and Pleadings in this case?

MR ESTRIBÍ: Not directly, no. I have been involved more specifically in the preparation of the estimations regarding the damages.

MR AIELLO: Here, we have an estimation dated 13 June 2018 that has your signature.

MR ESTRIBÍ: Yes.

MR AIELLO: Do you recognize this one?

MR ESTRIBÍ: Yes, I do, yes.

MR AIELLO: It is yours, I suppose, with all documents.

MR ESTRIBÍ: Yes.

MR AIELLO: But we have another expertise sent by Mr Nelson Carreyó to this honourable Tribunal on 9 October 2017.

MR ESTRIBÍ: Yes.

MR AIELLO: This one has not been signed. I would like to know if you are the author also of this one.

MR ESTRIBÍ: There was information sent to the Tribunal on 13 June, which I signed. That is the information I would like to consider as valid for the purpose of this trial.

MR AIELLO: I do not understand. Is this yours or not?

MR ESTRIBÍ: What I can account for is the one I signed.

MR AIELLO: It is not signed by you.

MR ESTRIBÍ: Precisely. The one I signed was the one that was sent out on 13 June. The other sheets are similar to the ones we issued, but they are simply not signed.

MR AIELLO: Yes, because reading this message there is written: "Panama hereby finds the attached economic report to be sustained by an expert witness at the oral proceeding." Are you this expert?

MR ESTRIBÍ: Well, like I said, I signed a – different copies of the model on 13 June, and this is the one that I am presenting today.

MR AIELLO: But not on 9 October 2017?

MR ESTRIBÍ: Well, I am responsible for the one sent and signed on 13 June. I cannot account for the…

MR AIELLO: Thank you. Coming back to your financial model – I suppose this is the correct name – this has no representation of your reasoning. Today you have illustrated, maybe for the first time, how you could evaluate all the damages, because we have any citation or reference of your sources here. And so I have to make some questions. First of all, how did you evaluate the amount of the damage and substitution of the vessel? I think it is on page 2, the first section: loss and damage suffered by owner; damage and substitution of the vessel etc.

MR ESTRIBÍ: Well, I think I addressed this question earlier, but I will be happy to do this again.

MR AIELLO: Yes, please.

MR ESTRIBÍ: The damage due to the loss of the vessel was for a total amount of US$ 1,641,670. This amount included both the principal, which in this case represented the $625,000, and interest rates for $1,016,670. The information regarding the value of the vessel at the time of the arrest was provided to us by Mr Arve Morch.

MR AIELLO: Was provided by?

MR ESTRIBÍ: Well, this information was essentially provided from C M Olsen and also in conversations we had with Mr Arve Morch, which provided us with information about the vessel at the time.

MR AIELLO: Okay. Have you ever seen or inspected the *"Norstar"* vessel?

MR ESTRIBÍ: No, I haven't. I have seen pictures of it – and, again, based my estimations on information provided by the owner as well as by the report issued by CM Olsen, which I already mentioned.

MR AIELLO: How is it possible to perform this kind of estimation, having never seen the vessel?

MR ESTRIBÍ: Like I said, the information that I included in the model was based on a report issued by CM Olsen, as well as by information provided directly to me by Mr Arve Morch, based on pictures and the report that I mentioned.

MR AIELLO: I suppose that you are speaking about this record, CM Olsen, dated 4 April 2001. Is that correct?

MR ESTRIBÍ: Yes, there was a report issued on that date by CM Olsen, which gave indications regarding the value of the vessel.

MR AIELLO: Do you know if CM Olsen had inspected the *"Norstar"* and when?

MR ESTRIBÍ: Yes, my understanding is that they did. I think I mentioned this earlier.

MR AIELLO: Your understanding?

MR ESTRIBÍ: Well, the information that was provided to me.

MR AIELLO: From who – sorry?

MR ESTRIBÍ: Was provided by Arve Morch, and also was included in chapter 4.

MR AIELLO: Mr Morch?

MR ESTRIBÍ: Yes.

MR AIELLO: Sorry, but I do not understand.

MR ESTRIBÍ: Oh, I am sorry – Mr Morch, Arve – was provided by him and also the information was contained in chapter 4, and that is where I obtained these figures from.

MR AIELLO: So Mr Morch told you that CM Olsen made this record, having inspected the ship – on which date?

MR ESTRIBÍ: That question I answered before. I did not answer it now. The Olsen report was based on an inspection that they made prior to the signature of the charter contract in 1998. As for the exact dates on which the inspections were made, I do not have that information available, but I do have the information that Olsen was well acquainted with the "*Norstar*" as a result of the fact that they inspected the vessel prior to the signature of the charter contract in 1988.

MR AIELLO: But we do not know if the vessel was inspected before or after the arrest?

MR ESTRIBÍ: What I know is what I just mentioned. I cannot speculate further than that. I can repeat what I said earlier regarding the Olsen information that was contained in the case in chapter 4, which states that the *"Norstar"* was in fact inspected prior to the signature of the charter contract in 1998.

MR AIELLO: Turning to chapter 2 of your expertise – for me it is page 3 but there is no numeration of the pages, but you can easily find the chart – this is related to loss of revenues. What is the period of time that you have taken into account?

MR ESTRIBÍ: Basically, from September 1998 to December 2018.

MR AIELLO: That is coming?

MR ESTRIBÍ: I am sorry?

MR AIELLO: That is coming?

MR ESTRIBÍ: Yes, as it was an approximation because we are not entirely sure when the reparations will take place, so it was an estimation.

MR AIELLO: Why 31 December of this year and not 31 December of 2044?

MR ESTRIBÍ: I guess because one needs to make fair assumptions for the purpose of the estimations. I cannot make projections that are not logical or not based on facts. I doubt that the vessel could have operated under any circumstances to that point, and that would have been highly speculative on my part. I tried to be objective and logical and base my assumptions on feasible and reasonable facts.

MR AIELLO: You are not an expert in the vessel or maritime field. Do you know what could be the normal period of life of a small tanker like the *"Norstar"*?

MR ESTRIBÍ: I am not an expert, but my information is based on information provided by specialists. Like I said, the assumption regarding the possibility or high likelihood that the vessel could still be operating was not my assumption; it was made by an expert. Second, I do understand from information that I discussed with Arve that there are several vessels that currently have the same age that the *"Norstar"* has and are still fully operational and working and have commercial operations today. In the company that we just mentioned, I think the Scanbio Company would be operating vessels with very similar specifications and a similar time of construction.

MR AIELLO: Which expert did you consult on this argument?

MR ESTRIBÍ: I did not consult an expert directly. I took the information from reports issued by experts who I have mentioned. I can mention them again. CM Olsen was one of them and the Scanbio Marine Group was another.

MR AIELLO: So you made research on the internet maybe, or something like that?

MR ESTRIBÍ: I did research but not for the purpose of the assumption that you mention, which is regarding the operation at the time. This was not research that I made directly. This is information that was provided in a report that stated that in fact – and I mentioned this earlier – there was a very high likelihood that if the *"Norstar"* had received timely and proper maintenance, it could still be operating even until today.

MR AIELLO: Do you know when the *"Norstar"* was built?

MR ESTRIBÍ: Yes, I have an approximate date. I think it was 1966 or 1967.

MR AIELLO: 1966?

MR ESTRIBÍ: That is correct.

MR AIELLO: So at the moment of the arrest this ship was 32 years old?

MR ESTRIBÍ: I guess, yes, my presumption is that it was.

MR AIELLO: In your evaluation, it could operate from 1998 to 2018, 20 years more, which means 52 years?

MR ESTRIBÍ: In my view, that was the view of the expert who provided the information, and I have already mentioned both experts.

MR AIELLO: Fifty-two years?

MR ESTRIBÍ: According to their view, yes.

MR AIELLO: In chapter 3 or section 3, as you like, you said –

MR ESTRIBÍ: Of the questionnaire, I am sorry?

MR AIELLO: Of *this*, chapter 3.

MR ESTRIBÍ: Give me one minute to get the printout of the model. Okay.

MR AIELLO: In this chapter you suggest the cost of the personnel, the crew, of the *"Norstar"* until 19 November 1998. Is that correct?

MR ESTRIBÍ: Yes. The item refers to the wages that had to be paid by the owner of the vessel from his own pocket as a result of the fact that the vessel was not operating because it had been arrested, and the information that I got directly from Mr Arve Morch is based on his report regarding the crew that was paid continuously until December or November, and it represented an amount – I think we mentioned it – of approximately $19,000.

MR AIELLO: How many people were working on the vessel at the moment of the arrest?

MR ESTRIBÍ: The details are contained in the information that was sent, and I believe you have a copy of that. I can look it up. From the information that I have related to the case, there were six members of the crew.

MR AIELLO: Six, not five? I see one master and –

MR ESTRIBÍ: I am sorry, yes, five.

MR AIELLO: One chief engineer, a cook and able seamen?

MR ESTRIBÍ: That is correct, sir.

MR AIELLO: I very much like to eat because I am an Italian, so I am very curious about the cook. When does this cook finish his work? We do not have any date.

MR ESTRIBÍ: I think you are asking questions that an economic expert is not entitled to know regarding the direct involvement of the crew and exact operations or functions that they perform. My estimations were based on the information contained in the case and provided also by Mr Arve Morch.

MR AIELLO: For the chief engineer you say "paid until the end of December 1998". What about the cook? Until which date was he paid by Mr Morch?

MR ESTRIBÍ: I am not in a position to provide details regarding the exact date that the crew that worked back in 1998 ceased from the vessel. I think there are much more entitled people in this room to respond about that, but I could say, with all due respect, that at the end of the day the assumptions, if they vary, the ones that you are making, would have a very negligible impact on the model. The model really would not change much in its final amounts if the cook stayed one week or two or three or four. I understand that probably it is very important but from my damage estimation the impact of the cook who earned $300 per month is quite negligible.

MR AIELLO: You could say the same about the able seamen?

MR ESTRIBÍ: Again, what I could say is that I do not have this information in detail. I have the information that was contained in chapter 4, and there was a detail contained in my estimations that is identical to the one contained in chapter 4.

MR AIELLO: Have you ever seen the contract between Mr Morch and the cabin crew?

MR ESTRIBÍ: I must admit, no, I have not seen it. I have not seen the contract. My understanding is that there are several documents that were lost in the vessel when it was arrested, and this might have been one of them, but my answer to your question is: no, sir, I have not seen the copy of the contract that was signed between the crew and the owner.

MR AIELLO: How can you give to the Tribunal an evaluation of the wages of the cabin crew if you have never seen the contract or other kinds of document? I cannot understand it. Can you explain this, please?

MR ESTRIBÍ: Let me limit it to your statement about me not seeing other documents. You will have to specify what other documents. I just said that I have not seen a document pertaining to the contract between the owner of the vessel and the crew. I have not seen that. I have seen other documents, but that one I have not seen. I am guessing that perhaps this is one of the documents that was not recovered as a result of the fact that some of the documents were lost in the vessel.

MR AIELLO: Can you tell the Tribunal what kind of documents you are speaking about, because these documents are not alleged in this case, so we are very curious at this moment?

MR ESTRIBÍ: Can you be more specific in your question?

MR AIELLO: What kind of document did you use to evaluate this amount, for example for the master, 6,600?

MR ESTRIBÍ: The document that I used, the basis of the information was the information contained in chapter 4, where there is a detail of the different salaries earned by the crew, and the information that I have in my report is identical to the one contained there.

MR AIELLO: In general or in this case?

MR ESTRIBÍ: I will try to rephrase my answer. Your question was: where did I get the information regarding the different salaries earned by each member of the crew? My answer was that I got this from chapter 4, where there was a detail regarding the salaries earned by each member.

MR AIELLO: Do you remember the names of the members of the crew?

MR ESTRIBÍ: No, I do not.

MR AIELLO: Have you ever met them?

MR ESTRIBÍ: No, I have not, sir, not that I know of.

MR AIELLO: Going to the legal fees, section 4, you seem to have included the expenses sustained for this proceeding, but this honourable Tribunal will take these into consideration in the light of the result of this case. For example, what I see is that from 2011, if I am correct, there are a lot of legal fees – Nelson Carreyó and others – but do you know if these legal fees were paid for the criminal proceedings in Italy?

MR ESTRIBÍ: Again, this information is taken from chapter 4 and it is identical in that sense, on the one hand, and on the second hand … Can you restate the question, please?

MR AIELLO: The question is very easy.

MR ESTRIBÍ: I am sure it is.

MR AIELLO: I would like to know whether you have checked that these legal fees were paid for criminal proceedings in Italy?

MR ESTRIBÍ: Like I mentioned earlier, the information that is contained in my model, accounted for in the model, essentially I took from information that was contained in chapter 4. Secondly, some invoices have been sent recently by each lawyer and I have tried to include some of them because some of those invoices were generated recently, so they could not be incorporated; they were generated ex-post on 13 June, so they are not included here.

MR AIELLO: I can imagine that if they have sent some invoices a little before, these are obviously related to different proceedings, not the Italian criminal proceedings that had finished before?

MR ESTRIBÍ: From my understanding, there are two legal fees: ones that pertain to the owner and legal fees also for the charterer. My understanding – and again this is not information that I came up with but I took it from chapter 4 – is that part of that was related to the events that occurred immediately after the arrest of the vessel. The other part of the invoices and services rendered by each lawyer is related perhaps to other stages of the process.

MR AIELLO: I am sorry, we are just speaking about legal fees, section 4. These fees were apparently sustained not immediately after the arrest of the vessel, so if you want to make more precise your last answer, you can.

MR ESTRIBÍ: To what question, if you are kind enough to repeat it?

MR AIELLO: These legal fees were not paid for the Italian criminal process?

MR ESTRIBÍ: When you say "these", to which ones do you refer? There is a large list of invoices.

MR AIELLO: *This* one, from 2011. (*Document handed to the expert*)

MR ESTRIBÍ: I will try to reply to my best knowledge. There are different invoices contained in the Annexes of the case. They pertain to different legal services during different periods. As an economist, I cannot account exactly for what was the nature of the services or the time at which they were rendered. I could go over each detail but from the perspective of damage calculations I simply added up all the information regarding invoices and legal fee payments that were contained in chapter 4, and I have added more recent information regarding invoices that were generated recently. The exact nature of the expenditure and purpose is something that I respectfully find is not within my competence as an expert estimating damages.

MR AIELLO: On the third section you speak about material and non-material damage to natural persons.

MR ESTRIBÍ: Yes, sir.

MR AIELLO: Can you explain to us what does it mean, which are material, which are non-material – moral, for example, I suppose?

MR ESTRIBÍ: Yes, in fact there is a section on material and non-material damage to natural persons. I already accounted for the amount and how the interest rate applied. The information I took, again, from documents contained in chapter 4 and information contained in chapter 4, so the information that is contained in my estimations is identical to the ones that are already contained in chapter 4, so I could not account exactly for the criteria that prevailed in the calculations and estimations. I took the figures as they were provided to me and they were provided to me essentially through chapter 4 and information that was there. It is there, and there are abundant details in the chapter that you can cross-examine with. The information I have is exact. So I think we should refer this to the person that put up the case, chapter 4. I, as an economist, simply took the damages that were accounted for, applied the interest rate, and estimated the damage.

MR AIELLO: I have to say that non-material damage is one of the most difficult arguments in jurisprudence in each country.

MR ESTRIBÍ: I am sure it is.

MR AIELLO: Are you a lawyer?

MR ESTRIBÍ: No, I am not, sir. I am an economist.

MR AIELLO: How did you make this quantification of non-material damages?

MR ESTRIBÍ: I think I will rephrase myself. I did not make them. I took them, and I took them from chapter 4, and that is where the information is, essentially, and it is identical to the one I have in the estimations that were submitted to the Court by myself.

MR AIELLO: When in the section 3 of chapter 3 you speak about pain and suffering, what do you refer to? Pain and suffering?

MR ESTRIBÍ: I in particular am not referring to anything. Like I said, this information is contained in chapter 4 and I took it exactly as it is there in terms of the specification of the expenditure and the amounts. The only thing I modified, if you wish, was to apply in this case the interest, and estimate what the total amount of damage would be, including the principal, which I did not estimate, and the interest, which I did estimate according to the methodology I have already explained.

MR AIELLO: Have you any medical documents just to demonstrate that there was pain and suffering like psychological or other form of illness? Have you any documentary evidence of medical problems of the present claimants – not the present claimants; sorry. The present claimants are Panama. Panama does not suffer. But of Mr Morch, Mr Rossi and someone else. Can you show this medical documentation?

MR ESTRIBÍ: Like I said, this information was not generated by me. It was taken by me. I used it in my model and it was contained in chapter 4. As for your question, have I seen any documentation of a medical nature regarding this item or other, my answer would be no, I have not seen medical documentation in this regard.

MR AIELLO: About fees and taxes to the Panama Maritime Authority – can you explain to which period of time they are related?

MR ESTRIBÍ: Yes, gladly. I have a certification here that I mentioned earlier dated 23 August 2018. If I may, I will try to translate as best I can. "It is a pleasure for me to reply this letter."

This was addressed, by the way, by Dr Nelson Carreyó to Fernando Solorzano, General Director of *Autoridad Marítima de Panamá* – Panama Maritime Authority – where he essentially says the following: "According to your memorial of 22 August through which you request we certify the amount owed to us, to Autoridad Marítima de Panamá, for the *"Norstar"* vessel, here is the following information."

Then there is a certification which is numbered 106117 of 23 August corresponding to the *"Norstar"* vessel and essentially what they says is: "We take this opportunity to submit the communiqué issued on August 16 2018, and that certificate essentially establishes the following: that" – Oh, this is in English. Good. – "that according to the statements of account issued by consular assistance and maritime contributor division of the department of ship registry, the ship *"Norstar"* with IMO 6703056 keeps a balance owed to the Panama Maritime Authority for the total amount of $135,111.95 calculated up to September 30, 2018.

And then the same certificate shows another figure in the following way: "that the ship *"Norstar"* with the already mentioned IMO keeps a balance owed to the Panama Maritime Authority for the local amount of $136,899 calculated up to December 31, 2018".

MR AIELLO: 2018?

MR ESTRIBÍ: Yes. So the information is contained in an official document, from what I can see. I am not sure that answers your question as to where I got the figure from.

MR AIELLO: Thank you. How did you estimate the compensation for the cargo, not having inspected the vessel?

MR ESTRIBÍ: Can you repeat the question?

MR AIELLO: Yes. You spoke a while ago about the damage for the loss of the cargo.

MR ESTRIBÍ: That is correct, yes.

MR AIELLO: Can you explain how did you estimate this value, not having inspected the vessel?

MR ESTRIBÍ: So this is a different subject from the one that we discussed about the – okay.

MR AIELLO: Yes. Can you repeat something?

MR ESTRIBÍ: Sure, I will be glad to. I think I went over this but I will be happy to repeat the information I provided earlier. You are referring to the estimation that was made regarding the value of the cargo, which in this case was fuel.

Let me just find the answer right here. I have all the facts.

MR AIELLO: Which is the source of your information?

MR ESTRIBÍ: The source of the information is provided by the owner of the vessel, Mr Arve Morch, essentially, one, two. There is also an annexe, Reply of Panama, email from Mr Petter Vadis dated 27 May 2001, where he determined the amount of gasoil on board at the moment of the arrest of the vessel. So, according to Mr Arve Morch, the price of gasoil in cargo tanks is based on a naval provision that establishes a price in 1998 at the time of the arrest of approximately 500-600 per metric ton.

MR AIELLO: So the source is an email sent to Mr Morch three years after the seizure of the vessel from a third person? You have not any bill or document able to attest the quantity and the price of the gasoil?

MR ESTRIBÍ: I do not have it and, as far as my knowledge is concerned, this could be the result of the fact already mentioned that some of the documentation was lost when the vessel was arrested.

MR AIELLO: So we have a mail sent three years after but we do not know how much, which was the quantity effectively inside the vessel at the moment of the seizure?

MR ESTRIBÍ: Well, I have not made that affirmation, sir. The affirmation I made is the facts I have stemmed from Mr Arve Morch and the email.

MR AIELLO: Yes, thank you.

THE PRESIDENT: Mr Aiello, we have reached already 4.50 p.m. If you are able to finish your cross-examination in a few minutes, I will allow you to continue, but if you need more than five minutes, I will take a break.

MR AIELLO: Thank you, Mr President. I am able to finish in one minute, if you consent.

THE PRESIDENT: You may proceed.

MR AIELLO: Thank you.

(*To the expert*) Have you taken into account how the cargo would have been used? Which was the end of the cargo?

MR ESTRIBÍ: In my knowledge –

MR AIELLO: If you have any information about this.

MR ESTRIBÍ: Let me see if I understand the question. The question is: what do I know would be the purpose of having cargo on the vessel?

MR AIELLO: We do not know what was the final destination of this cargo. Do you know anything about this?

MR ESTRIBÍ: I can make an educated guess, an assumption. My assumption is that it was destined to sell to yachts. That is the only thing I can account for in terms of the –

MR AIELLO: No.

MR ESTRIBÍ: Geographic destiny? I am not sure I can account for that.

MR AIELLO: No, no, no. I am sorry. The question is about the cargo existent on the vessel at the moment of the arrest. Do you know what kind of sort had this cargo?

MR ESTRIBÍ: What was the nature of the cargo?

MR AIELLO: No; how it was used, if it was used.

MR ESTRIBÍ: My understanding is that the *"Norstar"* was in the business of bunkering, selling fuel to yachts.

MR AIELLO: Okay, okay. That is all.

Thank you, Mr President. I have finished.

THE PRESIDENT: Thank you, Mr Aiello. At this stage the Tribunal will withdraw for a break of 30 minutes. The hearing will continue at 5.20 p.m.

(*Break*)

THE PRESIDENT: An expert who was cross-examined by the other Party may be re-examined by the Party who had called the expert. Therefore, I ask the Agent of Panama whether Panama wishes to re-examine the expert.

MR CARREYÓ: That is correct, your Honour. Mr von der Wense will do that.

THE PRESIDENT: Thank you.

I then give the floor to the Mr von der Wense to re-examine the expert. I wish to emphasize that no new issues shall be raised during re-examination.

MR VON DER WENSE: Thank you very much, Mr President.

MR HORATIO ESTRIBÍ
RE-EXAMINED BY MR VON DER WENSE (PANAMA)
[ITLOS/PV.18/C25/4/Rev.1, pp. 29-30]

MR VON DER WENSE: Mr Estribí, I only have a few questions to you.

In the cross-examination Italy has indicated that there might be a kind of conflict of interests. For the sake of clarification, is there any relation to your other work for the Government of Panama in this case? For example, have you received any orders or so?

MR ESTRIBÍ: None whatsoever. They are completely unrelated. I mean, the tasks I was hired for regarding the *"Norstar"* and the daily duties that I fulfil as a consultant for the Government are, I repeat, completely unrelated, and I have received in no form, implicit or explicit, any instruction from any official from the Government of Panama regarding this case.

MR VON DER WENSE: We also have learnt that you have had contact with Arve Morch. Just for the sake of clarification, to avoid misunderstanding, are you aware that the owner of the vessel was the Inter Marine Company, and not Mr Morch?

MR ESTRIBÍ: Yes, I must clarify: my understanding is that Mr Arve is the general manager of Inter Marine, and an administrator, not the direct owner of the vessel. I must clarify that for the record – I am sorry.

MR VON DER WENSE: Thank you very much. My next question would be: we have learned, for example, that you do not recall the names of the crew, and for example that you did not inspect the vessel. Irrespective of the fact that the ship was demolished already in 2015, so as a consequence it would have been quite impossible for you to inspect the vessel, did you feel that you have had enough information to make your estimations and calculations?

MR ESTRIBÍ: Yes, I did, sir, because I was hired specifically to estimate the damages resulting from the arrest of the vessel, and I based many of the estimations on the information that was provided to me; and one of those was the vessel *per se* – the value of the vessel. The same is true, for example, regarding the value of an amount of the fuel that was on board at the time of the arrest. I think it is important to clarify that I was not hired to estimate the value of the vessel *per se*; I was hired to take that as a basis to make an estimation of the damages that derived from the arrest, which is, in turn, based on several assumptions, which I assumed are correct and I take as certain.

MR VON DER WENSE: Do you feel that this procedure applied here, in providing you with information, is kind of unusual, and is it according to your experience in other cases?

MR ESTRIBÍ: That is an important issue because I was asked a moment ago if I was an expert in evaluating how much a vessel is worth, and regardless of whether I have experience or not I was actually not hired to do that task. I was hired, like I said, to estimate damages stemming

from the arrest. On the other hand, I am familiar with the elaboration of financial and economic models. I have done econometrics both as a teacher and also I have been involved as an expert in several legal cases in Panama which have involved econometric models as well as financial models. I don't mean to sound disrespectful, but this model is not really the most complicated model I have come up with; it is just a model that compounds interest and it takes certain values that are brought to future value by compounding interest. It does not involve any sophisticated mathematical tools to do the exercise.

MR VON DER WENSE: Thank you. You have already answered my last question, but just to make it clear, that I have the correct understanding – that your task was to make an economic calculation based on the information provided to you by, for example, the owner, other experts and lawyers, and not to make, for example, an inspection of the non-existing vessel or medical expertise of the crew, or an expertise about the legal aspects of immaterial damages for example?

MR ESTRIBÍ: That is correct. My main task was to estimate the future value of the losses caused by the arrest of the vessel and that are the result of several factors including a certain time span that was assumed, interest rates that were assumed, and also certain values of – for instance, the ship, like I mentioned – the vessel, as well as the fuel that was on board; and some of the assumptions that I made, that I had to make, were those regarding the expenditures in terms of legal fees and the hiring of lawyers. This is something that I did not question. This is something that I basically took as an input for my estimates.

MR VON DER WENSE: Thank you, Mr Estribí. I do not have more questions, Mr President. Thank you.

THE PRESIDENT: Thank you, Mr von der Wense.

Pursuant to article 80 of the Rules of the Tribunal, the President and Judges of the Tribunal may also put questions to the expert. I was informed that Judge Kittichaisaree wishes to put a question to Mr Estribí. I therefore give the floor to Judge Kittichaisaree to put his question.

MR SILVIO ROSSI
QUESTIONS FROM JUDGE KITTICHAISAREE
[ITLOS/PV.18/C25/4/Rev.1, pp. 30-32]

JUDGE KITTICHAISAREE: Mr Estribí, I have two main questions. The first one relates to your answer to question 26 on page 3. You said: "Additionally to offshore bunkering services and provision for transport of … gasoil the *["Norstar"]* could also have been alternatively used for transportation of other liquid bio-products such as vegoils and even fresh water."

My question to you, sir: is this so-called potential alternative use of the *"Norstar"* included in calculation of the total loss of revenue pertaining to the owner of the *"Norstar"*?

MR ESTRIBÍ: Your Honour, can you repeat? I understood everything except the last part of the question, if you are so kind as to repeat.

JUDGE KITTICHAISAREE: Yes, because if you look at your answer to question 20 you said you also take into account other factors including *et cetera, et cetera*. So my question to you is: other factors – does it include the possibility of so-called additional use, alternative use

of the *"Norstar"* for transportation of other liquid bio-products, *et cetera*, and even fresh water? So do you include every possibility in the calculation of the claim for damage?

MR ESTRIBÍ: I will try to respond, your Honour, in my best knowledge and understanding of the question. When I mentioned the potential for the *"Norstar"* to be used in other alternative commercial activities, I did so based on information that was provided to me by an expert, first; second, it was a general assumption, which implies that I did not model *per se* different alternative uses. I guess the point I wanted to stress was the fact that the *"Norstar"* could have generated loss of profits all throughout the last twenty years, considering that it could have been used either for the original purpose it was destined for, that is to act as a bunkering vessel, or other uses. I am not sure I am replying fully, as your expectations, but I did not model scenarios. I guess the point I wanted to stress is that there is a loss of revenue as a result of the fact that the ship did have potential in other alternative uses – and just to make the assumption sounder and not assume that – well, what if it could not do any more bunkering; what if it could not – simply was not completely designed, because of its age, for this purpose? Then we could have safely and soundly assumed that there were other alternative uses.

JUDGE KITTICHAISAREE: Thank you very much. If I understand your answer correctly, you also include the possibility of other uses in the calculation of the claim for damages.

MR ESTRIBÍ: No, your Honour. In fact, I am assuming that simply from the point of view of the possibility that somebody might say, what would happen if the vessel was not in the capacity to serve any more for the original purpose, then my answer would be: my estimations of loss of revenue would be still be sound, would still be valid, considering that there were other alternative uses.

JUDGE KITTICHAISAREE: Thank you very much. My second and last question: you have not included the 2 per cent inflation in the claim of damages. You say that it is some kind of underestimation. I just would like to ask you whether it is you, or any other persons who decide not to include this kind of – who decided not to insist on including the so-called inflation adjustment in the claim of damages?

MR ESTRIBÍ: I guess, your Honour, that the reply would be myself: I decided not to include it, and it only represents 2 per cent. I could have, but I thought it was fair for the time being just to leave this out of the model because I had made other assumptions and there is always a certain margin of approximation in each model. So I simply considered that at this time it was not a priority to include it – but I did think it was important to mention that there is a certain margin there that was simply not accounted for.

JUDGE KITTICHAISAREE: Thank you very much, Mr President.

THE PRESIDENT: Mr Estribí, thank you very much for your testimony. Your examination is now finished. You may withdraw.

MR ESTRIBÍ: Thank you very much.

(*The expert withdrew*)

EXAMINATION OF EXPERTS – 11 September 2018, p.m.

THE PRESIDENT: This brings us to the end of this afternoon's sitting and concludes the first round of pleadings by Panama. The hearing will continue tomorrow morning at 10 a.m. with the first round of pleadings by Italy. I wish you a good evening. The sitting is now closed.

(*The sitting closed at 5.38 p.m.*)

PUBLIC SITTING HELD ON 12 SEPTEMBER 2018, 10 A.M.

Tribunal

Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

For Panama: [See sitting of 10 September 2018, 10 a.m.]

For Italy: [See sitting of 10 September 2018, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 12 SEPTEMBRE 2018, 10 HEURES

Tribunal

Présents : M. PAIK, *Président* ; MM. NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, Mme KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mme LIJNZAAD, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 10 septembre 2018, 10 h 00]

Pour l'Italie : [Voir l'audience du 10 septembre 2018, 10 h 00]

THE PRESIDENT: Good morning, everyone. Yesterday, Panama concluded its first round of oral argument in the Tribunal's hearing on the merits of the *M/V "Norstar" Case.* Today we will hear the first round of oral argument by Italy.

I first give the floor to the Co-Agent of Italy, Mr Aiello, to make a statement.

First Round: Italy

STATEMENT OF MR AIELLO
CO-AGENT OF ITALY
[ITLOS/PV.18/C25/5/Rev.1, pp. 1-3]

Mr President, distinguished Members of the Tribunal. If it pleases the Tribunal, and before outlining the way Italy's statement will be organized, I shall make a few general preliminary remarks on behalf of Italy.

As I maintained during my brief introduction on Monday, Italy is here to demonstrate once more its confidence in international adjudication. Both during the Preliminary Objections phase of these proceedings, and in the exchange of communications in the merits phase, Italy has always acted in a spirit of cooperation with this Tribunal and with a view to guaranteeing the proper administration of justice. Italy wishes again to express its full trust in the capacity of this Tribunal to settle this case according to rules of international law. I recall this fact with particular emphasis now because Italy's trust in the Tribunal as a judicial institution at the highest level goes together with the determination not to allow its process to be misused.

Mr President, while reiterating its full confidence in this Tribunal, Italy wishes to acknowledge the Judgment of 4 November 2016 on the Preliminary Objections in this case. In particular, Italy acknowledges the precise delineation of the contours of the merits of the case spelled out by the Tribunal in that ruling, which curtails the Tribunal's jurisdiction in this case to the assessment of whether the Decree of Seizure in question amounts to, *vel non*, an infringement of articles 87 and 300 of the Convention.

Mr President, Members of the Tribunal, without prejudice to Italy's principal contentions to the effect that its conduct complained of by Panama in the present proceedings is absolutely lawful under international law, I would like to present the organization of Italy's pleadings of today and tomorrow. Our *plaidoirie* will be organized in five parts.

First, Professor Attila Tanzi will address some general issues concerning Panama's misconstruction of the disputed facts and of their legal relevance. His speech will come in three parts. The first part of his speech will be devoted to a few fundamental clarifications about this case. He will respond to Panama's attempt to enlarge the boundaries of this dispute, as delineated by this Tribunal in its Judgment of 4 November 2016, by presenting additional claims and trying to characterize Italy's defences as counterclaims. He will address Panama's conflation between the Preliminary Objections and the merits phase of these proceedings, as well as its confusion between Italian domestic law and international law. He will conclude this part by showing how Panama has failed to address significant arguments advanced by Italy in its written pleadings and how it falls short of the required standard of proof.

The second part of Professor Tanzi's speech will sketch Panama's mischaracterization of the factual background relevant to the present dispute. To that end, consistent with the narrative that Italy has presented in its Counter-Memorial and Rejoinder, Professor Tanzi will correctly present the Italian criminal investigations and proceedings which led to the adoption of the Decree of Seizure of the *"Norstar"*. He will deal with those factual elements that are strictly relevant for the present dispute, and will single out by contrast those elements of fact pleaded by Panama that are entirely immaterial for the purposes of the present case. In particular, he will also address the scope and purpose of the Decree of Seizure of the *"Norstar"*. He will also present the reasons which led to the release of the *"Norstar"* and the acquittal of the persons accused in the Italian criminal proceedings. He will conclude the second part of his speech by addressing the vessel's condition at the time of its arrest and the failure to retrieve the vessel. Finally, the third part of Professor Tanzi's speech will emphasise the remedies available to the shipowner and how he and his associates have remained inactive all along,

whilst having ample opportunity to avoid, or reduce to the minimum, the economic damages they now claim, by resorting to the appropriate domestic or international remedies in a timely fashion.

After the morning break, Professor Ida Caracciolo will respond to Panama's argument alleging Italy's breach of article 87 UNCLOS. Following Professor Tanzi's elaboration of the scope and the factual background of the present dispute, Professor Caracciolo's speech will come in three parts: first, she will demonstrate that Italy has not breached article 87, paragraph 1. She will elaborate on the fact that the *"Norstar"* was not in the high seas at the time of the adoption of the Decree of Seizure and the request for its execution and she will show that, in any case, the Decree was not able to interfere with Panama's freedom of navigation. She will further demonstrate that freedom of navigation does not apply outside the high seas and cannot be interpreted as freedom to gain access to the high seas and that the extraterritorial nature of an exercise of jurisdiction is not relevant from the perspective of freedom of navigation under article 87. Second, Professor Caracciolo will show that the Decree of Seizure and the request for its execution targeted activities carried out by the *"Norstar"* on the Italian territory, the Italian internal waters, and/or the Italian territorial sea, and not on the high seas. Third and last, she will respond to Panama's argument concerning article 87, paragraph 2, by showing that the obligations herein contemplated concern Panama, and not Italy.

This afternoon Mr Paolo Busco will counter Panama's arguments concerning the alleged breach of article 300 UNCLOS. His speech will come in three parts: first, he will make a few preliminary clarifications on the issue. Second, he will respond to Panama's unsubstantiated assertion that Italy has abused its rights. Third, he will address Panama's argument according to which Italy has breached its obligation of good faith. To this end, he will first respond to Panama's assertion that Italy breached article 300 due to its conduct prior to and during these proceedings and that article 300 authorizes a broad and liberal interpretation of article 87 UNCLOS. Then, he will address Panama's argument that Italy has allegedly breached article 300 by adopting the Decree of Seizure too hastily, by waiting until 1998 to arrest the *"Norstar"*, by waiting to arrest the vessel until it was put into port in Spain and by detaining the *"Norstar"* for an excessively long period.

Mr Busco will respond to Panama's additional claims based on articles 92 and 97 UNCLOS. He will demonstrate that such claims are new. Following this point, he will show that, since these claims were neither "implicit" in the Application of Panama, nor do they directly arise out of the subject-matter of the dispute as delineated by the Tribunal, they fall outside the scope of the present dispute and are inadmissible. Last, he will respond to Panama's argument according to which articles 92 and 97 are "inextricably linked" to article 87, by showing their autonomous nature.

Professor Tanzi will take the floor tomorrow morning, responding to the human rights claims advanced by Panama. He will demonstrate how such claims fall outside the scope of the present dispute. Without prejudice to this assertion, he will take the opportunity to underline how the Italian proceedings were in full conformity with Italy's international human rights obligations, stressing that Italy has neither breached the right to property of, or denied justice to, the shipowner and the other persons involved in the operations of the *"Norstar"*.

Professor Francesca Graziani will take the floor and respond to Panama's arguments on its claim for compensation, without prejudice to Italy's argument on the inexistence of a breach of articles 87 or 300 UNCLOS. Her speech will come in three parts: first, Professor Graziani will reiterate that Panama has not discharged its burden of proof with regard to compensation. Second, she will demonstrate that Italy has no obligation to compensate the alleged damages claimed by Panama because Panama has not demonstrated the existence of a direct causal link between the alleged wrongful act and damages claimed by Panama. Next to that, and without

prejudice to the above arguments, she will elaborate on the duty to prevent and mitigate damages and demonstrate that, in any case, the causal link has been interrupted due to the conduct of the shipowner and the other persons involved in the operations of the *"Norstar"*. Third, she will demonstrate how Panama's quantification of damages is excessive and disproportionate.

Mr President, Members of the Tribunal, as communicated to this Tribunal with its letter of 23 August 2018, Italy will also avail itself of two expert witnesses. These are Dr Vitaliano Esposito, former Public Prosecutor at the Italian Court of Cassation and expert in Italian criminal law and procedure, and Captain Guido Matteini, a naval expert. Italy will examine Dr Vitaliano Esposito and Captain Guido Matteini tomorrow morning, after the break, at the end of the speeches of counsel for Italy. Dr Esposito will give testimony on four specific issues of Italian criminal procedure pertinent to the Italian criminal proceedings involving the *"Norstar"* which may be relevant as part of the disputed facts. Captain Matteini will give testimony relating to the damages claimed by Panama, with special regard to the value of the *"Norstar"* at the relevant time.

Mr President, Members of the Tribunal, this ends my introduction and I thank you for your attention. Mr President, I would request that you invite Professor Attila Tanzi to the podium.

THE PRESIDENT: Thank you, Mr Aiello.

I now call upon Mr Tanzi to make a statement.

STATEMENT OF MR TANZI
LEAD COUNSEL AND ADVOCATE FOR ITALY
[ITLOS/PV.18/C25/5/Rev.1, pp. 3-25]

Good morning, Mr President. Mr President, distinguished Members of the Tribunal, it is a privilege to appear once again before you representing my country, Italy.

As anticipated by the Agent, my response this morning to Panama's mischaracterizations will come in three parts and I will be on my feet for about 90 minutes.

First, I will make some cross-cutting, general remarks that are essential to properly frame this case and appreciate its true nature. Second, I will illustrate the facts of this case, and I will respond to Panama's main misrepresentations of the factual record of this dispute. Third, I will illustrate the remedies available under Italian law to the shipowner in order to seek redress against any alleged misconduct by the Italian authorities, including mechanisms to repossess the vessel, to obtain redress for any wrong allegedly suffered by the crew and others connected to the *"Norstar"*.

Mr President, distinguished Members of the Tribunal, I will start by addressing four preliminary issues, which emerge from the fundamental misconceptions and omissions that Panama has advanced in its written pleadings and reiterated during the first two days of this hearing. They are, in summary: first, the scope of the dispute before the Tribunal; second, Panama's confusion between the incidental proceedings on Preliminary Objections and the present proceedings on the merits; third, Panama's failure to appreciate the relevance to the present dispute of the distinction between domestic law and international law; fourth and last, I will address Panama's failure to discharge its burden of proof on essential elements of its claim.

Mr President, Members of the Tribunal, first and foremost, a fundamental point which requires clarification concerns Panama's misconception of the scope and contents of the present dispute. On Monday and Tuesday, we heard the opposing Agent and Counsel attempting to plead a case which, in fact and law, is different from the one before you. We heard that this case is not about the Decree of Seizure and the request for its execution, but also about the execution itself, as if these were not distinct phases. We heard them invoke articles 92 and 97 of the Convention; we heard them plead violations of various human rights obligations in a manner that suggests the Tribunal should become a human rights court and find on breaches of human rights conventions. In the written pleadings, Mr President, we even heard opposing Counsel incomprehensibly argue about mysterious counterclaims that Italy never made.

Panama's attempt to enlarge the dispute is not limited to the law. Both Counsel and witnesses for Panama referred time and again to the *"Spiro F"* case, a case which has nothing to do with the present dispute. Its only purpose is to blur the factual matrix before you, Mr President. There is one link only between the two vessels: the *"Spiro F"* replaced the *"Norstar"* in summer 1998, before the Decree of Seizure. At that point the *"Norstar"* left the stage and never made its return.

Against Panama's multiple attempts to enlarge the dispute, Mr President, Members of the Tribunal, Italy is pleased to be able to rely on the Tribunal's Judgment of 4 November 2016, which delineated with crystal-clear language the boundaries of the *M/V "Norstar" Case*.

According to the Tribunal's Judgment, with special regard to paragraphs 122 and 132, the merits of the present case exclusively concern the questions of (a) whether the Decree of Seizure and its request for execution constitute a breach of article 87 of the Convention";[1] and,

[1] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44 ff., para. 122.

(b) whether Italy has breached article 300 regarding the way it fulfilled its obligations under article 87.[2]

The confusion between the Decree of Seizure and its request for execution on the one hand, and the actual enforcement of those acts, on the other, is best epitomized by the summary of Panama's Reply, at paragraph 592, which you may find at tab 3 of your folder and is now shown on the screen. You may note that, in the first indent, the alleged breach of article 87 by Italy is described to consist of "ordering and requesting [the] arrest" of the *M/V "Norstar"*; but in the fourth indent it is stated that "[t]he arrest of the *M/V 'Norstar'* was unlawful",[3] and in the fifth indent one finds the statement whereby "[…] Italy arrested the *M/V 'Norstar'*".[4] This statement is complemented by the incomprehensibly dramatic – and false – assertion that "[t]he arrest of the *M/V 'Norstar'* was an extreme, violent, and forceful action on the part of Italy."[5]

Mr President, Members of the Tribunal, by speaking only of the Decree of Seizure and the request for execution when delineating the dispute in its Judgment, the Tribunal has limited this case to the question of the legality under articles 87 and 300 of these acts alone. The Tribunal has thus made clear that there is a difference between detention, that is, enforcement action, and acts that are the logical precedents to the enforcement action.

As observed by Judge Attard and Judge Wolfrum, "[t]he Judgment has identified the Italian Public Prosecutor's Decree of Seizure against the *M/V 'Norstar'* together with the request for judicial assistance (paragraph 122) as the relevant act[s]".[6]

In other words, this case, as delineated by the Tribunal, is plainly not one about the enforcement of the Decree.

Indeed, Mr President, this case could not be about enforcement.

If the case were about enforcement of the Decree, the Tribunal would likely have had to decline its jurisdiction over the entire *"Norstar"* dispute, since article 87 of the Convention would not have been relevant *ratione loci*. As you are aware, the Decree *was* enforced in Spain's internal waters, an area of the sea where article 87, simply put, does not apply.

The Tribunal's delineation of the dispute has far-reaching implications for the overall tenability of Panama's claim. This, Mr President, is a claim for damages, as Panama itself has portrayed it. Even if any damage could be found to have been caused under the circumstances of this case, such damage would stem from the enforcement of the Decree, not from the Decree and the request for execution as such. Thus, even if, *arguendo,* the Decree and the request for execution as such were to be found unlawful, Panama would not be entitled to anything more than a declaratory judgment to this effect.

Panama does not limit itself to trying to enlarge this dispute by confusing the Decree of Seizure with its execution. It also tries to bring new causes of action. In particular, Panama has attempted to advance additional claims based on articles 92 and 97 of the Convention, as well as on human rights, with special regard to the right to property and due process.

Even if Panama's claims were not judicially barred, they must be declared inadmissible because Panama did not include these claims in its Application, and the claim must be indicated in the Application expressly. As this Tribunal observed, "it is not sufficient for an applicant to make a general statement without invoking particular provisions of the Convention that allegedly have been violated."[7]

Neither article 92 nor article 97 are mentioned in Panama's Application.

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[2] *Ibidem*, para. 132.
[3] *Reply of the Republic of Panama*, 28 February 2018, para. 592.
[4] *Ibidem*.
[5] *Memorial of the Republic of Panama*, 11 April 2017, para. 93.
[6] *M/V "Norstar"* (see footnote 1), Joint Separate Opinion of Judges Wolfrum and Attard, para. 28.
[7] *M/V "Norstar"* (see footnote 1), pp. 28-29, para. 109.

Finally, Mr President, on Panama's repeated attempts to enlarge the dispute, Panama's written pleadings went so far as to attribute two counterclaims to Italy which Italy never filed. Panama characterizes two of Italy's defences as counterclaims: the first is based on the shipowner's contributory fault due to its lack of action in retrieving the vessel; and the second is based on its failure to discharge the duty to mitigate the damage claimed.

As observed by the ICJ in *Application of the Genocide Convention (Bosnia* v. *Serbia)*, "a counter-claim is independent of the principal claim in so far as it constitutes a separate 'claim', that is to say an autonomous legal act the object of which is to submit a new claim to the Court".[8]

Mr President, Members of the Tribunal, Italy's arguments are not independent of Panama's claims, nor can they be considered as "autonomous legal act[s] the object of which is to submit a new claim". We are simply responding to Panama.

Mr President, my second general consideration concerns Panama's confusion between the Preliminary Objections and the merits phases of the proceedings. Panama relies on statements that the Tribunal made in its Preliminary Objections Judgment in respect of the relevance of articles 87[9] and 300,[10] mischaracterizing them in a manner that suggests that the Tribunal determined already in November 2016 that those provisions have been breached. This includes Panama confusing the *prima facie* assessment of the relevance of articles 87[11] and 300[12] for jurisdictional purposes with the putative assessment of their actual infringement.

However, it is a basic principle that what a court or tribunal states during the Preliminary Objections phase in respect of issues that remain to be determined on the merits does not prejudice the court or tribunal's evaluation of those issues at the merits stage. As stated by the ICJ in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, in its Judgment on Preliminary Objections "[t]he Court must … emphasize that its ruling in the present Judgment … does not in any way prejudge the merits".[13]

The Tribunal in this case has already confirmed the same principle in its Preliminary Objections Judgment when it explained that the Tribunal "is not concerned in the preliminary objection proceedings with the question as to whether or not the conduct of Italy would amount to an internationally wrongful act and thus give rise to international responsibility".[14]

The Tribunal noted that articles 87 and 300 of the Convention are "relevant" to the present case but it clearly stopped short of considering whether Italy had breached those provisions. In fact, in light of the new evidence or the continued lack thereof, to prove that the *"Norstar"* was on the high seas at the time of the Decree and request for execution, nothing would prevent this Tribunal from adjudging and declaring, even at this merits stage, that article 87 is simply irrelevant to this case.

Mr President, Members of the Tribunal, my third general consideration concerns another fundamental confusion emerging from Panama's pleadings. This is the one between domestic law and international law, and their respective relationship in general terms and as regards this case.

Panama appeared to accept this fundamental distinction on Monday morning. Mr Carreyó cited a passage from the PCIJ's Judgment in *Treatment of Polish Nationals in Danzig*, which confirmed that the legality or otherwise of conduct under domestic law does not

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[8] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, p. 256, para. 27.
[9] *Reply* (see footnote 3), para. 9. See also *ibidem*, paras. 59-61, 82, 185, 195-196.
[10] *Ibidem*, para. 242.
[11] *Ibidem*, paras. 9, 59-61, 82, 185, 195-196.
[12] *Ibidem*, para. 242.
[13] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, para. 56.
[14] *M/V "Norstar"* (see footnote 1), para. 162.

determine whether there is a breach of international law.[15] Mr Carreyó also then insisted that, "[w]ith this in mind, Panama will continue to refrain from addressing any of the Italian legal provisions, but will use only its judgments as elements of evidence before this Tribunal."[16]

And yet, Mr President, despite saying that it appreciates the distinction, Panama's arguments are ridden by this confusion.

First, the Italian courts acquitted those involved with the *"Norstar"* on the basis of the fact that a crime was not found to have been committed. That is, an acquittal on the merits. The Italian judicial authorities never said that the Decree of Seizure was in any way unlawful because of its extraterritorial application or for any other reason. It is therefore a logical fallacy to say, as Panama does, that, because those involved with the *"Norstar"* were acquitted, then article 87 of UNCLOS was breached and that Italy cannot *venire contra factum proprium*. The argument just does not follow.

However, Mr President, even if the Italian courts had declared the Decree unlawful as a matter of Italian law, and not simply acquitted the accused, as they did, opposing Counsel is oblivious of the distinction between domestic and international law as it was applied by the Chamber of the ICJ in the *Elsi* case. There, the Court stated that "the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law".[17]

As enunciated by the PCIJ, "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts."[18] It therefore follows that, if the Italian courts had declared the Decree unlawful as a matter of Italian law, which they did not, this would not mean that there is a breach of international law.

In this respect I must also respond to Mr Carreyó's complaint raised on Monday that "there was an error of judgment when the arrest of the *'Norstar'* was ordered".[19] Mr President and Members of the Tribunal, a State cannot possibly be held internationally responsible for conducting investigations that ultimately led to the acquittal of the defendants. That would represent an intolerable interference with each State's sovereign right to investigate and prosecute crime.

For the same basic reason, Mr Carreyó's suggestion that wrongfulness under international law somehow followed because no compensation was paid as a matter of domestic law[20] must also fail. Again, a State cannot possibly be held internationally responsible every time it does not award compensation to an individual who has been acquitted of a crime, particularly if it has not been asked for. In fact, as I will explain later, those involved with the *"Norstar"* could have pursued compensation before the Italian courts, but they did not.

Mr President, I have come to my fourth and last preliminary point which is important that we keep in the front of our considerations. It concerns the generally recognized principle that "evidence produced by the parties [must be] 'sufficient' to satisfy the burden of proof".[21] The principle applies to assertions of fact and their credibility, as well to contentions of law and their reliability.

Article 28 of the Statute of the Tribunal provides that, when one of the Parties is absent, the Tribunal "must satisfy itself … that the claim is well founded in fact and law". Even when both Parties take part in the proceedings, the Tribunal must presumably want to be satisfied that the claim is indeed well founded in fact and law.

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[15] ITLOS/PV.18/C25/1, page 6, lines 44-50; page 7, lines 1-2.
[16] *Ibidem*, page 7, lines 4-6.
[17] *Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, para. 124.
[18] *German Interests in Polish Upper Silesia (Germ. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7* (May 25), p. 19.
[19] ITLOS/PV.18/C25/2, page 22, lines 37-38.
[20] *Ibidem*, page 34, lines 1-7.
[21] C. Brown, *A Common Law of International Adjudication* (OUP 2007), p. 101.

I must also emphasize, as a general proposition, that Panama must bear the evidential consequences of its significant delay in commencing this case. As the tribunal in the *Gentini* case said, "great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence."[22] It is in this light – or obscurity – that we must consider opposing Counsel's suggestion on Monday, with which Mr Morch agreed,[23] that, had the logbook of the ship been available, the question of the *"Norstar"*'s whereabouts would be easily proved; but, Mr President, had Panama pursued its claim more diligently, certainly before the destruction of the ship, the logbook would probably be available. Mr Morch insisted on Monday that the logbook was still on board of the ship in 2015, that is 12 years after Italy unconditionally released the vessel.[24]

Mr President, Panama's pleadings otherwise give rise to three sets of problems on the point of evidence. The first one pertains to assertions which Panama simply fails to prove by a sufficient standard of proof. Second, we have instances in which Panama tries to make up for this failure by attempting to shift the burden of proof onto Italy. The third one arises from a number of Panama's contentions which are patently disproved by evidence produced by Panama itself.

First, Mr President, Panama advances a significant number of factual and legal contentions which are unsupported by a sufficient standard of proof. I will provide a few examples without prejudice to the irrelevance of such contentions for the purposes of the present dispute. First, Panama asserts that, "up until the date of the enforcement of the arrest order, the vessel had been operating with complete normalcy."[25] That is not proved by Panama, while evidence produced by Italy proves the contrary, namely that at the time of the arrest the vessel was not in a condition that would allow it to sail, not even for one nautical mile. I will revert to this point shortly.

Second, Panama asserts that, "[a]t the time of its arrest, the *M/V 'Norstar'* was a seaworthy, legally manned … tanker" equipped with up-to-date mechanics and technology, as well as that,

> [t]his vessel and its shipowner had a well-established reputation as an ongoing business with important assets on board and a value of US$ 625,000, as had been stated in its certification. At the time of its arrest, the vessel was laden with 177,566 MT gasoil in cargo tanks valued at US$ 108,670.39.[26]

None of that, Mr President, is proved by Panama; and, in fact, the evidence proves that the *M/V "Norstar"* was in a very poor condition, far removed from seaworthiness – and we know nothing about the cargo.

Third, Panama asserts that Italy was in bad faith in conducting its domestic criminal proceedings[27] and in ordering the arrest of the *"Norstar"* while it was in the port of Palma de Mallorca.[28] As observed by the *Lac Lanoux* Tribunal, *"la mauvaise fois ne se présume pas"*.[29] Not only can bad faith not be presumed, Mr President, but such a serious allegation against Italy and against a State must also be proved to a rigorous standard of proof. Panama falls far short of that in this case. The point will be elaborated upon this afternoon by my colleague Mr Busco.

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[22] *Gentini case* (1903) *X RIAA 551*, p. 561.
[23] ITLOS/PV.18/C25/2, page 12, lines 36-40.
[24] *Ibidem*, page 12, line 30.
[25] *Reply* (see footnote 3), para. 436.
[26] *Memorial* (see footnote 5), para. 23.
[27] *Reply* (see footnote 3), paras. 250-275, particularly para. 253.
[28] *Ibidem*, paras. 293-300, particularly para. 299.
[29] *Affaire du lac Lanoux (Espagne, France), in Report of International Arbitral Awards, 1957*, p. 281, at 305.

Fourth, Panama asserts that there is a nexus between Italy's alleged wrongful conduct and the damages claimed. Professor Francesca Graziani will revert in detail on this point tomorrow, as well as on the grounds for the quantification of each head of damages, and she will show how, here too, Panama patently falls short of a sufficient standard of proof.

Second on evidence, Mr President, it is worth underlining that frequently where Panama cannot prove its assertions, it instead tries to shift the burden of proof onto the defendant. I shall give you just two examples.

When Panama cannot prove the nexus between Italy's alleged wrongful conduct and the damages claimed, it instead urges Italy to demonstrate that a causal link does not exist.[30] But it is for the claimant, in the first place, to demonstrate a positive and not for the defendant to prove a negative. The same applies to evidence concerning the conditions and value of the vessel at the time of the adoption of the Decree of Seizure.[31]

Third, on evidence, Mr President, come Panama's contentions which are patently disproven by evidence produced by Panama itself. This is particularly the case with regard to Panama's surprising assertion that neither the shipowner nor Panama was informed of the release of the vessel and that, accordingly, they were not aware of the possibility of retrieving the "*M/V Norstar*"[32] – assertions that have been somewhat confusingly mitigated during the last two days of hearing.

As it has been shown by Italy in its written pleadings, the very evidence attached by Panama to its pleadings demonstrates that: a) on 11 March 1999 the Office of the Prosecutor of the Tribunal of Savona asked the Italian Embassy in Oslo to inform Mr Morch of the conditional lifting of 24 February 1999;[33] b) on 26 March 2003 Mr Morch was notified by registered email of the judgment of the Tribunal of Savona of 18 March 2003;[34] c) further to that, again, evidence produced by Panama also shows that a hard copy of the judgment in question was delivered to Mr Morch on 2 July 2003 by the Norwegian police upon request of the Italian authorities.[35]

Mr President, I wish to dwell on this aspect of the factual background for two main reasons: first, because it epitomizes the curious circumstance in which Panama's assertions are simply disproven by evidence produced by Panama itself; and, second, because it bears on multiple key legal issues of the present case, including the alleged justification for the owner's inaction with respect to the release of the vessel, which we heard during the first two days of this hearing as much as we read in Panama's written pleadings.

I may first draw your attention to paragraph 30 of Panama's Memorial, which you find at tab 5 of your folder and is also being reproduced on the screen before you at this moment. It tells us that Italy diligently engaged in the appropriate communication procedure in order to notify Mr Morch of the final release of the vessel:

> On 18 March 2003, Italy sent to Spain a request for legal assistance … with a certified copy of the operative part of the judgment issued on 14 March 2003, ordering that the *M/V Norstar* be released and returned to its owner, and asking Spain to execute the above-mentioned release order and inform the custodian of the ship of the order and "check whether the property has really been taken back and send me the relevant record".[36]

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[30] *Reply (see footnote 3), paras. 406-417.*
[31] *Ibidem, para. 533.*
[32] *Ibidem, paras. 459-468.*
[33] *Counter-Memorial of Italy*, 11 October 2017, para. 54, referring to *Memorial* (see footnote 5), Annex 8.
[34] *Rejoinder of Italy*, 13 June 2018, paras. 33-39, specifically para. 37, referring to *Reply* (see footnote 3), para. 463.
[35] *Reply* (see footnote 3), para. 463, referring to *Counter-Memorial* (see footnote 33), Annex Q.
[36] *Memorial* (see footnote 5), para. 30.

Annex 11 to Panama's Memorial shows that such request was duly followed through by the Spanish authorities three days later. You may find this document at tab 6 of your Judges' folder.

In addition, Mr President, we learnt from Panama's Memorial that Italy's communication was duly received three days later by Mr Morch, on 21 March 2003. You may find an excerpt of the relevant passage of Panama's Memorial at tab 5 of your folder.

Mr President, I will close on the evidence by stressing the point that the Applicant has the general advantage to decide if and when to file a case based on its preparation, and the evidence shows that Panama's Agent has had this case on his radar screen for nearly 18 years before filing the Application in 2015. Panama has no excuse for its failure to prove its claims.

Mr President, Members of the Tribunal, having addressed you on certain cross-cutting points that Italy thinks should be at the forefront of the discussion in the present case, I will now address you on Panama's main mischaracterizations of the facts.

In my account, I shall, with one exception, limit myself to bringing to your attention only the key factual disagreements between the Parties. Obviously, factual elements include certain issues of Italian law that, as we well know, are facts from the perspective of international law.

Mr President, Members of the Tribunal, one fundamental fact is uncontested between the Parties, and I would like to bring it to the forefront of your attention: the *"Norstar"* was in port when the Decree of Seizure and the request for execution were actually enforced.

With that fundamental clarification made, the key areas of disagreement between the parties are the following:

a. The whereabouts of the *"Norstar"* between 11 August and 25 September 1998;
b. The physical conditions of the *M/V "Norstar"* at the time of its arrest;
c. The correct characterization of the relevant Italian law and proceedings;
d. The basis for the adoption of the Decree and the place where the alleged crimes were committed;
e. The reasons why the *M/V "Norstar"* was released and the individuals acquitted; and
f. The communication concerning the release of the vessel and the failure to retrieve the *M/V "Norstar"* by the owner.

Mr President, I will now turn to the whereabouts of the *"Norstar"* between 11 August and 24 September 1998.

According to evidence that Panama itself has submitted at Annex 16 to its Memorial,[37] which you can now see on the screen, the *M/V "Norstar"* entered the bay of Palma de Mallorca in March 1998 and did not leave that bay between that time and the execution of the Decree on 25 September 1998.[38] As much as Panama has contested during this hearing the reliability of its own evidence, it has not been able to prove otherwise.

Mr Morch was cross-examined on Monday on this piece of evidence. According to Mr Morch, the document is generally accurate in describing that the *M/V "Norstar"* entered into port in Palma in March 1998. The only instance that Mr Morch seems to remember of the *"Norstar"* leaving port concerns an alleged voyage to Algeria. Two things must be noted in this regard: first, no evidence has been provided with regard to this voyage; second, according to Mr Morch, the voyage was asserted to have taken place in July, that is, before the Decree of Seizure was issued. Mr Morch could not point to any other instance of the ship leaving port after July 1998.

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[37] *Memorial* (see footnote 5), Annex 16.
[38] *Counter-Memorial* (see footnote 33), para 51.

We have not heard any evidence, Mr President, let alone any convincing evidence, that the ship was in navigation on the high seas on the date of the issuance of the Decree of Seizure and in the period between such issuance and the actual enforcement of the Decree. Simply put, Mr President, Members of the Tribunal, Panama has failed to prove the essential condition for a breach of article 87 to occur, namely, that the ship was on the high seas when the alleged interference with its navigation occurred.

Mr President, I will now address the conditions of the *"Norstar"* at the time of its arrest.

Italy is not surprised that there is no evidence that the ship was on the high seas in the summer of 1998. This is in consideration of the bad physical conditions of the vessel.

It is proved that on Saturday, 5 September 1998, the *"Norstar"* could not sail from Palma de Mallorca, where it was moored, to the port of Palma de Mallorca, which is roughly one mile, under normal weather conditions, namely no precipitations, 27 degrees Celsius and a fairly typical wind speed of 5.3 metres per second, as set out on page 4 of tab 17 of your folder. The evidence also shows that this state of impossibility was due to "the bad conditions of the chains aboard", "the anchor of the starboard [being] broke[n]", "the chain and the one of the portside [being] in very bad state" and, last but not least, "the breakdown of one of the main generator[s]". I refer you to page 3 of tab 17.

Contrary to what Mr Morch said on Monday, this was not a case of the ship being prevented from entering the port simply due to the dangerous cargo.[39] There were clearly much more fundamental failures affecting the seaworthiness of this vessel.

Italy's Agent will later examine Italy's naval expert on the conditions of the *"Norstar"*, from which it will be possible to gather more information on the state of the ship, also in relation to the photographic evidence that we have seen during the first two days of this hearing.

Mr President, I will now turn to Panama's assertion that the investigations, the Decree of Seizure and the appeal by the Public Prosecutor at the Savona Tribunal against the judgment rendered by the latter in 2003 were the result of some kind of prosecutorial abuse of power by the Italian authorities, by which Italy prosecuted conduct for which it knew its courts did not have jurisdiction. This is a patent and offensive mischaracterization.

In the first place, and despite the evidence provided by Mr Rossi on Monday suggesting without foundation the existence of some malicious reason behind the Italian authorities' investigations, the evidence produced by Italy in its written pleadings unquestionably proves the contrary; namely, it proves that the Decree of Seizure was adopted once the investigations ,which were conducted primarily against an Italian national, had provided sufficient *fumus* for the investigative authorities to reasonably suspect that Mr Rossi had engaged in a tax evasion plan which was supposedly carried out through the use of the *M/V "Norstar"* with the support of those involved with it.

Mr Rossi's direct involvement, and that of his company Rossmare International, in the alleged criminal activity in question emerged from reasonable suspicion – I repeat suspicion – that he organized the purchase of fuel in Livorno and other European Union ports;[40] the issuance by Mr Rossi of false invoices, namely invoices addressed to non-European Union nationals upon the resale of fuel to Italian and other European Union-flagged vessels; and the advertisement by Rossmare International of the supply of duty-free fuel.[41]

The close relationship between Mr Rossi and Rossmare International, on the one hand, and the *"Norstar"*, on the other, was proven by evidence to the effect that the former paid in advance the expenses of the masters and the crew of the latter;[42] and that Mr Rossi gave

[39] ITLOS/PV.18/C25/2, page 3, lines 15-21.
[40] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (*Counter-Memorial* (see footnote 33), Annex A), at 1.
[41] *Ibidem*, at 7.
[42] *Ibidem*.

instructions to the masters of the *"Norstar"* on fuel resale through a mobile phone which he gave to the crew of the vessel and which was paid by Rossmare International.[43]

As to the Decree of Seizure, the facts simply show that there is nothing abusive behind this Decree. As we have seen, it was adopted on the ground of a regular investigatory framework and it was based on sufficient *fumus* for the purposes of further investigation into alleged criminal activity carried out primarily by an Italian national in relation to alleged crimes committed exclusively on Italian territory. I refer you to tab 8 of your folder.

Panama also contends that the Decree was unlawful under Italian law because it was issued on 11 August 1998, that is, before the formal completion of the investigations, which took place on 24 September.

However, in line with article 109 of the Italian Constitution, the judiciary directly availed itself of and was in constant control of the judicial police. I may refer you to page 3 of tab 9. The investigations had started in September 1997 and, therefore, the Public Prosecutor has been in close contact with the fiscal police and kept informed of the investigations all along ever since then, that is, for nearly one year.

THE PRESIDENT: Mr Tanzi, I am sorry to interrupt you. I have been informed that the interpreters are having difficulty in following your statement. It is very important that your statement is duly and accurately interpreted. Therefore, could you please slow down a little?

MR TANZI: I will do so with pleasure, Mr President.

THE PRESIDENT: Thank you.

MR TANZI: Panama also alleges that the Italian criminal proceedings constituted an extraterritorial exercise of criminal jurisdiction. Panama asserts that the Decree as adopted in "the wrongful conclusion that the activity of the vessel while carrying out on the high seas constituted a crime".[44] I may refer you to tab 5 and to the text before you on the screen, which will also correct my actual reading, Mr President, and I thank you for bearing with it.

Mr President, Members of the Tribunal, the investigations which led to the Decree targeted suspected offences allegedly committed on Italian territory and applied domestic legislation whose scope of application is far from having any extraterritorial reach.

Against Panama's insistence to the contrary, suffice to reiterate that the evidence produced by Italy in its written pleadings unquestionably demonstrates that the Decree was adopted as part of criminal proceedings concerning conduct constituting alleged offences which occurred exclusively in Italian territory. Indeed, the Decree was adopted pursuant to article 253 of the Italian Code of Criminal Procedure, which you can find at page 1 of tab 9, and we will refer to it shortly, which provides the grounds for probationary seizure for the purpose of the investigation of crimes that fall within the scope of article 6 of the Italian Criminal Code – a key provision which lays down the principle of territoriality of crimes under Italian law; and you can find it at page 3 of tab 9, Mr President.

The investigations which led to the Decree in question showed sufficient *fumus boni iuris* to further enquire into an alleged tax evasion plan which consisted of alleged offences committed on Italian territory, and certainly not bunkering, which is not outlawed under Italian legislation. In fact, had the fuel been consumed by the *"Norstar"* and the leisure boats in question on the high seas and/or carried to ports located in the internal waters other than those of Italy or of other EU coastal States, such as Gibraltar, the resale of the fuel in question on the

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[43] *Ibidem*.

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

high seas would not have raised the slightest suspicion concerning offences of the kind in question.

On the contrary, the suspected criminal scheme which was investigated basically consisted of three elements: first, loading the tanker with fuel purchased from the Italian port of Livorno in exemption of excise duties and VAT – that is, avoiding 70 per cent of the regular fuel price – upon false declarations that the fuel was meant for the vessel's own ship store; second, the subsequent resale to Italian and other European leisure boats stationed on the high seas off the coasts of the Italian city of Sanremo, which rendered the just mentioned declarations false declarations; third, the re-entry of the leisure boats into Italian territory and the internal waters with fuel on board, thus potentially eluding the payment of the fiscal duties due under Italian law. The second element, namely the sale of fuel on the high seas, did not constitute a suspected offence as such, but it was materially instrumental in grounding the suspicion that the fuel declaration – which was filed at the time of purchase on Italian territory – was false, and that the re-entry into Italian ports could amount to tax evasion. Here, again, the suspected offences would occur exclusively on Italian territory.

Mr President, I will now turn to the Decree in question. On 11 August 1998, the Prosecutor at the Tribunal of Savona issued a Decree of Seizure against the *"Norstar"* based on article 253 of the Italian Code of Criminal Procedure. According to this provision, which you find at tab 9 of your folder and on the screen before you:

> 1. The judicial authority adopts, with motivated order, the seizure of the *corpus delicti* and of any other thing related to the crime and necessary to the assessment of the factual background of the case.
>
> 2. The things on or through which the crime was committed, as well as the product, profit or price of the crime, are to be considered *corpus delicti*.

By way of background, it is important to keep this provision in mind, and I will revert to it shortly.

I will now show that the Decree did not target bunkering activities, which means activities carried out on the high seas, but rather targeted alleged offences that occurred within Italian territory.

This is plainly corroborated by the text of the Decree, which reads in part as follows, and you can see it on the screen before you. These pieces of legislation have been reproduced in Annexes B, C and E of Italy's Counter-Memorial:

> Having regard to the criminal proceedings filed against ROSSI SILVIO and others for the offence pursuant to Articles 81(2) and 110 crim. code, Articles 40(1)(b) and 40(4) of Legislative Decree no. 504/95, Articles 292-295(1) of Decree of the President of the Republic no 43/3 and Article 4(1)(f) of Law no. 516/82, committed in Savona and in other ports of the State during 1997.[45]

The description of the conduct which was the object of the investigations and constituted the suspected crimes is again to be found in the Decree of Seizure. For the most relevant parts, it reads:

> As a result of complex investigations carried out it emerged that ROSSMARE INTERNATIONAL s.a.s., managed by ROSSI SILVIO, sells in a continuous and widespread fashion, mineral oils (gas oil and lubricant oil) for consideration, which it bought exempt from

[45] Seizure order by the Public Prosecutor of the Tribunal of Savona, 11 August 1998 (*Counter-Memorial* (see footnote 33), Annex I).

taxes (as ship's stores) from customs warehouses both in Italy (Livorno) and in other EU States (Barcelona) and intended to trade in Italy, thus evading payment of customs duties and taxes by fictitiously using oil tankers, which are in fact chartered, and by resorting also to consequent tax fraud in respect of the product sold.

I refer to the rest of the text there in tab 8 of your folder, Mr President.

The crimes in connection to which the Decree of Seizure was adopted under article 253 of the Italian Criminal Code, which I read in full a second ago, are the following:

a. avoiding the payment of excise duties on mineral oil under Article 40(1)(b) and 40(4) ("Avoidance of the ascertainment or payment of excise duty on mineral oils") of the Legislative Decree no. 504/95 containing the Act on production and consumption taxation and the relevant criminal and administrative fines;[46]
b. smuggling under article 292 of the Decree of the President of the Republic no. 43/73, occurring in case of avoided payment of border's fees due for goods;[47]
c. stating in the income tax return or in the annexed budget or financial statement, income or other revenues, or expenses or other negative components, different from the real ones by utilizing documents certifying facts not true or putting in place a fraudulent behaviour with a view to evading income taxes or VAT or obtaining undue reimbursement for him/herself or for third parties (Article 4(1)(f) of Law no. 516/82).[48]

In sum, Mr President, the disputed Decree was adopted simply because it represented *corpus delicti.*

I pause here to emphasize that Mr Carreyó misused this term on Monday in order to advance an incorrect characterization of the Decree and of the concept of *corpus delicti.* In particular, Mr Carreyó described that *corpus delicti* "refers either to the proof that a crime has been committed before a person can be convicted of having committed that crime, or to the object upon which the crime was committed, which itself proves the existence of that crime".

He then asked: "How, then, can Italy continue to pretend that the material acts of the *'Norstar'* could still be considered as alleged criminal conduct by describing it as a *corpus delicti*?"[49]

But that is not at all what Italy is doing. *Corpus delicti* is a term which may have different connotations. But article 253, paragraph 1, of the Italian Criminal Procedure, which I had shown you on the screen a while ago and which is again being reproduced before you, clearly indicates that *corpus delicti* may refer to an object that is "necessary to the assessment of the factual background of the case". That was precisely the purpose of the Decree in this case under which the *"Norstar"*, as *corpus delicti*, was simply an instrument to be used in the further investigation of suspected smuggling and tax evasion.

The fact that this investigation did not lead to the ultimate prosecution of the individuals concerned – and condemnation – of course, does not necessarily mean that the seizure of that *corpus delicti* must therefore have been wrongful. As I will revert to shortly, the Italian courts acquitted the defendants, but did not find the Decree to be unlawful.

Mr President, Members of the Tribunal, I should also emphasize at this point that Mr Carreyó's assertions on Monday that the seizure was a *sine die* confiscation is simply wrong. This seizure, by its very nature, as a means of investigation, as we have just seen from

[46] Legislative Decree No. 504 of 26 October 1995, Article 40 (*Counter-Memorial* (see footnote 33), Annex B).
[47] Decree of the President of the Republic No. 43 of 23 January 1973, Articles 2, 253-254 and 292-295*bis* (*Counter-Memorial* (see footnote 33), Annex C).
[48] Law No. 516 of 7 August 1982, Article 1, amending Law Decree No. 429 of 10 July 1982, Article 4 (*Counter-Memorial* (see footnote 33), Annex E).
[49] ITLOS/PV.18/C25/2, page 36, lines 1-6.

article 253 of the Italian Procedural Criminal Code, was only a temporary measure. That is also why, of course, the vessel was conditionally released in February 1999 and unconditionally released in March 2003. Clearly, there was nothing confiscatory about this seizure, nor anything *sine die* about it, and it was only the owner's failure to retrieve the vessel that extended the period of the seizure.

Mr President, there is no denying that, as Panama has pointed out, the Public Prosecutor envisaged, if necessary, the "hot pursuit" of the vessel under article 111 of UNCLOS in order to enforce the Decree, and that he also referred to a contiguous zone that Italy has not promulgated. But this is immaterial for the international legal assessment of the Italian conduct in the instant case. Had the Decree been enforced by the Italian Coast Guard on the high seas on either ground, then the facts of this case would have been materially different. But of course Italy did not enforce the Decree on the high seas; this is a different dispute from the one which is being portrayed by Panama.

Finally on extraterritoriality, Mr President, even if, *arguendo,* elements of extraterritoriality were to be found in the Decree in question, the fact remains that it has not produced the slightest physical or otherwise concrete interference on the *"Norstar"*'s navigation on the high seas. Professor Caracciolo after me, and Mr Busco this afternoon, will elaborate on this point.

Mr President, I shall now turn to Panama's repeated assertions that the Decree of Seizure was found to be wrongful by the Italian judiciary itself. I have already illustrated how, even if, *arguendo*, this were to be considered as true, the question of any wrongfulness under international law would be an entirely separate question, governed by a different legal standard. However, Mr President, in the present circumstances there is no real need to resort to such basic principles of international law, since, as a matter of fact, the Decree in question was never found unlawful by the Italian courts.

I should respond at the outset here to Mr Carreyó's statement of Monday that "the Italian judgments and [their] reasoning cannot be disassociated from the decree of seizure because such judgments reflect the final outcome of the Italian decision that is at the root of this case".[50]

But, Mr President, Members of the Tribunal, Mr Carreyó ignores the precise basis on which the Tribunal of Savona acquitted the defendants and which, as I shall now explain, fully contradicts Panama's case.

As already amply recalled, one of the grounds upon which Panama alleges that Italy's domestic courts found the Decree in question to be illegal under Italian law is that of the alleged "extraterritorial" reach of the Decree.

But, Mr President, this is not at all the reasoning followed by the Tribunal of Savona.

The fact of the matter, Mr President, is that the accused were not acquitted because the crimes allegedly committed through the *"Norstar"* consisted of conduct carried out on the high seas, but just because it was carried out without reaching the threshold of criminal responsibility for conduct carried out in Italy.

Had the Italian courts found that the Italian jurisdiction was exercised extraterritorially by the Public Prosecutor, they would have declined jurisdiction because the crime would have been one out of the reach of the Italian judiciary. They would not have acquitted those involved on the merits of the claim, as they did; they would have declined jurisdiction.

Mr President, I will now briefly summarize the actual reasoning of the Italian judiciary, whose decisions you may find in your Judge's folder, at tab 10.

As to the alleged crime of "avoiding the payment of excise duties on mineral oil under Article 40(1)(b) and 40(4) of the Legislative Decree no. 504/95", the Tribunal found that the

[50] ITLOS/PV.18/C25/1, page 18, lines 17-21.

Italian fiscal law does not require a leisure vessel, supplied abroad in exemption of VAT and excise duties, to declare the fuel and pay customs upon return to Italian waters and harbours, unless such fuel is unloaded or consumed within the customs line. Since this was found not to have been the case, the Tribunal declared that the crime of evasion of excise duties and VAT had not been committed.

As to the crime of smuggling, the Tribunal found that failure to mention the exempted fuel in the Ship's Bulletin does not constitute smuggling because the relevant provisions of Italian law do not contain an explicit provision sanctioning such failure with specific regard to mineral oil products, but only others. Again, the Tribunal of Savona simply found that the crime had not been committed.

Lastly, as to the crime of tax fraud, the Tribunal deemed that it was not sufficiently demonstrated that the amount of gas oil reintroduced into Italy's territory reached the value threshold of criminal relevance established by Italian law (7.5 million Italian lira at the time). Again, the Tribunal found that the crime was not committed.

In sum, Mr President, what the Italian courts did was simple and straightforward, and certainly does not correspond to what Panama tries to portray: the Tribunal of Savona acquitted the accused based on its assessment that the conduct of the accused fell short of the criminal threshold provided for under Italian law. The Appellate Court of Genoa, which was in no way concerned with the *M/V "Norstar"*, simply confirmed the acquittals in the former judgment. As observed by the ICJ, "[i]t would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law".[51]

You can find this quote in tab 11, Mr President.

Panama has also tried to pull the wool over our eyes by telling the story that the decision by the Tribunal of Savona of 2003, which lifted the seizure after the acquittal, "was not full and final"[52] and that "the Savona Public Prosecutor appealed the decision in front of the Court of Appeal of Genoa, despite having full knowledge of its illegal conduct when ordering and requesting the arrest of the *M/V 'Norstar'*".[53]

This, again, is just untrue.

It is true that the Public Prosecutor appealed the decision of the Tribunal of Savona. However, the appeal did not encompass the part of the judgment which provided for the release of the *"Norstar"*. The Prosecutor did not apply for suspension of the lifting and, therefore, under the Italian Code of Criminal Procedure the release of the *"Norstar"* became irrevocable and final on 20 August 2003.

It is unquestionable that the owner was promptly informed of the judicial decision on the lifting of the seizure and, thus, that this decision was final.

Mr President, Members of the Tribunal, I may refer you to tab 6 of your folder. There you find the communication, dated 18 March 2003, by the Tribunal of Savona to the Spanish authorities of the judgment of 13 March 2003. The relevant passage of that communication reads as follows: "I hereby forward a certified copy of the operative part of the judgment issued by this Court on 14 March 2003 *ordering that the motorship Norstar be released and returned* to the company Intermarine A.S."

Mr President, there was evidently nothing *sine die* about that Decree. Italy has already demonstrated that the Spanish authorities took note of such request and definitely withdrew the seizure on 21 July 2003. You may find the relevant document, again, at page 2, tab 6 of your Folder.

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[51] *Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15 ff., para. 124.

[52] *Application of the Republic of Panama*, 16 November 2015, para. 8.

[53] *Memorial* (see footnote 5), para. 32.

Annex 12 to Panama's Memorial shows that the Tribunal of Savona had sent to Intermarine the notification of the lifting on 21 March 2003; that on 3 April 2003, the Italian Ministry of Justice requested the Norwegian authorities to notify Intermarine of exactly the same information; and the Norwegian Ministry of Justice confirmed on 23 July 2003 that Mr Morch was notified with a copy of the relevant documents on 2 July 2003. You may find a copy of those communications in your folder, at tab 16.

Panama remarkably itself acknowledges that the shipowner was informed of the lifting of the seizure just a couple of weeks after the judgment was rendered, as follows:

> The ship owner received a document identified as R.G. 415/02 dated 21 March 2003 by registered mail dated 26 March 2003 which was the decision of 13/14 March 2003 that ordered "that the seizure of motor vessel Norstar be revoked and the vessel returned to INTERMARINE A.S. and the caution money released." The same document (415/03) was later on 2 July 2003 delivered by the police.[54]

Again, you may find a copy of the relevant communication at tab 16 of your folder.

While we have responded to Panama's repeated claims of lack of communication by the Italian judiciary of their decisions, we now hear from opposing Counsel that this is no longer the problem. The problem now, as we have heard this week, is that

> simply informing the ship owner of the judgment ordering the release of the vessel was not sufficient and did not relieve Italy from its duty to take the necessary, positive and effective steps to enforce this order and place the *"Norstar"* at the disposition of the shipowner.[55]

Mr President, Panama has not substantiated this assertion with any authority. The existence of a duty of a kind referred to by Panama would go beyond the reasonable standards contained in due process principles that, as I have just shown, have been fully complied with: by investigating the vessel according to the law, by releasing the vessel according to the law, by acquitting the accused according to the law, and promptly notifying the interested individuals of all of the above.

Mr President, Members of the Tribunal, I will now turn to the issue of the owner's failure to retrieve the vessel.

As Italy has explained in its pleadings, in February 1999 the ship was released upon the payment of a security, whereas in March 2003 it was definitely released. However, the vessel was not retrieved by the owner on either occasion.

Panama tries to blame Italy for this failure. When it comes to describing the conduct of the Italian judicial authorities with regard to the application to lift the seizure of the *"Norstar"*, Panama tries to depict a set of factual circumstances that would suggest neglect and arbitrariness on the part of the Italian judiciary.

In paragraph 28 of its Memorial, Panama refers to an application by the owner to lift the seizure of the vessel and suggests that, at one and the same time, such application was met with a refusal, and an offer of release against an unreasonable bond, on 18 January 1999. Panama adds that "[t]his decision was communicated to the shipowner on 29 June 1999". You can find this at tab 5 of your folder, Mr President.

The very evidence produced by Panama shows a more articulated picture than this incomplete account. First, the refusal dated 18 January 1999 was explained in the operative part of the decision in question to be of a temporary nature, based on the fact that the "investigative exigencies" had not yet been completed. Mr President, Members of the Tribunal,

[54] *Reply* (see footnote 3), para. 463.
[55] ITLOS/PV.18/C25/3, page 24, lines 17-20.

I can refer you to tab 12 of your folder. In fact, this refusal was followed only five weeks later by a conditional release, once the investigative and probationary purposes had been achieved. Mr President, there was evidently nothing *sine die* about that Decree.

Second, with regard to the communication to the shipowner of the refusal of the 18 January 1999 request for release, which occurred through diplomatic channels only in June 1999, it would be surprising if the shipowner's attorney in the meantime had not received ordinary judicial notification. This is the law and the uncontroversial practice in Italy and the negative cannot be presumed.

Third, in any case, the issue of this tardy communication is superseded by the fact that the refusal of 18 January 1999 was followed five weeks later, in February, by the decision of the release of the vessel against a security. We learn this from Annex 8 to Panama's Memorial.

Fourth, to confuse matters more, in its Memorial, at paragraph 28, Panama tells us that this decision, which is dated 24 February 1999, was communicated to the shipowner in June, but from Annex 9 to Panama's Memorial it appears that such communication referred to the refusal of 18 January, whereas from Annex 8 we learn that on 11 March the Public Prosecutor of the Tribunal of Savona requested the Italian Embassy in Oslo to inform Intermarine that the vessel could be released upon security. You can find the relevant passages at tab 13 of your folder, Mr President.

Panama also tries to advance arguments about the alleged illegitimacy of the release order of 1999. I address these arguments here since, as already recalled, these issues of Italian law constitute a fact from the perspective of international law.

Panama puts forward three arguments in order to ground the alleged wrongfulness of the conditional release of the vessel. Each one of them is unfounded as a matter of fact. First, Panama contends that "[s]ince the arrest of the *M/V 'Norstar'* was unlawful, Italy had the duty to release the *M/V 'Norstar'* without any consideration or security".[56]

Second, Panama contends that the security was unreasonable.

Third, Panama asserts that, anyhow, "the owner of M/V Norstar could not provide [the security] as through the long arrest the market for such business had been destroyed with no further income."[57]

THE PRESIDENT: Mr Tanzi, I am sorry to interrupt you but we have reached 11.30. At this stage the Tribunal will withdraw for a break of 30 minutes. You may continue your statement at noon, when we will resume the hearing.

(*Break*)

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

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

As to the first point, on the alleged unlawfulness of the Decree under Italian law pleaded by Panama, I have already demonstrated how the adoption of the Decree was in full conformity with the Italian law. I have already illustrated how the Tribunal of Savona in its judgment of 2003 never found the Decree unlawful, whereas, as just emphasized, the Appellate Court of Genoa did not address the issue of the Decree's lawfulness, simply because the release of the vessel by the Tribunal of Savona had not been appealed by the Prosecutor.

As to the second point, namely the alleged unreasonableness of the security invoked by Panama, it is simply unfounded. The security was determined in the amount of

[56] *Reply* (see footnote 3), para. 450.
[57] *Application* (see footnote 52), para. 7.

250,000,000 Italian lira – i.e. approximately US$ 145,000. If we take the value of the ship suggested by Panama – that is, US$ 625,000 – the bond corresponded to less than 25 per cent of the value declared by Panama.

Mr President, the case law of this Tribunal on prompt release plainly shows that the amount of the security at issue was not only reasonable, but it was far lower, and I would say generous, with respect to the average standard followed by this Tribunal.

Suffice to recall the Tribunal's precedents in the *Monte Confurco*, *Camouco* and *Volga* cases: there, the security was equal to or greater than the value of the ship. For reason of brevity, Mr President, I may refer you to tab 14 for the relevant passages.

Third, Mr President, on Panama's contention that the shipowner was unable to pay the security because "through the long arrest [of the *M/V 'Norstar'*] the market for [its] business had been destroyed".[58] Mr President, either the owner and Inter Marine had "[a]t the time … a well-established reputation as an ongoing business",[59] and in that case five months of seizure of one of his ships would not be able to put him "out of business"; or it was already in poor financial condition at the time of the seizure.

This, Mr President, appears to be the real situation and this accounts for at least one of the reasons why the bond was not payed and the *"Norstar"* was not retrieved by the owner. Let us look at tab 15, Mr President, at the letter by Sparenbanken dated 16 September 1998, that is a few days prior to the actual enforcement of the seizure of the vessel. This document[60] refers to "Inter Marine's financial position, with poor liquidity and a high level of short-term debt".

This is obviously a matter on which Panama should have been able to provide evidence; yet the only document that Panama has submitted is a letter dated 27 May 2001 by Mr Emil Petter Vadis, the managing director of Inter Marine, to Mr Morch.[61] This email merely contains a list of clients that the *"Norstar"* allegedly supplied in the summer of 1998, but this very generic list says nothing about the financial state of Inter Marine and plainly contradicts what we heard on Monday from Mr Silvio Rossi.

Mr President, Members of the Tribunal, Italy may not be held accountable for Panama's or the owner's difficulties and failures.

I will now turn, Mr President, to the remedies available, the options available under Italian law for the shipowner to retrieve the vessel and for him and the other individuals involved with the *"Norstar"* to obtain redress for the alleged damages derived from the Decree.

Italy has already explained in its written pleadings that the shipowner and the other persons involved had multiple legal remedies they could resort to if they really believed at the relevant time that the security was truly unreasonable and that they had suffered a truly unjust damage, and if they truly thought that the ship was worth anything close to what Panama is now claiming before you.

In the first place, Mr President – and I refer you to tab 9 – the owner could apply before the same Public Prosecutor for the re-examination of the Decree under article 257 of the Code of Criminal Procedure. You may find again at tab 9 the relevant criminal law and procedural criminal law provisions.

Had that remedy proved unsuccessful, the individuals in question could have lodged a claim against the refusal of re-examination of the Decree before the Judge of the Preliminary Investigations under Article 263, paragraph 5, of the Code of Criminal Procedure.

Had that remedy proved unsuccessful, too, the applicants could have then applied against the decision of the judge of the preliminary investigations before the Court of Cassation

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[58] *Ibidem*.
[59] *Memorial* (see footnote 5), para. 23.
[60] *Reply* (see footnote 3), Annex 2.
[61] *Reply* (see footnote 3), Annex 1.

under article 324 of the Code of Criminal Procedure. Had that remedy proved unsuccessful too, and the individuals in question were truly convinced at the relevant time – as much as Panama now seems to be – that the security was truly unreasonable, that they had suffered a truly unjust damage, and if they truly believed that the ship was worth anything close to what Panama is now claiming before you, then, Mr President, they could seek redress by suing the Italian Ministry of Justice for damages. Under article 2043 of the Italian Civil Code, any person who, by an intentional or negligent act, causes unfair damage to another, must compensate the victim; under article 28 of the Italian Constitution, civil liability for breaches of criminal, civil or administrative law by State officials applies also to the State and State entities. This provision is also to be found in tab 9 of your folder, Mr President.

Mr President, if the individuals in question were truly convinced at the relevant time – as much as Panama now seems to be – that the Italian judiciary was tainted by bad faith and that, therefore, the Italian domestic remedies would be arbitrary and discriminatory, and if they truly believed that the ship was worth anything close to what Panama is now claiming before you, then either the owner, or Panama, could also have lodged an application for prompt release under article 292 UNCLOS.

Of course, neither the owner nor Panama took any of these actions.

I will now conclude my speech by recalling the most salient preliminary points and facts in this case. They demonstrate that this case, at the end of the day, is a simple and narrow one. In particular it concerns an alleged breach of article 87 and article 300. No other alleged breach is relevant.

It concerns the lawfulness under international law of the Savona Public Prosecutor's Decree of Seizure and Italy's request for assistance from the Spanish authorities, both in August 1998. No other Italian conduct is relevant for the purposes of the present dispute.

The Decree and request were based on the Italian authorities' good faith investigation into alleged criminal conduct carried out primarily by Italian nationals and exclusively on Italian territory.

The *"Norstar"* was arrested in September 1998 not on the high seas, but in Spain's internal waters.

When it was arrested, the *"Norstar"* was not seaworthy and it was in fact in such poor condition that it could not even sail one nautical mile into the port.

The Tribunal of Savona in February 1999 ordered the conditional release of the *"Norstar"* upon payment of a minimal security. That order was duly communicated to the shipowner, but the vessel was not retrieved.

The Tribunal of Savona ultimately acquitted the defendants and ordered the unconditional release of the *"Norstar"* in March 2003. This was not because any of the alleged criminal conduct took place on the high seas beyond Italy's jurisdiction – not at all.

Mr President, thus is the simple and narrow nature of this case. What these facts also reveal is the perfectly ordinary exercise of a State's sovereign right to investigate and prosecute possible crimes relating to tax and customs infringements on its territory, and the legitimate powers to temporarily seize property for the purpose of investigating such crimes. In this case, the investigation and prosecution led to the acquittal of the defendants and the release of the vessel seized, but that too, Mr President, is ordinary. Panama's attempts to elevate the ordinary processes of a State's criminal courts into a breach of international law must be rejected by this Tribunal.

Mr President, Members of the Tribunal, this concludes my speech. I kindly ask you to invite Professor Caracciolo to take the floor and present the arguments concerning article 87. I thank you for your attention, Mr President.

THE PRESIDENT: Thank you, Mr Tanzi.

I then give the floor to Ms Caracciolo to make a statement.

STATEMENT OF MS CARACCIOLO
COUNSEL AND ADVOCATE FOR ITALY
[ITLOS/PV.18/C25/5/Rev.1, pp. 25-35]

Mr President, distinguished Members of the Tribunal, I am honoured to appear before you today, and especially to do so on behalf of my country, Italy.

In my presentation, I shall explain why Italy has not, by means of the Decree of Seizure of the *M/V "Norstar"* and the request for its execution with regard to activities carried out by the *"Norstar"* on the high seas, violated article 87 of the Convention vis-à-vis Panama.

In order to duly respond to the allegations submitted by Panama in the pleadings as well as in the hearings, my presentation will be divided into four main parts.

The first part will dwell on the subject matter of the present dispute with regard to article 87, paragraph 1, of the Convention. Building up on what Professor Tanzi has said, I will point to Panama's misleading interpretation of the Judgment adopted by this Tribunal on 4 November 2016.

The second part will deal with the alleged breach of article 87, paragraph 1, of the Convention. In particular, I shall demonstrate: (a) that the *"Norstar"* was not navigating on the high seas when the Decree of Seizure and the request for its execution were issued; (b) that the Decree of Seizure and the request for its execution were not able to interfere with Panama's freedom of navigation, and in fact did not determine any interference; (c) that freedom of navigation on the high seas cannot be interpreted as a provision that applies to areas other than the high seas, or as freedom to gain access to the high seas; (d) that the question of the extraterritorial nature of an exercise of jurisdiction is not relevant from the perspective of freedom of navigation under article 87.

In the third part, I shall focus on the fact that, even if the extraterritoriality of an exercise of jurisdiction is a matter that is not relevant under article 87, the Decree of Seizure and the request for its execution in any event targeted crimes committed by the *"Norstar"* within the Italian territory (that is to say, the Italian internal waters, and/or the Italian territorial sea). In other words, that Italy did not exercise its jurisdiction extraterritorially, but sought to prosecute domestic crimes.

Finally, the fourth part will stress that article 87, paragraph 2, is not applicable to Italy in the instant case; and, for this fact alone, it cannot have been breached.

Mr President, Members of the Tribunal, I come to the first part of my presentation, which deals with the subject matter of the present dispute and Panama's misleading interpretation of the Judgment of 4 November 2016 vis-à-vis article 87, paragraph 1.

As my colleague Professor Tanzi has already illustrated, the subject matter *sub judice* has been attentively curtailed by the Tribunal in November 2016. At paragraph 122 the Tribunal clearly established that the measures under scrutiny are uniquely the Decree of Seizure and the request for its execution from the perspective of articles 87 and 300.

Panama ignores the Tribunal's ruling. In the pleadings as well as in the hearing, Panama has continuously and insistently attempted to enlarge the subject matter of the instant dispute. For example, going beyond the terms of its application, Panama tries to expand the dispute to articles 92 and 97 of the Convention, on which Mr Paolo Busco will elaborate later on. Human rights claims are similarly based on this expansive approach. Professor Tanzi will address you on this matter tomorrow. For what is relevant from the specific angle of my presentation, Panama has conflated the execution of a Decree of Seizure and a request for its execution, with the notion of the actual execution and enforcement of those acts, hence trying to present before the Tribunal a dispute that is different, and larger, from the one the Tribunal has decided to admit to the merits.

This approach, wrong as it is, does not assist Panama in any way; and, indeed, it is not clear what Panama seeks to obtain by conflating the notion of Decree of Seizure, and the request for its execution, with the notion of execution of the Decree of Seizure and of the request. Even if this dispute were about the execution of the Decree, Panama would not be able to demonstrate a breach of article 87 for the simple fact that the execution of the Decree was perfectly legal, having occurred in the internal waters of Spain, an area of the sea where article 87 does not apply, let alone can be breached.

Mr President, Members of the Tribunal, let me also point to another grave error that Panama has incurred with regard to the interpretation of the Judgment of 4 November. As Professor Tanzi has mentioned previously, Panama has maintained that in its Judgment this Tribunal has already determined the dispute by establishing the responsibility of Italy for the breach of article 87, paragraph 1.

Mr President, Members of the Tribunal, you may find that this is a rather plain point to argue, but it is nevertheless necessary, since there is no doubt that Panama looks at the 4 November Judgment as a sort of pre-decision on the merits. Panama claims, for example that:

> the Tribunal tacitly rejected the Italian argument … deciding that: "the decree of seizure … against the *M/V 'Norstar'* … and the request for its execution by the Prosecutor at the Court of Savona may be viewed as an infringement of the rights of Panama under article 87 as the flag State of the vessel".[1]

This point has been stressed by Panama time and again. Thus, according to Panama the Judgment of 2016 is not an interlocutory decision but a definitive decision on the breach by Italy of the navigational rights of Panama on the high seas.[2] In doing so, Panama not only undermines the importance and authority of the present proceedings on the merits and also disregards one of the most established principles applicable to international proceedings, namely that a decision on a preliminary objection cannot lead to any adjudication on the merits. Allow me to mention the Permanent Court of International Justice, which qualified a preliminary objection as one "submitted for the purpose of excluding an examination by the Court of the merits of the case, and being one upon which the Court can give a decision without in any way adjudicating upon the merits".[3]

Equally, in the *South West Africa* case of 1996, the International Court of Justice stressed that "a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with a preliminary objection."[4]

Also in the *Fisheries Jurisdiction* case of 1973 as well as in the *Nicaragua* case of 1984, the Court concluded as follows: "the Court will avoid not only all expression of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits."[5]

Bearing in mind these considerations, I wish to emphasize what exactly this Tribunal ruled in November 2016. At paragraph 110, the Tribunal stated that at the stage of Preliminary Objections its function is to establish "a link between the facts advanced by Panama and the

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[1] *Reply of the Republic of Panama*, 28 February 2018, para. 82; and *M/V "Norstar" (Panama* v. *Italy)*, *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44 ff., para. 122.

[2] *Reply* (see footnote 62), paras. 184-187.

[3] *Panevezys-Saldutiskis Railway (Est.* v. *Lith.)*, *1938 P.C.I.J. (ser. A/B) No. 76* (Feb. 28), p. 22.

[4] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, pp. 36-37, para. 59.

[5] *Fisheries Jurisdiction (United Kingdom* v. *Iceland)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3, p. 7, para. 11; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, p. 397, para. 11.

provisions of the Convention referred to by it and show that such provisions can sustain the claims submitted by Panama".[6]

This much having been clarified, I will now turn to explaining why Italy has not, by means of the Decree of Seizure and the request for its execution, breached article 87 of the Convention.

Mr President, Members of the Tribunal, in order for a breach of article 87 to occur, the *condicio sine qua non* is that article 87 is in the first place applicable at the time when the alleged interference with freedom of navigation occurs. Clearly, if the provision is not applicable, all the more so, it cannot be breached. It is not contested between the Parties that when the Decree of Seizure was executed, the *M/V "Norstar"* was not on the high seas. The execution of the Decree, while not being the subject of this dispute, is therefore certainly not in breach of article 87.

I shall now demonstrate that also the Decree of Seizure and the request for its execution did not breach article 87, paragraph 1, because the *M/V "Norstar"* was not navigating on the high seas at the time of their adoption.

Mr Busco the other day made reference in cross-examination to a document submitted by Panama itself in these proceedings, according to which the *M/V "Norstar"* entered the port of Palma de Mallorca in March 1998, namely several months before the date of the Decree of Seizure, and never once did it leave the port between March 1998 and the 25 September of the same year, when the Decree was executed.[7]

As Professor Tanzi has already argued, no evidence has been provided by Panama's witnesses during cross-examination of the fact that the *"Norstar"* was navigating in the summer of 1998.

Ultimately, what Panama has not been able to prove is a critical condition for its case that the vessel was on the high seas on 11 August 1998 when the Decree of Seizure was issued and the request for execution transmitted to the Spanish authorities and at any other time thereafter.

Other documents show why this is the case; namely, that the technical bad conditions of the *"Norstar"* made navigation impossible outside the internal waters of Palma de Mallorca.

The vessel's poor conditions in the summer of 1998 are also confirmed by a fax sent by Transcoma Baleares to the Spanish port authorities in Palma de Mallorca on 7 September 1998, that is to say 28 days after the adoption of the Decree of Seizure and the request for its execution. Indeed, in this communication Transcoma refers to the bad condition of the chains aboard, the broken starboard anchor, the breakdown of one of the two generators, and the lack of any fuel.[8]

Mr President, Members of the Tribunal, Panama sustains that the *"Norstar"* was in excellent condition and navigating on the high seas when the Decree of Seizure and the request for its execution were issued. Italy believes that this is not the case. We have also heard from Panama's witnesses that the ship was perfectly efficient at the time of its arrest, which occurred on 25 September 1998. Contemporary evidence, like the fax sent by Transcoma Baleares dated 25 September shows exactly the opposite.

Mr President, Members of the Tribunal, let me make one final consideration. Panama, as the claimant in this case, has to prove that the conditions for a breach of article 87 have occurred. This includes proving the conditions that constitute a logical precedent for a breach to occur, namely that the ship was on the high seas when the alleged interference with freedom of navigation took place. In this case, the alleged interference is constituted by the Decree of

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[6] *M/V "Norstar"* (see footnote 1), para. 110.

[7] *Counter-Memorial of the Italian Republic*, 11 October 2017, para. 51.

[8] *Report of the seizure by the Spanish Authorities, 25 September 1998* (*Counter-Memorial* (see footnote 68), Annex K), at 3.

Seizure and the request for its execution. Panama has not been able to discharge the burden placed upon it that the vessel was on the high seas when these acts were adopted. Saying that one does not recall where the ship was or that the ship may have been on the high seas, but may well have been in port, is obviously not enough to prove that the ship was for sure on the high seas, when the acts whose legality is being investigated in these proceedings came to light.

Mr President, Members of the Tribunal, in conclusion: the Decree of Seizure and the request for its execution did not breach article 87, paragraph 1, because it is not proven that the vessel was on the high seas when they were issued.

Mr President, Members of the Tribunal, without prejudice to what I have already stated, I shall now contest Panama's argument that the Decree of Seizure and the request for its execution amount to an interference with the freedom of navigation of the *"Norstar"* and hence are in breach of article 87.

Apodictically, in the Reply Panama affirms that "Italy's conduct amounted to physical interference with the movement of the *M/V 'Norstar'*".[9]

According to article 87, the high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by the Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States freedom of navigation.

The essential content of freedom of navigation consists in a prohibition for States other than the flag State to interfere with the navigation of a vessel on the high seas.[10]

In the *Nuclear Tests* case before the International Court of Justice, the interdiction by France, also through the use of force, of vast areas of the Pacific closed to foreign shipping in 1974, was at the basis of the protest by New Zealand, which argued that: "the interference with ships and aircrafts on the high seas and in the superjacent air space … constitute[s] infringement of the freedom of navigation".[11]

In the *Croatia* v. *Slovenia* case, an arbitral tribunal under Annex VII of the Convention described the meaning of freedom of navigation under article 87, paragraph 1, stating that "ships and aircraft of all flags and of all kinds, civil and military, exercising the freedom of [navigation] are not subject to boarding, arrest, detention, diversion or any other form of interference".[12]

What can be derived from this is that, while the degree of interference may vary, at least some degree of interference with freedom of navigation is necessary in order for a breach of article 87 to be conceivable. Where there is no interference of any sort, there cannot be a breach of article 87.

The first question to ask is: what sort of interference typically is relevant from the perspective of article 87? Other provisions of the UNCLOS case law and scholars suggest that the interference relevant from the perspective of article 87 is interference that reaches a certain threshold, essentially physical interference or threat of physical interference.

Article 110, paragraph 1 of the Convention, for example, describes boarding as interference. It reads as follows: "Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship … is not justified in boarding it unless there is reasonable ground".

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[9] Reply (see footnote 62), para. 90.

[10] T. Treves, 'Navigation', in R. J. Dupuy, D. Vignes (eds.), *A Handbook on the New Law of the Sea, Volume 2* (Nijhoof 1991) 835, p. 837.

[11] *Nuclear Tests (Australia* v. *France)*, Application Instituting Proceedings, 9 May 1973, p. 28.

[12] *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009*, PCA Case No. 2012-04, Final Award, 29 June 2017, p. 361, para. 1129.

In this sense, for the Convention, interference with navigation occurs when an enforcement action or other kind of tangible and material interference impedes the movement of a ship.

The Convention has adopted a notion of interference on the high seas that has remained unchanged for centuries. Already in 1893, Professor Halleck used language suggestive of physical interference when qualifying the term. He warned that "[t]o enter into [a non-national] vessel, or to interrupt its course, by a foreign power in time of peace ... is an act of force, and is *prima facie* a wrong, a trespass, which can be justified only when done for some purpose, allowed to form a sufficient justification by the law of nations."[13]

International jurisprudence corroborates the assessment that breaches of article 87, paragraph 1, typically involve conduct by a coastal State amounting to material interference with the navigation of a foreign vessel. In its pleadings, Italy has already referred to two arbitral tribunals' awards of 1921. In one, the *"Wanderer"* case, the tribunal stated that "[t]he fundamental principle of the international maritime law is that no nation can exercise a right of visitation and search over foreign vessels pursuing a lawful vocation on the high seas, except in time of war or by special agreement."[14] Again, visitation and search are conducts that point towards a high threshold when characterizing the word interference: some sort of physical, material interference with the movement of a vessel appears necessary.

More recently, and as regards the case law of this Tribunal, in the *M/V "SAIGA" Case* the complaint by the Applicant State regarding article 87 concerned the following activities: "[I]nter alia the attack on the *M/V 'Saiga'* and its crew in the exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and the removal of the cargo of gasoil".[15]

In the *"Volga" Case* the activities put in place by the Australian military personnel and lamented by Russia amounted to enforcement measures, namely the boarding of the Russian fishing boat when it was on the high seas, its detention by the military personnel and, finally, its diversion under escort of a military warship towards an Australian port.[16]

Again, in the *"Arctic Sunrise" Case*, the Netherlands objected to the "boarding, investigating, ... arresting and detaining the *'Arctic Sunrise'*" as measures contrary to article 87, paragraph 1, of the Convention.[17]

Allow me also to refer to the Separate Opinion to the Judgment of 2016, where Judges Wolfrum and Attard explained that freedom of navigation is to be interpreted as freedom from enforcement actions. In particular, Judges Wolfrum and Attard held that

> [c]onsidering the object and purpose of article 87 of the Convention, this provision first and foremost protects the free movement of vessels on the high seas against enforcement measures by States other than the flag State or States so authorized by the latter. [E]nforcement actions ... which hinder the freedom of movement of the vessel concerned.[18]

To conclude, it is enforcement activities that are typically deemed to interfere with the freedom of navigation of vessels. This is because only these activities are capable of materially hampering or hindering the movement of a foreign vessel on the high seas. It clearly follows that a Decree of Seizure and a request for execution, until the moment they are enforced, are unable to produce any of the effects indicated above. Without being executed, they are devoid of any enforcement effects *per se*. Thus they cannot breach alone article 87, paragraph 1, and

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[13] H. Halleck, *Elements of International Law and the Law of War* (3rd edn; Baker 1893), p. 264.
[14] *Owners, Officers and Men of the Wanderer (Gr.Br).*v. *United States* (1921) VI RIAA 68, p. 71.
[15] *Counter-Memorial* (see footnote 68), para. 83.
[16] *Ibidem*, para. 84.
[17] *Ibidem*, para. 82.
[18] *Ibidem*, paras. 85-86.

they did not, in this case. As to Panama's new and rather surprising claim that some Italian war vessels would have threatened the *"Norstar"* at gunpoint on the high seas, I can only say that this is an entirely unsubstantiated assertion. One would expect to see some evidence of this conduct, since this is a case about article 87. However, even if the conduct to which Panama refers had happened, which it did not, certainly it had nothing to do with the Decree of Seizure and the request for its execution.

Mr President, Members of the Tribunal, Italy does not deny that in certain exceptional circumstances an act that falls short of enforcement action may still become relevant from the perspective of article 87, for instance when it produces some "chilling effect". Let us take the case of a piece of legislation that allows the extraterritorial exercise of a country's jurisdiction to prescribe and hence criminalize certain conducts on the high seas. A ship may self-restrain herself from crossing those areas of the sea where the extraterritorial legislation is applicable and this may, potentially, be conduct that is relevant from the perspective of article 87. Mr Busco will later address you on this matter. However, let me say for now that chilling effect of any sort and intensity presupposes evidently and necessarily two conditions: (a) that the source of the chilling is actually known, or at least knowable, by the entity that has exercised self-restraint, because logically there can be no inhibition, even in theory, when a threat is not known or not knowable; and (b) that a clear causal link between the ship's self-restraint and the act said to determine the chilling subsists. Therefore, the existence of a chilling effect cannot but be ascertained on a case-by-case basis, taking into consideration the specific circumstances of each event. I need scarcely add that, being extraordinary, if at all relevant from the angle of article 87, chilling effect cannot be lightly presumed.

Turning then to the present case, Italy's position is that the Decree of Seizure and the request for its execution did not interfere with the navigation of the *"Norstar"*, even from the modest and limited perspective of a chilling effect. Indeed, neither Panama, the owner of the *"Norstar"*, the charterer, the master nor the crew knew or could have known of the Decree of Seizure and the request for its execution. That is because, according to the Italian Code of Criminal Procedure, all investigative acts conducted by the Public Prosecutor and/or the judicial police are covered by investigative secrecy. This secrecy is specifically necessary in order to permit that a probative seizure can achieve its purpose. By definition, a probative seizure needs to be carried out "by surprise" to prevent suspects from tampering with evidence and undermining the course of justice.[19]

In the Rejoinder, Italy quoted the Italian Court of Cassation, which stated as follows: "[t]he effectiveness of seizure depends upon the secrecy of its issuance and promptness of its execution. It cannot be effectively repeated, since the element of surprise is its inherent feature and may not be renewed".[20] Similarly, the Tribunal of Milan held that "[t]he … notification of impending investigations … would frustrate the effectiveness of the seizure, which is an unexpected act of investigation".[21]

Our Agent will later examine President Esposito on this matter, and he will confirm to the Tribunal that a Decree of Seizure and a request for execution are, until the moment of their enforcement, secret. As such, they are not able to produce any inhibition, or chilling effect on those that they target.

Mr President, Members of the Tribunal, let me also address the Decree in an even more abstract dimension than the chilling effect.

Panama extrapolates the following language from the Decree of Seizure: "having noted that the seizure of the mentioned goods must be performed also in international seas". It does

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[19] European Court of Human Rights, *Garcia Alva* v. *Germany* (Application No. 23541/94), Judgment, 13 February 2001, para. 42.

[20] *Rejoinder of the Italian Republic*, 13 June 2018, para. 50.

[21] *Ibidem*.

so while discussing article 300 and good faith, but I address this point in my speech because it is relevant to article 87.

I would like to make three observations.

First, had the Decree of Seizure been executed on the high seas, it would ordinarily have constituted interference with the freedom of navigation of Panama. However, for the reasons explained above, the Decree of Seizure and the request for execution did not determine any interference. This is enough for the purposes of the present case. The fact that the Decree of Seizure and the request had not the power to interfere and did not interfere with the *"Norstar"*'s ability to navigate means that no breach of article 87 occurred vis-à-vis Panama.

Second, the fact that the Prosecutor issued, together with the Decree of Seizure, a request for execution addressed to authorities in Spain, where the *"Norstar"* was located, is evidence of the fact that the Decree was intended to be executed in Spain. Italy would not have needed the co-operation of the Spanish authorities, had it meant to arrest the vessel on the high seas.

Third, one cannot conclude that the Decree of Seizure would be illegal only because it mentions in the abstract the possibility of an enforcement on the high seas. There are exceptional circumstances in which enforcement on the high seas by a coastal State against a foreign ship is allowed. One of these exceptions is hot pursuit, under article 111 of the Convention, and indeed, article 111 of the Convention is quoted in the Decree of Seizure, even if Panama, unsurprisingly, fails to mention it, as a possible basis for the arrest. The legality of a possible arrest under international law of the *"Norstar"* pursuant to article 111 is not part of the dispute in this case.

However, it seems appropriate that the Prosecutor envisaged hot pursuit. The *"Norstar"* was thought to have violated the laws and regulations of Italy. Hot pursuit commencing in the territory of Italy and continuing onto the high seas was rightfully considered by the Prosecutor as a possible option.

Mr President, Members of the Tribunal, I shall now turn to the question that article 87, paragraph 1, is not violated because article 87 cannot be interpreted as a provision that applies anywhere else than the high seas, or conferring a right to a ship detained in port in the context of legal proceedings to gain access to the high seas.

Panama has repeatedly attempted to say that even if the *"Norstar"* was in Spanish internal waters in the summer of 1998, nevertheless it enjoyed the freedom of navigation enshrined in article 87, paragraph 1. Let me draw your attention to the fact that Panama has continuously changed its interpretation of freedom of navigation in the attempt to justify its claim. The concept has been interpreted from time to time as freedom of navigation "on" the high seas, as freedom of navigation "of" the high seas and as freedom of navigation "towards" the high seas. Let me give you some examples of Panama's creativity in proposing always-new facets of the concept of freedom of navigation.

In the Application, Panama holds that "the right of peaceful navigation of the Republic of Panama through the Norstar was violated by the Italian Republic agents … hindering the movements and activities of foreign vessels in the High Seas".

In the Memorial Panama still tides to the assertion that article 87 establishes the freedom of navigation "on the high seas which all States enjoy".[22]

However, in the Reply Panama's strategy suddenly changes. Panama begins to interpret the freedom of navigation as freedom of navigation everywhere in maritime spaces, including from internal waters towards the high seas.[23] According to Panama "the fact that a vessel is in port does not affect its right to enjoy freedom of navigation, including the freedom to sail

[22] *Memorial of the Republic of Panama*, 11 April 2017, para. 68.
[23] *Reply* (see footnote 62), para. 70.

towards the high seas".[24] Finally, from that Panama infers that "the consequence of Italy's wrongful arrest would have been the same no matter where the arrest took place, because it would have impeded the *M/V 'Norstar'*'s freedom to sail or navigate on the high seas in any case".[25]

Panama's position on interpreting article 87, paragraph 1, as if the provision established an absolute freedom of navigation at all times and everywhere is completely untenable.

It is a fact that the Convention ensures the access to and from the open sea. Let me mention article 36, on the freedom of navigation in straits used for international navigation; article 58, on the freedom of navigation in the exclusive economic zone; also articles 17 to 26 and article 52, on the innocent passage in the territorial sea and through archipelagic waters, since the right of innocent passage is nothing more than a remnant of the full freedom of navigation in those maritime spaces now included in the territorial seas of coastal States.

However, the Convention is absolutely silent on navigational rights of foreign vessels in the internal waters. This because internal waters are assimilated to the land territories of States. Therefore, as is confirmed by article 8, paragraph 1, of the Convention,[26] the internal waters' regime is characterized by the unlimited sovereignty of the coastal State,[27] thus excluding any right of navigation for foreign ships, except the cases of distress or special agreement. This is also corroborated by article 8, paragraph 2, of the Convention, which allows the right of innocent passage of foreign ships in those internal waters that before their enclosure by straight baselines were part of the territorial sea.

Equally, the absence of navigational rights in the coastal States' internal waters is confirmed by the long-lasting States' practice to conclude bilateral treaties on friendship, commerce and navigation providing access of the ships of one State to the ports of the other.

Also scholars are adamant on the lack of any right of foreign vessels to navigate towards the high seas in internal waters. Professor Hoffmann writes that:

> all waters inside a coastal State's baselines are internal waters where foreign ships enjoy no rights of navigation except as otherwise provided in a treaty that may confer a right of access, or where before its enclosure by straight baselines, the internal waters were part of the territorial sea.[28]

Professor Bangert observes that "[t]he most important constituent element of the internal waters regime is the lack of any right of passage for foreign ships, except in cases of distress or special agreement".[29]

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[24] *Ibidem*, para. 72.

[25] *Ibidem*, para. 75.

[26] "*Article 8. Internal waters*"

1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

[27] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, p. 111, paras. 212 and 213.

[28] A.J. Hoffmann, 'Navigation, Freedom of', *Max Planck Encyclopedia of Public International Law* (April 2011) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1199?prd=EPIL>, para. 7.

[29] K. Bangert, 'Internal Waters', *Max Planck Encyclopedia of Public International Law* (February 2018) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1968>, para. 16.

Professors Churchill and Lowe point out that "[t]he coastal State enjoys full territorial sovereignty over its internal waters. Consequently, there is no right of innocent passage, such as exists in the territorial sea, through them".[30]

Finally, Professor Tanaka comments that "[u]nlike the territorial sea, the right of innocent passage does not apply to internal waters".[31]

THE PRESIDENT: Ms Caracciolo, I am sorry to interrupt you but we have now reached 1 p.m. This brings us to the end of morning sitting. You may continue your statement in the afternoon when the hearing is resumed at 3 o'clock. The sitting is now closed.

(*The sitting closed at 1.00 p.m.*)

[30] R.R. Churchill, V. Lowe, *The Law of the Sea* (3rd edn; Manchester University Press 1999) p. 61.
[31] Y. Tanaka, *The International Law of the Sea* (CUP 2012), p. 78.

PUBLIC SITTING HELD ON 12 SEPTEMBER 2018, 3 P.M.

Tribunal

Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

For Panama: [See sitting of 10 September 2018, 10 a.m.]

For Italy: [See sitting of 10 September 2018, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 12 SEPTEMBRE 2018, 15 HEURES

Tribunal

Présents : M. PAIK, *Président* ; MM. NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, Mme KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mme LIJNZAAD, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 10 septembre 2018, 10 h 00]

Pour l'Italie : [Voir l'audience du 10 septembre 2018, 10 h 00]

THE PRESIDENT: Good afternoon everyone. Before the lunch break Ms Caracciolo was speaking.

I now give the floor again to you, Ms Caracciolo, to continue your statement.

First Round: Italy (continued)

STATEMENT OF MS CARACCIOLO (continued)
COUNSEL AND ADVOCATE FOR ITALY
[ITLOS/PV.18/C25/5/Rev.1, pp. 1-7]

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

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

In its pleadings, Italy has in particular referred to the *M/V "Louisa" Case*, where the Tribunal ruled that "article 87 cannot be interpreted in such a way as to grant the *M/V 'Louisa'* a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it."[94]

In the same case, Judge Paik declared that:

> [w]hile the content of the freedom of the high seas is subject to change, and indeed has evolved over time, it has been long established that this freedom is one which all States enjoy "in the high seas". ... To extend the freedom of the high seas to include a right of the State to have access to the high seas to enjoy that freedom is warranted neither by the text of the relevant provisions or the context of the Convention, nor by established State practice on this matter.[95]

On the same vein, it is also worth mentioning the Dissenting Opinions of Judge Cot and Judge Wolfrum, again in the *M/V "Louisa" Case*. Judge Cot observed that: "Article 87 covers freedom of the high seas and, in particular, freedom of navigation. But the existence of a basic freedom does not prohibit the coastal State from exercising the powers of its police and judiciary in its own territory."[96]

Equally Judge Wolfrum commented that:

> It is hard to imagine how the arrest of a vessel in port in the course of national criminal proceedings can be construed as violating the freedom of navigation on the high seas. To take this argument to the extreme it would, in fact, mean that the principle of the freedom of navigation would render vessels immune from criminal prosecution since any arrest of a vessel, under which ground whatsoever, would violate the flag State's right to enjoy the freedom of navigation.[97]

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

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

STATEMENT OF MS CARACCIOLO – 12 September 2018, p.m.

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

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

In the Memorial, Panama asserts that "article 87 of the Convention precludes Italy from extending the application of its customs laws and regulations to high seas"[98] and that "Italy's customs laws cannot be applied to ships flying the flag of Panama or of any other State on the high seas."[99] In the Reply, Panama maintains that:

> Therefore the application of its internal laws by Italy to the activities and conduct performed by the *M/V "Norstar"* and all the persons involved in its operation constitutes a clear breach of article 87 of the Convention. If Italy had rightfully interpreted this provision it would have also concluded this.[100]

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

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

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

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

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

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

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

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[98] *Memorial of the Republic of Panama*, 11 April 2017, para. 87.
[99] *Ibid.*, para. 87.
[100] *Reply of the Republic of Panama*, 28 February 2018, para. 106.

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

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

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

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

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

Let me recall some of the arguments of Panama, that I summarize in the following four items. First, in the Reply, Panama retains that: "... the activities for which the *M/V 'Norstar'* was detained took place in international, not Spanish waters ...".[101] Second, in the Memorial, Panama argues that Italy has extended "... the application of its customs laws and regulations to the high seas. ...".[102] Third, even more strongly, again in the Memorial, Panama affirms that Italy has exercised "... its criminal jurisdiction beyond its territorial waters".[103] Finally, Panama stubbornly, over and over, insists that the reason for the Decree of Seizure was bunkering on the high seas. In the Memorial, Panama alleges that "in arresting a vessel for carrying out bunkering ... on the high seas, Italy violated the principle of the freedom of the high seas ... , contravening article 87 of the Convention".[104]

Also in the Reply and in the hearings, Panama engages at length in redundant and pressing attempts to demonstrate that the crime allegedly targeted by the Savona Public Prosecutor was only that of bunkering. [105]

According to Panama true and founding evidence is given by expressions and phrases picked here and there in the Decree of Seizure, in the decree refusing the release of the *M/V "Norstar"*, in the letter rogatory, and in the judgments from the Tribunal of Savona and the Court of Appeal of Genoa. Expressions and phrases such as "off-shore bunkering", "international waters", "stationed outside the territorial waters", "traded the oil in international waters", "beyond the territorial sea" and similar should, for Panama, substantiate the very objective of the investigations by the Savona Public Prosecutor.[106]

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[101] *Ibid.*, para. 83.
[102] *Memorial* (see footnote 5), para. 87
[103] *Ibid.*, para. 80.
[104] *Ibid.*, para. 83.
[105] e.g. *Reply* (see footnote 7), para. 131.
[106] ITLOS/PV.18/C25/2, pp. 26-27.

STATEMENT OF MS CARACCIOLO – 12 September 2018, p.m.

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

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

The Decree of Seizure and the request of its execution did not concern off-shore bunkering activities on the high seas. Quite on the contrary, what the public prosecutor was targeting were several conducts put in place in the territory of Italy, its internal waters, and/or its territorial sea. In particular, as expressly indicated in the Decree of Seizure and in the request of its execution, these conducts allegedly consisted of "fiscal evasion of excise duties for mineral oils";[107] "smuggling";[108] and "tax fraud with regard to the suspected violation of the custom duties on the imported fuels".[109]

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

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

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

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

Mr President, Members of the Tribunal, the criminalization of evading the payment of custom duties and taxes and of smuggling of goods is not peculiar only to the Italian legal order, but it is pursued nearly by all States to such an extent that a multilateral treaty has been adopted to promote the cooperation between States thereof; I refer to the International Convention on Mutual Administrative Assistance for the Prevention, Investigation and Suppression of Customs Offences adopted in Nairobi on 9 June 1977, that you can find in the judges folder at tab 19.[110]

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[107] Legislative decree no. 504/95, Article 40(1)(b) (*Counter-Memorial of Italy*, 11 October 2017, Annex B).

[108] Decree of the President of the Republic no. 43/73, Articles 292-295 (*Counter-Memorial* (see footnote 14), Annex C).

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

[110] This Convention even provides for a common definition of customs offence in Article 1 which reads as follows: "[f]or the purposes of this Convention: ... (b) the term "Customs offence" means any breach, or attempted breach, of Customs law; (c) the term "Customs fraud" means a Customs offence by which a person deceives the Customs and thus evades, wholly or partly, the payment of import or export duties and taxes or the application of prohibitions or restrictions laid down by Customs law or obtains any advantage contrary to Customs law; (d) the term "smuggling" means Customs fraud consisting in the movement of goods across a Customs frontier in any clandestine manner; (e) the term "import or export duties and taxes" means Customs duties and all other duties,

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

> It is indisputable that every sovereign State has the right to control its ports, for they are part of its maritime communications. It has the international competence ... to regulate as it deems best, transportation from its territory, whether by land or by sea. With regard to the development and safeguard of its economic and financial interests particularly, a State has undeniably the right to regulate and control importation to, and exportation from, its territory of articles of every description; this right of control embraces the right to prohibit the ingress or egress of certain goods, and to levy duties upon imports and exports.[111]

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

As Italy has already demonstrated in the written pleadings, neither the Tribunal of Savona nor the Court of Appeal of Genoa dismissed this reconstruction of facts as assessed by the fiscal police and the Public Prosecutor of Savona. On the contrary, what they did was to dismiss that the relevant conducts amounted to criminal offences, on the merits.[112]

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

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

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

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taxes, fees or other charges which are collected on or in connection with the importation or exportation of goods but not including fees and charges which are limited in amount to the approximate cost of services rendered".

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

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

arrest made by Italy adversely affected the use of the high seas by the Panamanian vessel and all persons involved in its operation".[113]

Under article 87, paragraph 2, the freedoms of the high seas "shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area".

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

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

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

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

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

THE PRESIDENT: Thank you, Ms Caracciolo.

I now give the floor to Mr Busco to make a statement.

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

STATEMENT OF MR BUSCO
COUNSEL AND ADVOCATE FOR ITALY
[ITLOS/PV.18/C25/5/Rev.1, pp. 7-24]

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

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

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

First of all, I would like to note that the purpose of these proceedings is not to review in theoretical terms the compatibility with international law of the texts of judicial acts by the Italian authorities. The purpose of these proceedings is to assess whether the Decree of Seizure and the request for execution, regardless of their enforcement, were capable of interfering, and whether they actually interfered, with the *"Norstar"*'s ability to navigate on the high seas, thus breaching Panama's rights under article 87 of the Convention.

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

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

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

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

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

within the Government of the Congo to which Mr Yerodia belonged. It is precisely the knowability by Mr Yerodia of the arrest warrant that rendered the measure capable of producing a chilling effect on Mr Yerodia's freedom to travel.[1]

In the Yerodia case, then, the abstract knowability of the arrest warrant had become actual knowledge and determined that the minister was in concrete inhibited from moving freely. Could you please turn to tab 21, page 3, of your Judges' folder? In the Judgment, the Court explained that, on applying for a visa go to two countries, the Minister "[apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium".[2]

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

> the disputed arrest warrant effectively bars the Minister for Foreign Affairs of the Democratic Republic of the Congo from leaving that State in order to go to any other State which his duties require him to visit and, hence, from carrying out those duties. [3]

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

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

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

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

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

I now turn briefly, with your permission, to the fact that the Decree of Seizure concerned activities that the *"Norstar"* carried out in part on the high seas. Ms Caracciolo has already argued that the Decree concerned crimes committed on Italian territory and that Italy

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[1] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, p. 9, para. 14.

[2] *Arrest Warrant* (see footnote 21), p. 30, para. 71.

[3] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 182, p. 201, para. 71.

did not exercise its jurisdiction extraterritorially with regard to those crimes. I therefore refer to her explanation and to Mr Tanzi's explanation this morning.

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

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

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

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

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

In placing so much emphasis on the fact that the activities for which the *"Norstar"* was prosecuted occurred on the high seas, Panama has entirely missed the test for a breach of article 87 to occur. By Panama's reasoning, one would have to conclude that exercise of jurisdiction on the high seas with regard to crimes committed in the territory of the State is not extraterritorial but compatible with article 87; and yet this is not the case. Also, the exercise of jurisdiction with regard to crimes committed entirely in the territorial sea of the coastal State can result in a breach of article 87, if it determines an interference with freedom of navigation on the high seas not otherwise allowed by the Convention, for instance because the State is acting in hot pursuit under article 111 of the Convention

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

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

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Article 300 of the Convention reads as follows: "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

We have already mentioned many times paragraph 122 of the Judgment. I will also mention paragraph 132. According to paragraph 132 of the Judgment, the relevance of article 300 to the present case is limited to article 87. In particular, the Tribunal held that it considered article 300 relevant with respect to the question "as to whether Italy has fulfilled in good faith the obligations assumed by it under … the Convention".[4]

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

First, it tries to bring into article 300 also the question of abuse of rights, even if it is clear, from the mere and plain language of the Judgment, that the Tribunal only intends to investigate the question of good faith. Good faith and abuse of rights are closely related but they are not one and the same and, as I will explain, it is logic, even before law, that requires to keep the notions separate.

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

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

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

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

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

The language used by the Tribunal is neither random, nor accidental. Tribunals ordinarily specify which of the two components of article 300 – between abuse of rights and good faith – is relevant in each case. I would ask you kindly to turn to tab 21, page 5, of your Judges' folder. There you can see that the Annex VII Tribunal in the *Chagos Marine Protected Area Arbitration* case, for instance, found that article 300 was relevant to the dispute, and that the Tribunal's jurisdiction encompassed article 300 "insofar as it relate[d] to the abuse of rights".[5] Similarly, in this case, the Tribunal qualified the relevance of article 300 to good faith.

[4] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44 ff., para. 132.
[5] *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, PCA Case No. 2011-03, Final Award, 18 March 2015, p. 215, para. 547.

For these reasons, Panama's claim with regard to abuse of rights simply does not fall within the jurisdiction of the Tribunal as determined by its Judgment.

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

According to a recent commentary to the UNCLOS, that you find at tab 21, page 6: "[I]t becomes evident that the prohibition against the abuse of rights becomes relevant in situations where international legal norms provide the actors with a broad, perhaps almost unlimited, discretionary power to exercise a right."[6]

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

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

As a last point on article 300, I would like to also note that the modality in which Panama has invoked article 300 in its abuse of rights component is contrary to the established case law of this Tribunal. Even assuming that article 300 were relevant beyond article 87 – which it is not – Panama has for the most part not linked article 300 to any other provision of UNCLOS. It has spoken generally of the fact that the Public Prosecutor in Savona "abuse[d] the rights of the *M/V 'Norstar'*"[8] and that "the rights of the people involved in the *M/V 'Norstar'* have been abused". Panama's language is remarkably similar to the language already used by Panama itself in the *M/V "Virginia G" Case* against Guinea Bissau, in which Panama complained of an abuse of its rights "in all aspects of the arrest and detention the *'Virginia G'*".

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

> It is not sufficient for an applicant to make a general statement that a respondent by undertaking certain actions … acted in a manner which constitutes an abuse of rights without invoking particular provisions of the Convention that were violated in this respect … It is the duty of an applicant when invoking article 300 of the Convention to specify the concrete … rights under the Convention, with reference to a particular article, that … were exercised in a manner which constituted an abuse of right.[9]

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[6] A. Proelss, *United Nations Convention on the Law of the Sea. A Commentary* (Beck-Hart-Nomos 2017), p. 1942, para. 13.

[7] *Chagos Marine Protected Area* (see footnote 25), p. 193, para. 491.

[8] *Reply of the Republic of Panama*, 28 February 2018, para. 269.

[9] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, p. 109, para. 398-399.

So, again, even if article 300 were relevant beyond article 87, Panama has not done what it should have. The only exception is Panama's argument that Italy, as a coastal State, abused "its right enshrined in article 21 of the Convention to legally prevent the infringement of its customs or fiscal regulations by foreign ships which enter its territorial sea".[10]

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

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

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

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

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

The link between article 300 and other provisions of the Convention must be assessed with regard to the typical conduct that the concerned substantive provision prohibits or prescribes. With respect to the good faith component of article 300, therefore, the relevant question is: what are the obligations imposed by the substantive Convention provision to which article 300 is linked and that must be fulfilled in good faith? Article 87 is concerned with freedom of navigation of vessels on the high seas. The obligations that article 87 imposes concern the duty not to interfere with such freedom. This is the prescriptive nucleus of article 87 and respecting freedom of navigation constitutes the heart of the obligations enshrined therein.

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

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

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

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

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

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

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

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

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

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

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

> The report [of the conciliation commission] is not legally binding on the parties, but the parties would be under an obligation to negotiate in good faith on the basis of the conciliation report. … Although the parties are not required to reach an agreement, they are legally obligated to negotiate in good faith to try for such an end.[11]

[11] R. Beckman, 'UNCLOS Part XV and the South China Sea', in S. Jayakumar, T. Koh, R. Beckman (eds.), *The South China Sea Disputes and Law of the Sea* (Edward Elgar 2014) 229, 246.

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

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

> While the word negotiation appears in article 283, it does so as an example of a means of settlement. Negotiation as a means of settlement is subject to some doctrine: e.g. in the judgment in the *North Sea Continental Shelf* case. However, this doctrine does not apply to exchange of views, even in the sense of consultation: there is no requirement to seek to reach agreement.[12]

What this means, in a nutshell, is that under article 283 Italy did not have a duty to try and reach a settlement with Panama. It did not have an obligation to enter into negotiations with a view to arriving at an agreement, as the ICJ case referred to by Judge Anderson indicated in the *North Sea Continental Shelf* case. "[i]t did not have to pursue [negotiations] as far as possible with a view to concluding agreements",[13] as the PCIJ said in *Railway Traffic between Lithuania and Poland*.[14] It could simply have rejected Panama's settlement proposals, and it would have been well within its right to do so. Mr President, Members of the Tribunal, this is the crucial point: Italy did reject those proposals.

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

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

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

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

Let me go through the letter dated 15 August 2001 by Mr Carreyó that reads: "The undersigned therefore respectfully requests that the Italian State within reasonable time decides if it wants to release the vessel and pay the damages caused by the illegal procedure. Were [the] above-mentioned not to happen, Panama … will apply to the Hamburg Tribunal."[16]

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[12] D. Anderson, 'Article 283 of the United Nations Convention on the Law of the Sea', in T. M. Ndiaye, R. Wolfrum, C. Kojima (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Nijhoff 2007) 847, 853.

[13] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, p. 47, para. 85.

[14] *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 42 (Oct. 15)*, p. 12.

[15] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, p. 315, para. 89.

[16] *Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs*, 15 August 2001 (Written Preliminary Objections under article 294, paragraph 3, of the United Nations Convention on the Law of the Sea by the Italian Republic, 10 March 2016, Annex F).

Let us now take the letter from Mr Carreyó dated 3 August 2004. It reads: "The Government of Italy will understand that failing to respond to the demand of the Government of Panama by August 30th 2004, Panama will have no other choice than to submit the dispute to arbitration in accordance with Annex VII."[17]

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

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

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

As to the merits of Panama's claim that Italy has acted in bad faith because it has been uncooperative in the context of these proceedings, once again I need to register Italy's disbelief for Panama's allegations. Italy has acted cooperatively with Panama. It has even taken the initiative of proposing that the Parties could share a list of the documents in their respective files. This is in circumstances in which the Tribunal had already denied Panama's requests for an unqualified disclosure of documents and in circumstances in which international law does not require, to use Professor Kolb's words, that the parties "share information or … compromise their 'egoistic' interests as opposing parties".[18]

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

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

THE PRESIDENT: Thank you, Mr Busco.

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

MR BUSCO: Thank you, Mr President.

(*Break*)

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

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[17] *Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs*, 3 August 2004 (Observations and submissions of the Republic of Panama to the Preliminary Objections of the Italian Republic, 5 May 2016, Annex 3)

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

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

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

Panama also advances another line of reasoning to claim that Italy has breached article 300. In Panama's Reply, the argument is presented under the rubric *effet utile*. I do not need to assess here whether this expression is accurately used. Essentially, however, Panama's argument is as follows: good faith is an interpretative canon; article 300 and the principle of good faith enshrined therein must be used to draw links between article 300 and article 87. Article 87, in light of the principle of good faith, must be interpreted in a broad manner and the Tribunal can therefore conclude that a breach of article 87, liberally and broadly interpreted, has occurred. Mr President, Members of the Tribunal, if I can kindly ask you to turn to tab 3 of your Judges' folder, you will be able to read Panama's argument in its own words: Panama claims that "it is crucial to use the concept of good faith to interpret article 87 and link it with article 300 of the Convention".[19]

Also, Panama asks the Tribunal "to interpret article 87 in a broad manner ... so as to recognize a material breach of article 87 in light of the concept of good faith".[20]

There are several critical flaws with Panama's reasoning.

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

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

> [T]he reference to "good faith" in article 300 reflects article 2(2) of the UN Charter and the fundamental rule *pacta sunt servanda*. Article 26 of the Vienna Conventions of 1969 and 1986 formulate this rule in relation to a treaty in lapidary form: "Every treaty in force is binding on the parties to it and must be performed by them in good faith."[21]

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

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

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[19] *Reply* (see footnote 7), para. 215.

[20] *Ibid.*, para. 214.

[21] M. H. Nordquist, S. Rosenne, L. B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Volume V (Brill-Nijhoff 1989), p. 152, para. 300.4.

advanced by Saint Vincent and the Grenadines in the *M/V "Louisa" Case*. In that case, the claimant held that article 300 "can be accurately characterized as inviting a broad interpretation and a liberal application. While the determinations are up to this Tribunal, the Applicant urges the Tribunal to accept the responsibilities entailed in article 300".[22]

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

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

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

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

> The maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation .... Properly limited and applied, the maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty.[23]

Mr President, Members of the Tribunal, I will now turn my attention to claims that I would like to address more in depth on their merits. These claims are: a) that Italy breached good faith in allegedly issuing the Decree of Seizure prematurely; b); that Italy breached good faith because it only ordered the arrest of the *M/V "Norstar"* in 1998, even if it had been aware of the *"Norstar"*'s activities before that date; c) that Italy breached good faith because it waited until the *M/V "Norstar"* was in port before ordering the arrest of the ship; and d) that Italy breached good faith because it kept the *M/V "Norstar"* in detention for an inordinate period of time.

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

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

For the second consideration, I would like you to please open tab 21, page 19, of your Judges' folder, where you can read a passage from the Duzgit Integrity Arbitration, a decision rendered in 2016. In that passage the tribunal held: "The Tribunal is not aware of any prior instance in which another tribunal or court has found a breach of article 300 of the Convention. There is, therefore, little guidance as to the legal test to be satisfied to establish such a breach."[24]

This is very much the case. However, the vast majority of Panama's arguments on alleged breach of good faith by Italy point towards the alleged lack of reasonableness on the

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[22] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, p. 41, para. 130.

[23] ILC, 'Draft Articles on the Law of Treaties, with Commentaries', [1966-II] YbILC 187, p. 219, para. 6.

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

part of the Italian authorities when adopting the Decree of Seizure and the request for its execution. Italy does not have to find in theoretical terms what legal test has to be satisfied to establish that no breach of good faith has occurred. It simply has to answer Panama's allegations.

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

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

This much specified, I will first address Panama's argument that Italy breached good faith because it issued the Decree of Seizure prematurely. This argument is in turn composed of two sub-arguments. first, that the Decree of Seizure was issued prematurely because when the Italian authorities adopted the act, the fiscal police, competent for the investigation, had not yet transmitted a formal report on the outcome of the investigative activities to the prosecuting magistrate; second, that the Decree of Seizure was issued in the absence of clear evidence that the *"Norstar"* and those on board were actually guilty of the crime of which they were accused – in other words, that the Decree was issued without the required *fumus*.

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

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

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

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

> The lawfulness of a probative seizure is not to be assessed on the basis of the merits of the claim. Rather, it is to be assessed by looking at the extent to which the constitutive elements of the *notitia criminis* reasonably require further investigation aimed at gathering further forms of evidence, which may not be obtained without either depriving the indicted person of the availability of the good, or making the latter available to Judicial Authority.[25]

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

> Given that probative seizure aims at gathering evidence in respect of facts which may constitute an offence, it cannot itself rely on the certainty of the relevance of the seized good as body of evidence. The existence of a *fumus*, that is the mere possibility of a relationship between the good and the offence, is sufficient for lawful seizing. Therefore, whenever the ongoing investigation substantiates a *fumus*, the seizure is lawful and appropriate, since it is aimed at establishing, in itself or through further investigation, whether a relationship exists between the good and the offence.[26]

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

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

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

The other argument that Panama makes is that Italy breached article 300 with regard to article 87 because it waited till the *"Norstar"* was in port in order to arrest it. According to Panama, in particular, "if Italy admits that it cannot arrest the *M/V "Norstar"* on the high seas as that constitutes a violation of the freedom of navigation, Italy is clearly not acting in good faith when it decides to wait until that foreign vessel has left the high seas to arrest it".

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

Only exceptionally could a State arrest a foreign ship on the high seas without breaching article 87.

One exception is consent. For instance, speaking of activities that typically would constitute a breach of article 87, such as boarding a ship on the high seas, the Tribunal in the

[25] Italian Supreme Court, Criminal Section III, 24/09/2017, n. 15177.
[26] Italian Supreme Court, Criminal Section. II, 21/06/1999, n. 3273.

"Arctic Sunrise" Case held that "a coastal State may only exercise jurisdiction, involving law enforcement measures, over a ship, with the prior consent of the flag State".[27] The Tribunal was referring to a situation where a ship would be arrested on the high seas.

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

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

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

> [T]he M/V Norstar was detained for an inordinate period of time. ... [T]he detention was prolonged and the vessel was kept, in effect, incommunicado under Italy's control and authority over the years. This can only be considered as a betrayal of good faith. ... [I]t is the prolonged detention that brings the applicability of article 300 to this case.[28]

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

In any event, Mr President and Members of the Tribunal, I would like to delve here on the merits of this allegation. Panama's allegations of impropriety on Italy's part are devoid of any ground on the merits. Italy simply has not detained the *M/V "Norstar"* for an unreasonable period of time. The vessel was arrested on 25 September 1998. Its owner only filed a request for the release of the vessel on 12 January 1999, that is, three and a half months after the actual arrest of the ship. We know that at the latest on 11 March 1999, that is, two months after the request from the shipowner, the vessel was released and could have been collected, but it was not.

It took less for Italy to release the vessel pursuant to a request from the shipowner than to the shipowner to make such a request. One wonders why if two months is deemed by Panama too long a time to release a vessel, the shipowner took three and a half months to ask for the release of the ship. Panama also contends that "if Italy had realized that the shipowner was not taking any steps to take the vessel back, it should have instituted proceedings and/or contacted the Government of Panama, which, in turn, would have taken the necessary measures".

Mr President, Members of the Tribunal, one can lead a horse to water, but one cannot make it drink! In its pleadings Panama says that Italy should repay several thousand euros in

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[27] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia), PCA Case No. 2014-02, Award on the Merits, 14 August 2015*, p. 55, para. 231.

[28] *Reply* (see footnote 7), para. 228.

fees of lawyers that Mr Morch had to retain in Italy in the context of the domestic proceedings. We know for certain from those invoices that Mr Morch had counsel in 2003. Counsel could certainly have advised Mr Morch on the practical modalities of recovering his vessel after the release if he had any doubt. Italy should not bear the consequences of Mr Morch's lack of basic diligence in pursuing his interests.

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

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

I quote directly from Panama's pleadings, a passage that you can find at tab 3 of your Judges' folder: "The fact that only articles 87 and 300 have heretofore been considered relevant to the present dispute does not preclude the Tribunal from considering other violations of international law closely related to these provisions."

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

In this sense, article 92 does become relevant but in a manner that assists Italy's argument on article 87, specifically, to support our position that article 87 must be interpreted in a way that preserves its utility under the Convention. If article 87 prohibited the extraterritorial exercise of jurisdiction as such, without interference on the movement of a vessel on the high seas, how would it differ from article 92 then? This is again *effet utile*.

This, however, is a matter of applicable law and interpretation. This is not one of the modalities in which other provisions of the Convention can become relevant to the present dispute as Panama suggests. This is the only modality. The relevance of this provision does not mean that the jurisdiction of the Tribunal can be extended to decide on violations of the Convention that are not part of a dispute brought before the Tribunal. Panama's reasoning means that a claimant could commence a case before the Tribunal over the interpretation and application of certain provisions of the Convention, and turn that dispute into a completely different one, potentially involving the entire set of norms of UNCLOS. This is certainly not how the Convention works, and not how international litigation more in general works. As explained by the ICJ in the *Oil Platform* case, it is well established in the Court's jurisprudence that the parties to a case cannot in the course of proceedings "transform the dispute brought before the Court into a dispute that would be of a different nature".[29]

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

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

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[29] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 161, p. 213, para. 117.

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

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

Even leaving the question of preliminary proceedings aside, articles 92 and 97 were never included in Panama's original Application. According to the International Court of Justice in the *Fisheries* case: "It is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it."[30] This case law was quoted with approval by the ITLOS in the *M/V "Louisa" Case*. It is reflected at article 24 of the Statute of the Tribunal and article 54, paragraph 1, of its Rules of Procedure, which require the applicant, among other things, to "specify the precise nature of the claim". What this Tribunal means by setting out a claim in an application was determined by the Judgment of 4 November: "It is not sufficient for an applicant to make a general statement without invoking particular provisions of the Convention that allegedly have been violated."[31]

Against this background, Panama's claims on articles 92 and 97, which Panama never invoked in the Application, constitute new claims. Without prejudice to Italy's position on the lack of the jurisdiction of the Tribunal, as articulated just a few moments ago, these claims are subject to the rule posited by this Tribunal in the *M/V "Louisa" Case*. According to this rule: "It is a legal requirement that any new claim to be admitted must arise directly out of the Application or be implicit in it" and "while the subsequent pleadings may elucidate the terms of the Application, they must not go beyond the limits of the claim as set out in the Application."[32]

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

Panama's claims under articles 92 and 97 do not arise directly out of the Application. In the *Fishery* case, the expression "directly out of the Application" was further developed as "directly out of the question which is the subject matter of that Application". This expression has become common in the case law of the Court. The focus has to be therefore on the subject-matter of the Application. The subject matter of the Application filed by Panama is limited and concerns only one question: freedom of navigation. I would like to quote directly from Panama's Application to show you how Panama describes the subject matter of the Application in its own words. If you could kindly to turn to tab 25 of your folder, according to Panama: "The right of peaceful navigation of the Republic of Panama through the *M/V "Norstar"* was violated by the Italian Republic agents, the latter hindering the movements and activities of foreign vessels on the high seas."[33]

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

Allowing claims concerning articles 92 and 97 would change the subject matter from freedom of navigation to questions of exclusivity of the exercise of jurisdiction, including in the event of incident of navigation. This is tantamount to turning the *M/V "Norstar" Case* into

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[30] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, p. 447, para. 29.

[31] *M/V "Norstar"* (see footnote 24), pp. 28-29, para. 109.

[32] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, p. 44, paras. 142-143.

[33] *Application of the Republic of Panama*, 16 November 2015, para. 9.

a dispute "distinct from the subject of the dispute originally submitted in the Application".[34] In *Phosphate in Nauru*, in line with the case law of the PCIJ, the Court refused to entertain claims of this nature.

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

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

> The facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it … The Congo's … submissions arise "directly out of the question which is the subject-matter of that Application".[35]

In the *Fisheries* case, Germany raised for the first time in the Memorial the question of the harassment, on the part of Iceland, of German fishermen's boats. The Court, in a passage that you can find at tab 26, page 6 of your folder, held that the submission was "one based on facts subsequent to the filing of the application, but arising directly out of the question which is the subject-matter of that application".[36]

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

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

In *Certain Phosphate Lands in Nauru*, quoting its previous case law, the International Court of Justice explained that "implicit" means more than "generally linked". It held that: "[I]t is not sufficient that there should be links … of a general nature. Additional claims must have been implicit in the Application."[37] Yet, Panama only says that articles 92 and 97 are "closely related" to article 87. By Panama's own qualification, therefore, articles 92 and 97 are closely related to article 87, but not implicit in article 87.

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

> An additional claim is admissible if it is already implicit in the original case, or, in other words, if one of the elements of the initial claim is simply developed further – for example by drawing out the implications – so that it is not a raw new element of an enlargement of the case. … The links between the part and an element that was already present in the initial claim must be

[34] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240 ff., para. 68.
[35] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, p. 16, para. 36.
[36] *Fisheries Jurisdiction (Federal Republic of Germany* v. *Zeeland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, p. 203, para. 72.
[37] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240 ff., para. 67.

> sufficiently strong to justify the conclusion that the new element is implicit in the old. The links can also be purely objective in nature: independently of the question whether the new material amounts to a claim additional to the one originally formulated, the new material will be admissible if the Court is in any event implicitly bound to take account of the "additional issue" because it is indissociable from the legal reasoning associated with the original claim.[38]

In *Temple of Preah Vihear,* also at tab 26, page 10 of your folder, the ICJ ruled that the new question of the withdrawal of the army of a State from a disputed territory was implicit in the question concerning the sovereignty over that territory. The Court explained that the claim was "implicit in, and consequential on, the claim of sovereignty itself".[39]

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

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

Had Panama wanted to extend the dispute to breaches of articles 92 and 97, it could have done so by indicating them in the Application. Nothing prevented it from doing so back then. However, it is now too late to do so. As the Tribunal has stated in the *M/V "Louisa" Case*, in line with the established case law of the ICJ, these are not mere formalities, but matters that impinge on the legal security and the good administration of justice.[40] Nor is it a mere formality that Panama has failed to indicate, in its final submissions, that it is seeking from the Tribunal a declaration that either article 92 or article 97 have been breached.

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

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

THE PRESIDENT: Thank you, Mr Busco.

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

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

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

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

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

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

PUBLIC SITTING HELD ON 13 SEPTEMBER 2018, 10 A.M.

Tribunal

Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

For Panama: [See sitting of 10 September 2018, 10 a.m.]

For Italy: [See sitting of 10 September 2018, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 13 SEPTEMBRE 2018, 10 HEURES

Tribunal

Présents : M. PAIK, *Président* ; MM. NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, Mme KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mme LIJNZAAD, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 10 septembre 2018, 10 h 00]

Pour l'Italie : [Voir l'audience du 10 septembre 2018, 10 h 00]

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

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

STATEMENT OF MR TANZI – 13 September 2018, a.m.

First Round: Italy (continued)

STATEMENT OF MR TANZI
LEAD COUNSEL AND ADVOCATE FOR ITALY
[ITLOS/PV.18/C25/7/Rev.1, pp. 1-7]

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

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

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

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

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

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

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

This is not the first time, Mr President, that Panama has blown hot and cold on issues relating to human rights. Let me recall, Mr President, that Panama had once alleged in the "Legal Grounds" section of its Application that "[a]fter imprisoning members of the crew of the *M/V 'Norstar'*, the Italian Republic has (up until this date) evaded to account for this event".[4]

Except that, Mr President, this event never occurred. Panama had to concede in its Reply that "there were no restrictions of movement of any individual interested in the

[1] *Memorial of the Republic of Panama*, 11 April 2017, para. 260.
[2] *Reply of the Republic of Panama*, 28 February 2018, para. 593.
[3] ITLOS/PV.18/C25/1, page 4, lines 47-48.
[4] *Application of the Republic of Panama*, 15 November 2015, para. 10.

operations of the *M/V 'Norstar'"*.[5] You may find the relevant passage of Panama's Reply at tab 3 of your Judges' folder.

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

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

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

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

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

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

> Article 293 is not … a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention.

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

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

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[5] *Reply* (see footnote 0), para. 21.
[6] *The Arctic Sunrise Arbitration (Netherlands* v. *Russia*), *PCA Case No. 2014-02, Award on the Merits, 14 August 2015*, p. 46, para. 198.
[7] *Memorial* (see footnote 1), paras 140-141.
[8] *Ibid.*, paras 142-143.
[9] *Ibid.*, para. 148.
[10] *The Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe), PCA Case No. 2014-07, Award, 5 September 2016*, paras 207-208.

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

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

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

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

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

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

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

As to proportionality, you may recall that Professor Emily Crawford has expressed that: "[A]s a general principle, proportionality means that a State's acts must be a rational and reasonable exercise of means towards achieving a permissible goal, without unduly encroaching on protected rights of either the individual or another State."[13]

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

The Decree, Mr President, was also plainly proportionate. It was proportionate to its investigatory aims. This was confirmed by its temporary nature, which only prevented the

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

[12] European Court of Human Rights, *Case of Silickienė* v. *Lithuania* (Application no. 20496/02), Judgment, 10 April 2012, para. 63.

[13] E. Crawford, 'Proportionality', *Max Planck Encyclopedia of Public International Law* (May 2011) <http://opil.ouplaw.com.ezproxy.unibo.it/view/10.1093/law:epil/9780199231690/law-9780199231690-e1459?rskey=k05RpO&result=1&prd=EPIL>, para. 1.

owner's access to the ship for about five months – five months since the enforcement of the Decree, until the necessary investigation was completed, following which an order for conditional release was granted in February 1999; and the release of the vessel was confirmed by the final and unconditional release in 2003.

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

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

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

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

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

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

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

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

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[14] *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 15, para. 128.
[15] *Reply* (see footnote 2), para. 270.
[16] *Ibid.*, para. 145.
[17] *Ibid.*, para. 146.
[18] *Memorial* (see footnote 1), para. 133.

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

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

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

Panama's complaint about the overall conduct of Italy's judiciary is essentially an allegation of denial of justice. This inevitably brings us back again to the issue of Panama's failure to resort to the remedies that were available under Italian law. It is not by accident that in *"Tomimaru"* the notion of due process of law in relation to measures restricting the right to property in a vessel was given substance by the Tribunal explaining that such measures "should not be taken in such a way as to prevent the ship owner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention".[20]

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

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

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

Mr Morch on Monday afternoon freely accepted that he and his associates did not pursue the local remedies and he did not suggest that they were impeded in any way by the Italian authorities from doing so, even though it turns out that Mr Morch was assisted by attorneys in Italy, for which he paid their fees.[22] It was shown that such remedies were partially used for those remedies and obtained the conditional lifting in February 1999. As I have clearly indicated, the individuals in question thereafter remained inactive until this case was filed in 2015.

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

But even if, *arguendo*, Panama could bring the claims in question, the factual record provides that the Tribunal may find an equally clear answer: the Italian authorities investigated

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[19] *The Duzgit Integrity Arbitration* (see footnote 10), p. 54, para. 209.

[20] *Ibid.*

[21] *Pantechniki S.A. Contractors and Engineers (Greece)* v. *The Republic of Albania, ICSID Case No. ARB/07/21, Award (30 July 2009)*, para. 96.

[22] ITLOS/PV.18/C25/2, p. 14, lines 34-44.

the vessel according to the law; released the vessel according to the law; acquitted the accused according to the law; and promptly notified the interested individuals of all of this.

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

THE PRESIDENT: Thank you, Mr Tanzi.

I then give the floor to Ms Graziani to make a statement.

EXPOSÉ DE MME GRAZIANI
CONSEIL ET AVOCAT DE L'ITALIE
[TIDM/PV.18/A25/7/Rev.1, p. 8-24; ITLOS/PV.18/C25/7/Rev.1, pp. 7-22]

Monsieur le Président, Mesdames et Messieurs les juges, c'est un honneur et un privilège de m'adresser pour la deuxième fois à cet éminent Tribunal au nom de l'Italie. Je salue également les membres de la délégation du Panama.

Ma tâche ici concerne l'indemnisation réclamée par le Panama dans la présente affaire.

Il m'incombe avant tout de préciser que j'avancerai tous mes arguments sans préjudice de la thèse constamment soutenue par l'Italie tout au long de la phase écrite et réitérée hier et encore ce matin, à savoir qu'aucune indemnisation ne devrait être accordée au Panama, étant donné que l'Italie n'a violé ni l'article 87 ni l'article 300 de la Convention.

J'ajoute que l'indemnisation du préjudice découlant d'un fait internationalement « licite » peut être bien envisagée *in abstracto*. C'est notamment le cas prévu par l'article 110, paragraphe 3 de la Convention, consacré au « droit de visite » en haute mer.

Toutefois, comme Madame Caracciolo l'a dit hier, l'article 110 de la Convention n'est manifestement pas applicable en l'espèce.

Ceci étant dit, je tiens à dissiper toute impression que je cherche à me dérober à la responsabilité de traiter en détail le sujet de l'indemnisation des dommages réclamée par la République du Panama. Mon intervention a pour objet de démontrer comment et à quel point les prétentions du Panama sont fallacieuses et erronées.

Monsieur le Président, ma plaidoirie sera articulée en trois parties : une première partie d'ordre général vise à résumer pourquoi le « théorème accusatoire » du Panama est dépourvu de fondement juridique crédible ; une deuxième partie est centrée sur le « lien de causalité » entre le fait illicite dont le Panama tient l'Italie responsable et le préjudice qui en résulterait ; enfin, une troisième partie porte sur la quantification des dommages-intérêts réclamés par le Panama, lesquels, de l'avis de l'Italie, sont tout à fait démesurés.

Monsieur le Président, Mesdames et Messieurs les juges, la première partie de mon intervention est liée à ce que Monsieur Tanzi a dit hier de la « charge de la preuve », car, même s'agissant d'indemnisation, les revendications du Panama sont loin de respecter le principe qui veut que c'est à celui qui se plaint de rapporter la charge de la preuve.

Quand on lit les pages du mémoire et de la réplique du Panama, quand on écoute les plaidoiries, la question qui vient immédiatement à l'esprit est la suivante : où est la preuve, où est la preuve de ce que le Panama prétend ? Je le dis avec respect mais dans les termes les plus énergiques : les prétentions du Panama sont d'un point de vue juridique évasives, partiales et incomplètes. Les très maigres éléments fournis par le Panama ne peuvent pas être considérés comme équivalant, même de loin, à une démonstration ni de l'existence d'une preuve ni non plus de l'existence d'indices précis et concordants, car l'indice lui-même est trompeur et doit à son tour être prouvé au cours de la procédure.

Pour ne citer qu'un exemple, prenons la valeur économique du « Norstar ». Dès le début de l'instance, le Panama n'a cessé de répéter que le « Norstar » était un navire en excellent état, dont les activités commerciales florissantes, les actifs importants et la réputation bien établie ont été réduits à néant suite à l'ordonnance de saisie du procureur du Tribunal de Savone. Or, d'après le Panama, la preuve de la valeur du navire découlerait, entre autres, d'un document rédigé le 4 avril 2001 par Monsieur Olsen[1]. Je ne peux rien dire des compétences professionnelles de Monsieur Olsen, sauf que – chose assez étonnante – en premier lieu, Monsieur Olsen n'a jamais eu la possibilité de faire une inspection physique du « Norstar » et, en deuxième lieu, le Panama n'a jamais estimé nécessaire de nous fournir la preuve du fait que

[1] *Mémoire de la République du Panama*, 11 avril 2017, annexe 5.

Monsieur Olsen connaissait bien le « Norstar », étant donné qu'il avait inspecté le navire en mai 1998. Est-il vraiment possible de se contenter du « Document Olsen » comme base d'une estimation réaliste et plausible de la valeur du « Norstar » ou – comme je le crois – serait-il possible de répondre au Panama par l'adage bien connu selon lequel « ce qui est affirmé sans preuve peut être rejeté sans preuve »?

Par ailleurs, examinons de plus près l'attitude du Panama face à la « charge de la preuve » pour ce qui est de l'indemnisation. Pendant la phase des écritures et même dans les plaidoiries, le Panama a adopté pour son argumentation une stratégie articulée grosso modo comme suit.

Le plus souvent le Panama reprend le même argument en d'autres termes, cela je le lui accorde, oubliant cependant que ce n'est pas parce qu'on répète mille fois un refrain que celui-ci devient plus crédible.

Parfois, le Panama s'est appuyé sur des éléments de preuve qu'il a apparemment considérés comme décisifs pour dissiper toute espèce de doute, mais qui ne l'étaient pas. Prenez par exemple le sujet des photos du « Norstar » qui figurent à l'Annexe 4 de la réplique du Panama. Au paragraphe 435 de sa réplique, le Panama tient à préciser *(Continued in English)* : « The photos of the *M/V 'Norstar'* will show the standard of the vessel as presented for serious clients during offshore activities. »[2] *(Poursuit en français)* C'est aussi à partir de ces photos que nous devrions apparemment conclure de la valeur du « Norstar » en 1998, sauf que ces photos ne sont pas datées et que cela leur confère un degré de véracité tout à fait semblable à celui qu'on pourrait accorder aux photos reçues d'un inconnu qui nous montre un « château de la Loire » en le faisant passer pour sa propre maison. Ces photos ne nous montrent, en fait, que l'image d'un navire tout neuf plutôt que celle d'un navire âgé de plus de 30 ans[3].

Parfois, incapable de fournir la preuve, le Panama s'est caché derrière la maxime de la *res ipsa loquitur*, « la chose parle d'elle-même ». Mais la référence que le Panama fait à cette maxime témoigne seulement qu'il s'essaie d'échapper à la charge de la preuve. Le Panama fait semblant de ne pas savoir qu'une telle maxime répond à des besoins particuliers, afin d'aplanir les difficultés de la preuve lorsque la preuve de la faute est difficile à rapporter, comme cela arrive, par exemple, dans le domaine de la responsabilité médicale ou des accidents aériens ou maritimes. Prenez, par exemple, le paragraphe 454 de la réplique du Panama. Dans ce paragraphe, le Panama – pour justifier que dès l'instant de l'immobilisation du « Norstar » le propriétaire, dénué de tous ses revenus, ne pouvait pas payer la caution imposée en 1999 – se limite à affirmer *(Continued in English)*: « It is unnecessary to show that a ship under arrest could not continue being a productive business entity. It is an established fact ... . »[4]

(Poursuit en français) Mais est-ce qu'on peut vraiment soutenir que là où il survient une ordonnance de saisie, là se produit immanquablement, invariablement et inévitablement une perte immédiate de tout revenu des propriétaires des biens objets de la saisie, qui les empêche de verser une caution et de récupérer le bien ? Pour réduire à néant l'affirmation du Panama, il suffit de dire que dans l'affaire où a été impliqué le navire « Spiro F », affaire citée par le Panama, la caution a été payée et le navire a été récupéré.

Parfois aussi, le Panama, ne sachant pas comment fonder ses prétentions, s'en remet au « calcul des probabilités ». Ainsi, s'agissant du versement de la caution nécessaire pour reprendre le « Norstar » en 1999, le Panama arrive à dire dans sa réplique que même si le propriétaire du « Norstar » avait eu l'argent pour payer la dite caution, le navire *(Continued in English)* « would probably have been arrested again at the next opportunity doing its

[2] *Reply of the Republic of Panama*, 28 février 2018, par. 435.
[3] Ibid., annexe 4.
[4] Ibid., par. 454.

business. »[5] *(Poursuit en français)* Je ne conteste pas le don de voyance ou de divination du Panama. Mais, ici, nous ne sommes pas à Delphes.

Enfin, et comme l'a souligné hier Monsieur Tanzi, à chaque fois que le Panama est conscient de la faiblesse de ses argumentations, d'une manière assez stupéfiante il retourne la situation, change la donne à son profit et renverse la charge de la preuve : autrement dit, c'est le Panama qui demande à l'Italie de prouver ce que l'Italie a demandé au Panama de prouver. Cela arrive de manière manifeste et frappante par rapport, encore une fois, à la valeur du « Norstar ». Le Panama, après avoir réitéré que le document « Olsen » et les photos du « Norstar » ont une force probante incontestable, dans sa réplique se retranche derrière une phrase étonnante, qui est la suivante *(Continued in English)* : « By providing such a standard of evidence, the burden of proof now shifts to the respondent to prove that this assessment was wrong. »[6]

(Poursuit en français) Je tiens d'ores et déjà à rassurer le Panama que je ferai de mon mieux pour convaincre ce Tribunal que les arguments de l'Italie sont tous bien fondés. Mais je voudrais attirer, là, l'attention du Tribunal sur un point qui me semble bien plus important : après d'innombrables paroles contenues dans le mémoire et dans la réplique et écoutées au cours de l'audience, l'Italie ne voit rien que des assertions.

Monsieur le Président, Mesdames et Messieurs les juges, la deuxième partie de ma plaidoirie est dédiée au lien de causalité entre le fait prétendument illicite imputable à l'Italie et le préjudice réclamé par le Panama.

Il convient tout d'abord de reprendre là où on s'était arrêté le 4 novembre 2016, quand ce Tribunal a précisé le périmètre du litige entre le Panama et l'Italie. Comme mes collègues l'ont rappelé hier, le noyau de la présente affaire est limité à la question de savoir si l'« ordonnance de saisie » et la « demande *d'exequatur* », en tant que telles, ont déterminé les dommages revendiqués par le Panama[7].

C'est donc à partir de l'arrêt du Tribunal de novembre 2016 que je vais traiter les arguments défensifs avancés par l'Italie au sujet du « lien de causalité », à savoir trois arguments défensifs alternatifs que je présenterai par ordre d'importance, c'est-à-dire en ordre hiérarchique décroissant.

Monsieur le Président, Mesdames et Messieurs les juges, pour ce qui est du premier argument l'Italie soutient que même en supposant que l'« ordonnance de saisie » et la « demande de mise à exécution » aux autorités espagnoles soient en violation de la Convention, le préjudice revendiqué par le Panama ne présente pas du tout une connexion causale avec l'acte prétendument illicite attribué à l'Italie.

Selon le Panama la question du « lien de causalité » est tout à fait simple, sinon banale : comme l'Italie a ordonné la saisie du « Norstar », par conséquent c'est à l'Italie de réparer « tous » – et je le dis bien « tous » – les dommages revendiqués par le Panama, qu'ils soient ou non liés à l'acte illicite attribuable à l'Italie.

Ce raisonnement nous est proposé comme mathématiquement impeccable, à la manière d'un syllogisme aristotélicien. D'après le Panama, l'ordonnance de saisie aurait conduit à un « effet domino » ou à un « effet boule de neige », à savoir à une « cascade » d'événements supplémentaires dont chacun est à la base de nouveaux dommages et, dès lors de nouvelles revendications.

En particulier, le processus argumentatif du Panama est fondé sur le criterium du test « *but for* », parfaitement synthétisé dans cette phrase contenue au paragraphe 168 de son mémoire *(Continued in English)* : « Would damages have occurred if Italy had not ordered and

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[5] Ibid., par. 457.
[6] Ibid., par. 533.
[7] *Navire « Norstar » (Panama c. Italie), exceptions préliminaires, ordonnance du 15 mars 2016, TIDM Recueil 2016*, p. 31, par. 122.

requested the arrest of the *M/V 'Norstar'*? »[8] *(Poursuit en français)* De façon identique, la réplique du Panama recourt en maints passages à la rhétorique du « s'il n'y avait pas eu » *(Continued in English)* : « If it were not for its wrongful prosecution of the *M/V 'Norstar'* »;[9] « if the *M/V 'Norstar'* had not been arrested »;[10] « if it were not for the unlawful arrest of this vessel by Italy. »[11]

(Poursuit en français) Bien que le ton emphatique vienne en aide au Panama, laissez-moi vous dire que les argumentations du Panama ne tiennent pas la route du point de vue ni logique ni juridique.

Les prétentions du Panama reposent, en effet, sur une fausse interprétation de trois expressions contenues dans l'arrêt du 4 novembre 2016, à savoir : « ordonnance de saisie et demande de son exécution », « exécution de la saisie » et « mainmise juridique » du « Norstar » pendant l'immobilisation. Le Panama met tout dans le même panier, mélange tout, ne distingue pas entre « dommage » et « dommage », à savoir n'indique pas la « source » précise des dommages revendiqués. Le Panama brouille les cartes et s'en remet à la bienveillance de ce Tribunal, notamment vous laisse à vous, Mesdames et Messieurs les juges, la tâche de démêler tous les nœuds de son histoire chaotique et embrouillée.

L'Italie dit « non ». « Non », il n'est pas tenable de considérer l'« ordonnance de saisie et la demande de sa mise à exécution », d'un côté, et l'« exécution de la saisie », de l'autre côté, en tant que « synonymes », comme cela arrive dans les revendications, écrites et orales, du Panama dans lesquelles on ne sait plus où l'une s'arrête – l'ordonnance de saisie – et où l'autre commence – l'exécution de la saisie. Ni d'un point de vue sémantique ni, encore moins, d'un point de vue juridique, il n'est possible de traiter sur le même plan et donc d'assimiler l'« ordonnance » de saisie et la « demande d'exequatur » à la concrète et effective « exécution » de la saisie.

Sans préjudice de ce que je viens de dire, permettez-moi d'ajouter que « non », il n'est pas non plus tenable de dire que les dommages découlant de l'immobilisation du navire doivent être réparés par l'Italie, car l'Espagne se serait limitée à prêter son aide et assistance à l'Italie. Il faut être clair : si l'Italie a exercé un quelconque contrôle sur le « Norstar » pendant son immobilisation, cette forme de contrôle juridique implique que la décision portant sur le maintien ou non de la saisie sur le « Norstar »incombait aux autorités judiciaires italiennes. Au contraire, les autorités judiciaires italiennes n'avaient aucune juridiction sur la manière dont la mesure de saisie a été exécutée dans la réalité.

Permettez-moi d'ajouter qu'il me semble assez étonnant qu'aujourd'hui le Panama fasse autant de confusions, alors que c'est le Panama même qui, pendant la phase des exceptions préliminaires, a reconnu ce que je viens de dire. Je me réfère au paragraphe 150 de l'arrêt de novembre 2016, où le Tribunal a affirmé *(Continued in English)* « Panama points out that 'Spain was … responsible for the manner and methods of the seizure'. »[12]

(Poursuit en français) Eh bien, venons-nous à la conclusion : l'« ordonnance de saisie » et la « demande de sa mise à exécution » aux autorités espagnoles n'ont pas déterminé, à elles seules, à savoir indépendamment de leur exécution concrète, le préjudice réclamé par le Panama. Donc, si vraiment on voulait utiliser le test « *but for* » proposé par le Panama, la question que l'on devrait se poser est la suivante : « Abstraction faite de l'exécution de la mesure de saisie, l'ordonnance de saisie a-t-elle ou non, à elle seule, engendré les dommages revendiqués par la République du Panama dans la présente affaire ? ». La réponse est « non », évidemment.

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[8] *Memorial* (voir note de bas de page 1), par. 168.
[9] *Reply* (voir note de bas de page 2), par. 413.
[10] Ibid., par. 414.
[11] Ibid., par. 415.
[12] *M/V "Norstar"* (voir note de bas de page 7), par. 150.

D'ailleurs, le Panama semble fort conscient que la longue liste des dommages prétendument soufferts a son origine, non pas dans l'« ordonnance de saisie » en tant que telle, mais dans l'« exécution » de ladite mesure et dans la concrète « immobilisation » du « Norstar ». Ainsi, dès sa Requête introductive, le Panama a souligné que *(Continued in English)* « through the long arrest the market for such business had been destroyed. »[13] *(Poursuit en français)* Dans son mémoire, le Panama a affirmé *(Continued in English)* « The huge economic loss … has resulted from its arrest and prolonged confinement infringing on its freedom to navigate freely. »[14] *(Poursuit en français)* D'une manière plus évidente, dans la réplique le Panama a précisé que *(Continued in English)* « all damages caused have directly resulted from the enforcement of the arrest of the *M/V 'Norstar'* by Italy. »[15]

(Poursuit en français) En conclusion, si le Panama prétend que l'« ordonnance de saisie » et la « demande de son exécution » ont violé l'article 87 de la Convention, il conviendrait que le Panama réexamine ses revendications auprès de ce Tribunal et se limite à demander un jugement déclaratoire en tant que « satisfaction appropriée ».

Monsieur le Président, Mesdames et Messieurs les juges, le deuxième argument de l'Italie est avancé pour le cas où ce Tribunal constaterait un lien de causalité entre l'« ordonnance de saisie » et le « préjudice » du Panama. Ce deuxième argument porte sur le fait que dans leur quasi-totalité, les dommages-intérêts revendiqués par le Panama ne présentent pas une connexion causale naturelle et directe avec la violation de la Convention dont le Panama tient pour responsable l'Italie.

Le Panama ne s'est guère préoccupé, pendant la phase écrite, pas plus que dans la phase orale, de démontrer « pourquoi » et « comment » l'ordonnance de saisie, en 1998, aurait « déclenché » tous les dommages revendiqués par le Panama dans la présente affaire[16]. Ce que le Panama s'est contenté de faire, je le répète, c'est d'invoquer le *criterium* du test « *but for* ».

Or il me semble important d'appeler votre attention sur le fait que le test « *but for* » n'est qu'en apparence logique, et que son application risque, bien au contraire, de nous faire dérailler et de nous conduire sur un terrain glissant. Je me demande, par exemple : que se serait-il passé si, pendant l'exécution de la saisie, un membre de l'équipage du « Norstar » avait perdu l'équilibre, était tombé dans les eaux du port et s'était cassé une jambe ? Aujourd'hui le Panama pourrait réclamer devant ce Tribunal l'indemnisation pour les frais médicaux soutenus à cause de ce malheureux accident. Ce que j'ai dit pourrait ressembler à un paradoxe, mais à bien des égards, la plupart des dommages revendiqués par le Panama ne s'éloignent pas beaucoup de l'exemple que je viens de donner.

L'imputation du dommage ou du préjudice au fait international illicite est un processus juridique et pas seulement « historique ». Comme l'a dit, d'une manière très nette, la Commission du droit international, dans son projet sur la responsabilité internationale de l'Etat, la réparation ne compensera que les dommages qui sont vraiment la conséquence « normale », « naturelle », « nécessaire ou inévitable », « prévisible » de l'acte qui a engagé la responsabilité de l'Etat, et par conséquence, la réparation ne compensera pas le dommage qui est « trop indirect, trop éloigné et trop incertain pour être évalué »[17].

Ces principes ont été appliqués par ce Tribunal dans l'*Affaire du navire « Virginia G »*, où le Tribunal a conclu que beaucoup de demandes présentées par le Panama n'avaient pas satisfait la condition du « lien de causalité » entre la confiscation du « Virginia G » et lesdites

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[13] *Application initiating proceedings by the Republic of Panama*, 16 novembre 2015, par. 7.
[14] *Memorial* (voir note de bas de page 1), par. 170.
[15] *Reply* (voir note de bas de page 2), par. 405. Voir aussi par. 410.
[16] *Mémoire* (voir note de bas de page 1), par. 181.
[17] Commission du droit international, *Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite*, A/56/10, 2001, commentaire de l'article 31, par. 10.

demandes[18]. Ces principes ont été affirmés à nouveau le 2 février 2018 par la Cour internationale de Justice dans l'affaire du *Certaines activités menées par le Nicaragua dans la région frontalière* où la Cour a dit :

> Pour accorder indemnisation, elle analysera si, et dans quelle mesure, chacun des chefs de dommages [...] est la conséquence du comportement illicite du défendeur, en recherchant « s'il existe un lien de causalité suffisamment direct et certain entre le fait illicite [...] et le préjudice subi par le demandeur ».[19]

Eh bien, d'après l'Italie, si le Tribunal devait constater qu'un lien de causalité existe entre l'« ordonnance de saisie » et le « préjudice » du Panama, les seuls dommages-intérêts qui pourraient respecter, *in abstracto*, le « lien de causalité » avec l'ordonnance de saisie sont ceux relatifs à la non-utilisation du « Norstar » pendant son immobilisation et à la perte de cargaison prétendument soufferte par l'affréteur.

En dépit de l'accent rhétorique du Panama, aucun des autres dommages ne présente une connexion causale directe et naturelle avec l'acte prétendument illicite de l'Italie, car le Panama n'a pas fourni la moindre preuve que l'ordonnance de saisie du « Norstar » soit la cause « efficiente » et « immédiate », ainsi que la « source » de ces pertes.

En conclusion, le *criterium* du « *but for* » utilisé par le Panama est certainement suggestif, car il fait revenir à l'esprit l'« effet Cléopâtre » dont parlait Blaise Pascal, lorsqu'il disait : « Le nez de Cléopâtre, s'il eût été plus court, toute la face de la terre aurait changé ». En termes généraux et abstraits il n'est pas peut-être faux de dire qu'une seule « cause » – le nez de Cléopâtre – peut engendrer des conséquences inattendues qui s'étendent à l'échelle des nations. Mais là, on est devant un Tribunal et la question se présente en termes passablement différents : où est la preuve du lien de causalité qui justifierait tous les dommages invoqués par le Panama ?

Monsieur le Président, Mesdames et Messieurs les juges, j'en viens, enfin, au troisième argument défensif de l'Italie vis-à-vis du lien de causalité. A supposer qu'une connexion causale existe entre la violation de la Convention et les dommages réclamés par le Panama, l'Italie soutient que le comportement du propriétaire du « Norstar », avant ou, en tout cas, après l'arrêt du Tribunal de Savone de 2003, a brisé le « lien de causalité » entre l'acte dont le Panama tient pour responsable l'Italie et le préjudice invoqué par le Panama.

Dès le début du procès, et encore pendant la phase orale, le Panama a tenté de faire apparaître le propriétaire du « Norstar » comme une victime à la merci du système judiciaire italien. C'est précisément pour cette raison que le Panama n'a pas lésiné sur ses vives critiques au système judiciaire. C'est également pour cette raison que le Panama a insisté maintes fois sur la faute intentionnelle et volontaire du procureur du Tribunal de Savone, comme s'il avait pris ses décisions en toute connaissance de cause, à savoir dans le but d'infliger de lourdes pertes à Monsieur Morch.

Toutefois, à bien des égards, il ressort des faits de la cause une histoire différente de celle que le Panama raconte depuis toujours.

En effet, et comme Monsieur Tanzi l'a souligné hier, le propriétaire du « Norstar » a fait montre d'une inaction volontaire et d'une négligence manifeste dans la défense de ses intérêts. Et l'omission fautive manifestée par Monsieur Morch a interrompu, en tant que *novus actus interveniens*, le « lien de causalité » dont on est en train de débattre.

La jurisprudence et la pratique internationales sont unanimes à reconnaître que l'indemnisation n'est pas due lorsque, dans le déroulement des événements, un fait étranger de

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[18] *Navire « Virginia G » (Panama/Guinée-Bissau), arrêt, TIDM Recueil 2014*, par. 435 à 439.

[19] CIJ, *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, (Indemnisation), par. 32.

nature prépondérante a rompu la connexion causale entre le fait dommageable initial et le préjudice final. Dans la phase écrite, l'Italie a cité, à titre d'exemple, le deuxième rapport sur la responsabilité de l'Etat où Monsieur Arangio-Ruiz a fait référence à l'existence d'un *(Continued in English)* « clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed ».[20]

(Poursuit en français) C'est donc à la lumière de ce que je viens de dire qu'il faut examiner de plus près le comportement du propriétaire du « Norstar » *avant* et *après* l'arrêt du Tribunal de Savone de 2003.

Monsieur le Président, Mesdames et Messieurs les juges, le premier événement-clef de la cause qui, selon l'Italie, a brisé le « lien de causalité », porte sur le comportement du propriétaire du « Norstar » en 1999, lorsque Monsieur Morch n'a pas récupéré le navire contre le versement d'une garantie.

Hier Monsieur Tanzi a rappelé que la garantie imposée au propriétaire du « Norstar » était tout à fait légitime vis-à-vis de la législation italienne et du droit international. Je n'y reviendrai pas.

Il convient par contre de traiter en détail la « raison » qui, d'après le Panama, justifierait le non-versement de la garantie par le propriétaire du « Norstar ». Le Panama reste fidèle à un sujet qu'il a soutenu dès sa Requête introductive, à savoir que le propriétaire du « Norstar » ne pouvait pas payer le montant de la garantie car il s'agissait d'un montant *(Continued in English)* « which the owner of the *M/V 'Norstar'* could not provide as through the long arrest the market for such business had been destroyed with no further income ».[21] *(Poursuit en français)* Examinons attentivement ce cheval de bataille de la République du Panama, car d'après l'Italie le Panama a fait deux faux pas.

Premier faux pas : dans le mémoire, la raison fondamentale qui aurait réduit à néant les revenus du propriétaire du « Norstar » et de la sorte empêché le versement de la garantie consisterait dans l'« immobilisation prolongée » du « Norstar »[22]. Par contre, dans la réplique, et même au cours de sa plaidoirie, le Panama a dit que la crise économique du propriétaire du « Norstar » aurait été déterminée « dès l'instant » où le navire a été immobilisé dans le port de Palma de Majorque[23]. La différence que je viens de souligner n'est pas le fruit du hasard. Au contraire, le Panama a cherché à dribbler une objection spécifique avancée par l'Italie dans la phase écrite, à savoir que « cinq mois » se sont écoulés entre l'immobilisation du « Norstar » et la décision adoptée par le Procureur du Tribunal de Savone portant sur la garantie. Cinq mois ! Cinq mois ne peuvent pas être considérés comme un temps ni si long ni si déraisonnable. Voilà pourquoi le Panama a changé sa version des faits en affirmant que le propriétaire du « Norstar » a perdu toute sa fortune au « moment exact » où l'ordonnance de saisie a été exécutée par les autorités espagnoles. Mais en toute franchise, un tel revirement, inopiné et soudain, me paraît assez abusif.

Deuxième faux pas : le Panama dit que le propriétaire du « Norstar » a cherché à obtenir un prêt bancaire qui toutefois a été nié. Or, le fax de la Sparenbanken NOR, qui figure à l'annexe 2 de la réplique du Panama, est fort intéressant car il nous aide à comprendre pourquoi la banque a nié le prêt bancaire à Monsieur Morch[24]. Ce fax dévoile en effet que le 16 septembre 1998 – notamment quelques jours avant la saisie du « Norstar » – la condition économique du propriétaire du « Norstar », loin d'être rose et solide, était caractérisée par

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[20] G. Arangio-Ruiz, 'Second Report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur (UN Doc. A/CN.4/425)' [1989-II(1)] YbILC 2, pp. 12-13, para. 37.
[21] *Application initiating proceedings* (see footnote 13), para. 7.
[22] *Mémoire* (voir note de bas de page 1), par. 28.
[23] *Réplique* (voir note de bas de page 2), par. 452.
[24] Ibid., annexe 2.

(Continued in English) « poor liquidity and a high level of short-term debt ».[25] *(Poursuit en français)* Plus généralement, ce fax nous révèle, de manière limpide, qu'il y a des trous dans l'histoire que le Panama nous a racontée jusqu'à présent, à savoir que – et je cite le paragraphe 23 du mémoire *(Continued in English)* : « This vessel and its ship owner had a well-established reputation as an ongoing business with important assets on board ».[26]

(Poursuit en français) En conclusion, à supposer même que l'« ordonnance de saisie » a violé l'article 87 de la Convention, l'acte prétendument illicite attribué à l'Italie était toutefois terminé au mois de février 1999, cela parce que le propriétaire du « Norstar » n'avait pas récupéré le navire, face au versement d'une garantie « légitime », et il n'avait même pas introduit des recours pour contester la décision du procureur du Tribunal de Savone auprès des autorités juridictionnelles italiennes.

Monsieur le Président, Mesdames et Messieurs les juges, sans préjudice de ce que je viens de dire, il y a un deuxième événement-clef de la cause qui a, en tout cas, interrompu le « lien de causalité » : il s'agit de l'inaction du propriétaire du « Norstar » après l'arrêt du 13 mars 2003 par lequel le Tribunal de Savone a décidé la mainlevée de la saisie et la restitution immédiate du « Norstar » à la Société Intermarine.

Permettez-moi avant tout de rappeler que le jugement du Tribunal de Savone était définitif. Ainsi, dès le 13 mars 2003, le propriétaire du « Norstar » aurait pu récupérer le navire.

Dans sa réplique et aussi bien dans sa plaidoirie, le Panama a soutenu que si le propriétaire du « Norstar » n'a pas récupéré le navire, cela serait imputable à la circonstance que la communication portant sur la mainlevée du « Norstar » n'aurait jamais été notifiée ni au propriétaire du navire ni au Panama, en tant qu'Etat du pavillon[27]. Le Panama s'est longuement étendu sur ce sujet tout le long de sa plaidoirie, en réclamant à grands cris l'absence de coopération, la mauvaise foi et le manque total d'intérêt que l'Italie aurait démontré vis-à-vis du sort du « Norstar ».

Mais est-ce que la version du Panama correspond à ce qui s'est passé dans la réalité ? Comme Monsieur Tanzi l'a éclairci hier et ce matin, la réponse est non.

Le propriétaire du « Norstar » a reçu de la part de l'Italie non une, mais trois communications relatives à la mainlevée de la saisie : la première à travers les autorités judiciaires espagnoles et le gardien du « Norstar » le 18 mars 2003, à savoir seulement cinq jours après l'arrêt du Tribunal de Savone; la deuxième directement par voie de lettre recommandée, datée du 21 mars 2003, envoyée par les autorités judiciaires italiennes à Monsieur Morch qui a pris connaissance de cette communication le 26 mars suivant, comme le Panama le reconnaît dans sa réplique ; enfin, la troisième communication est parvenue à Monsieur Morch le 2 juillet 2003, à travers le Ministère de la justice de la Norvège, contacté le 21 mars 2003 par l'Italie, comme le Panama nous dit dans sa réplique[28].

Et alors, où serait exactement le manque de communication de la part de l'Italie ? L'accusation visiblement infondée du Panama démontre, une fois de plus, que le Panama fait tout pour brouiller les pistes et nous étourdir.

Enfin, je vais traiter un sujet très important dans la présente affaire. Dès la phase des exceptions préliminaires et encore très clairement au paragraphe 36 du mémoire, le Panama a affirmé que, après la décision du Tribunal de Savone, le propriétaire du « Norstar » se trouvait dans « l'impossibilité matérielle » de prendre possession du navire. Cela à cause de la longue période d'immobilisation du navire et des dommages subis en conséquence de cette

[25] Ibid., annexe 2.
[26] *Memorial* (voir note de bas de page 1), par. 23.
[27] *Réplique* (voir note de bas de page 2), par. 462 à 468.
[28] Ibid., par. 467.

immobilisation pendant laquelle *(Continued in English)* « the vessel had already experienced such physical decay that it could only be considered as wreckage ».[29]

(Poursuit en français) En dehors du fait que le Panama fait mine d'ignorer que déjà en 1998, le « Norstar » était tout sauf qu'un navire « fort » et « solide », la phrase qu'on vient de lire est très intéressante. Cela parce que, dans cette phrase, le Panama souligne que les dommages au « Norstar » découlent du fait que, pendant l'immobilisation, le navire n'a pas fait l'objet de travaux de maintenance réguliers.

Je vous prie de tenir compte de cette affirmation. Les dommages à un bien objet d'une mesure de saisie ne dérivent pas évidemment de l'« ordonnance de saisie » en tant que telle. Les dommages découlent de l'immobilisation et du traitement qu'on a réservé au bien pendant cette immobilisation, à savoir des conditions dans lesquelles l'objet saisi a été effectivement traité.

Et alors, nous voilà encore au point de départ, Mesdames et Messieurs les juges.

Monsieur Carreyó nous a dit, mardi, que l'Italie a exercé un « contrôle illimité » et une « juridiction absolue » sur le « Norstar » pendant l'immobilisation et que, par conséquent, c'est l'Italie qui aurait dû assurer les travaux d'entretien du « Norstar » tout le long de l'immobilisation, afin de garantir l'opérativité du navire et de lui consentir de quitter le port de Palma de Majorque en 2003[30].

Cette affirmation n'est pas tenable du tout. Il m'incombe de répéter ce que j'ai déjà dit : l'Italie ne porte pas la responsabilité sur la manière dont la saisie a été menée, car pendant son immobilisation, le « Norstar » était placé sous la surveillance de l'Espagne. L'Italie ne pouvait pas dès lors apprécier l'état de conservation du navire durant son immobilisation.

Il me semble par ailleurs important de remarquer que, lorsqu'une mesure de saisie a été ordonnée, la magistrature doit désigner une personne à laquelle la garde du bien est confiée, et plus en particulier, doit préciser les pouvoirs du gardien vis-à-vis du bien saisi. Le gardien est, à tous les effets, un auxiliaire du juge, chargé d'assurer l'entretien et la conservation du bien sous main de justice. Les faits de la cause nous disent que, au moment de la mainlevée du « Norstar », la garde du navire était en charge par l'Autorité portuaire de Palma de Majorque[31].

En revanche, il ne résulte pas des faits de la cause que le propriétaire du « Norstar » ait jamais demandé aux autorités espagnoles ou aux autorités italiennes de lui accorder la possibilité d'effectuer des travaux pour garantir l'entretien courant du navire.

Il ne résulte même pas des faits de la cause que le propriétaire du » Norstar » ait jamais introduit un recours devant les autorités judiciaires italiennes pour demander la réparation de tout préjudice prétendument subi. Mardi, Monsieur Carreyó nous a dit que, en 2003, après l'arrêt du Tribunal de Savone, Monsieur Morch attendait de la part de l'Italie un geste immédiat, décisif et concluant. Mais, veuillez me pardonner : qu'aurait dû exactement faire l'Italie ? Signer à Monsieur Morch, le 15 mars 2003, un chèque pour acheter un nouveau navire ? Pourquoi – et je le dis bien : pourquoi ? – les avocats de Monsieur Morch n'ont pas informé leur client qu'il aurait pu introduire des recours en Italie afin d'être intégralement dédommagé pour le préjudice subi ?

En conclusion, le comportement du propriétaire du « Norstar », par rapport à l'arrêt du Tribunal de Savone de 2003, a eu pour effet de briser le lien de causalité entre le fait prétendument illicite attribué à l'Italie et les dommages revendiqués par le Panama. Il faut le réitérer à nouveau et nettement : lorsque le Tribunal de Savone a statué sur la restitution du navire au propriétaire du « Norstar », et une fois que cette décision a été communiquée à l'Espagne, la magistrature italienne a épuisé toute compétence en la matière.

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[29] *Memorial* (voir note de bas de page 1), par. 36.
[30] *Mémoire* (voir note de bas de page 1), par. 31 ; *réplique* (voir note de bas de page 2), par. 469 à 470 et 473.
[31] *Contre-mémoire de la République italienne*, 11 octobre 2017, annexe O.

En ce qui concerne la véritable « raison » de cette négligence volontaire de la part du propriétaire du « Norstar », avant et après le jugement du Tribunal de Savone, permettez-moi de dire avec autant de clarté que de conviction que si le propriétaire du « Norstar » n'a pas retiré son navire, soit en 1999, soit en 2003, c'est parce que le propriétaire n'avait aucun intérêt à le récupérer. Contrairement à ce que le Panama prétend, le « Norstar » était un navire vieux qui, bien avant son immobilisation dans le port de Palma de Majorque, causait des dépenses considérables à Monsieur Morch.

Dans la troisième partie de ma plaidoirie je soutiendrai cette affirmation.

Monsieur le Président, Mesdames et Messieurs les juges, ma *tâche finale est de contester la légitimité et le « quantum » des* dommages-intérêts réclamés par le Panama dans la présente affaire.

A titre tout à fait préliminaire, permettez-moi de dire que par rapport à l'évaluation des dommages-intérêts revendiqués par la République du Panama, le Tribunal devrait prendre en compte l'inactivité et la négligence démontrées par le propriétaire du « Norstar » face à la défense de ses intérêts, lorsqu'il n'a pas retiré le navire, soit en 1999 soit en 2003. Dans la phase écrite, l'Italie s'est penchée longuement sur les obligations qui incombent sur la partie lésée de ne pas contribuer au préjudice et de minimiser les dommages. La Commission du droit international indique très clairement, dans son commentaire à l'article 39 du projet d'articles sur la responsabilité internationale des Etats, que la victime d'un fait illicite est censée agir raisonnablement face au préjudice, de sorte que son comportement négligent ou inactif peut constituer une « circonstance atténuante » de la responsabilité et affecter l'étendue de la réparation. Or, d'après l'Italie, le Panama a tenté de mettre toute responsabilité du préjudice subi sur l'Italie, alors qu'il aurait été de toute évidence possible, pour le propriétaire du « Norstar », d'agir de manière à limiter l'étendue de ses dommages en exploitant toutes les voies de recours prévues par la loi italienne pour contester la décision du procureur du Tribunal de Savone en 1999 et pour demander, en 2003, la réparation de tout préjudice injuste prétendument subi.

Cela dit, et sans préjudice des arguments soutenus par l'Italie dans son contre-mémoire et dans sa duplique, je tiens à formuler quatre observations.

Première observation : le montant revendiqué par le Panama a augmenté au fil du temps. Abstraction faite de la requête, du mémoire, de l'*Economic Report* d'octobre 2017 et de la réplique, dans le soi-disant *Economic Report* du 13 juin 2018, à la surprise de l'Italie, le montant total réclamé par le Panama est deux fois supérieur à celui indiqué dans la réplique : cela veut dire que ce montant a touché le pic d'environ 52 millions de dollars, auxquels il faut ajouter 197 000 euros à peu près.

Face aux sommes toujours différentes et de plus en plus importantes revendiquées par le Panama, l'Italie ne trouve rien d'autre à dire que l'on a l'impression d'être monté dans un taxi dont on doute du fonctionnement correct du taximètre. Il m'est difficile d'être plus claire et franche à la fois. A l'étonnement s'ajoute une stupéfaction additionnelle, car si le montant total réclamé par le Panama n'a pas cessé d'augmenter, le Panama n'a jamais estimé nécessaire de donner une explication rationnelle ou une raison guère satisfaisante et minimale acceptable qui puisse justifier des revendications tellement démesurées.

Prenez le document du 13 juin 2018. Est-ce qu'il s'agit d'un *Economic Report* convaincant, bien ficelé et soigneusement rédigé ? L'*Economic Report* ne donne pas une clef de lecture pour interpréter ou comprendre ce qu'il y a derrière les numéros et les chiffres qui semblent avoir été jetés au hasard sur le papier. D'après le Panama, la clef de lecture devrait être dérivée d'un article scientifique, attaché à l'*Economic Report*, intitulé « *Systematic Risk and the Cost of Equity Capital in the Shipping Industry* ». Mais est-ce qu'on peut considérer comme crédible l'attitude du Panama qui nous prie de bien vouloir prendre note d'un article scientifique pour en tirer les motifs qui justifieraient la hausse de ses revendications,

motivations que cependant le Panama n'estime pas opportun de nous donner ? Il m'incombe d'ajouter que les explications fournies, mardi, par Monsieur Estribi sont bien loin d'être satisfaisantes, étant donné que l'expert économique du Ministère de l'économie de la République du Panama s'est limité à répéter ce qui figure déjà au chapitre 4 de la réplique rédigée par la République du Panama.

Deuxième observation : L'*Economic Report* surestime déraisonnablement l'utilisation potentielle du « Norstar ». Le montant total qui figure dans l'*Economic Report* du 13 juin 2018 est basé sur une fausse prémisse, à savoir qu'en 1998, le « Norstar » était un navire en excellent état qui, s'il n'y avait pas eu la saisie, aurait certainement continué sans entraves son florissant business jusqu'à la fin de décembre 2018 – je le dis bien « jusqu'à la fin de décembre 2018 ». Dès le début de ce procès, le Panama a cherché à accréditer l'histoire d'un navire capable de résister à l'épreuve du temps, dont le propriétaire et l'affréteur, aussi bien que tout l'équipage, auraient tiré profit 24 heures sur 24, 365 jours par an pour une période indéterminée. C'est à partir de cette histoire que l'*Economic Report*, par rapport à la réplique, gonfle les chiffres concernant surtout : la valeur du navire, qui a doublé ; le manque à gagner pour le propriétaire du « Norstar », qui est trois fois supérieur ; enfin, la perte de revenus pour l'affréteur, qui est – c'est incroyable – cinq ou six fois supérieure.

Eh bien, est-ce qu'on est censé croire à l'histoire surprenante racontée par le Panama ? Bien que le Panama ait fait de son mieux pour brouiller les pistes, masquer et créer la confusion, les faits devant nous mettent en cause l'idée que l'on puisse assimiler le « Norstar » à une Ferrari de la mer et Monsieur Morch à un propriétaire qui avait trouvé une poule aux œufs d'or.

Monsieur Tanzi et mes collègues ont déjà abordé les véritables conditions du « Norstar » à l'époque de la saisie. Je ne veux pas abuser de votre patience et répéter ce qui a déjà été dit.

Il ne reste qu'une chose à faire : examiner à la loupe le « Norstar ». Le « Norstar » a été construit en 1966. Cela signifie qu'au moment de son immobilisation, le « Norstar » avait 32 ans. Or la vie active moyenne d'un navire n'est pas illimitée, comme le Panama voudrait nous le faire croire. Tous les navires similaires au « Norstar » ont une vie utile de 20-25 ans. En plus, tous les navires doivent faire face, au cours de leur vie, à un processus naturel d'amortissement ou de dépréciation de leur valeur d'origine. Tout cela, sans compter que l'*Economic Report* omet de déduire, des revenus générés par le « Norstar », les dépenses que le propriétaire aurait dû supporter, *inter alia*, pour payer les taxes et les impôts, pour assurer l'entretien régulier du navire et sa conformité aux normes de l'Organisation maritime internationale.

Troisième observation : l'*Economic Report* n'est pas fondé sur des éléments de preuve capables de satisfaire le moindre standard d'objectivité, de neutralité et d'équité.

J'ai déjà commenté le soi-disant « *Olsen Document* » et les photos du « Norstar », annexés à la réplique du Panama, je n'y reviendrai donc pas. Il convient, par contre, de se pencher sur les dommages relatifs à la perte de la cargaison, et en particulier, sur le sujet de la quantification du carburant à bord du « Norstar » au moment de la saisie. Le Panama a beaucoup écrit et beaucoup parlé sur ce sujet[32]. Toutefois, la seule preuve qui a été fournie consiste, tout simplement, en un e-mail envoyé par Monsieur Emil Petter Vadis, qualifié, par le Panama, en tant que directeur général de l'Intermarine. Examinons soigneusement ce document, qui figure à l'annexe 1 de la réplique et qui, d'après le Panama, devrait éliminer toute espèce de doute[33]. Dans son courriel, Monsieur Vadis se limite à indiquer une liste de probables acheteurs et le total des litres de carburant prétendument chargés en Algérie et prétendument à bord du « Norstar » au moment de son immobilisation. Il n'y a rien d'autre :

[32] *Réplique* (voir note de bas de page 2), par. 562.
[33] Ibid., annexe 1.

aucun reçu, aucune facture. Rien de rien. Permettez-moi d'ajouter que le courriel est daté du 27 mai 2001 – c'est-à-dire trois ans après la saisie du « Norstar » – et que le Panama n'a jamais expliqué pourquoi c'est seulement en 2001 (et non, par exemple, en 1998), que le directeur général de la société Intermarine a soudainement jugé nécessaire de porter ces informations à la connaissance du propriétaire du « Norstar ». Si j'avais plus de malice, je dirais que le courriel de Monsieur Vadis n'est rien d'autre qu'une preuve conçue et construite *ex post* afin de soutenir de quelque façon les prétentions du Panama. Et encore, permettez-moi d'ajouter que Monsieur Vadis est une personne pour qui le Panama réclame la réparation du préjudice matériel et moral dans la présente affaire, ce qui enlève, à mon avis, toute objectivité et crédibilité au courriel de Monsieur Vadis.

Ce n'est pas fini, car pour justifier ses revendications vis-à-vis du carburant, le Panama, dans sa réplique, d'une part, s'en remet au « calcul des probabilités », lorsqu'il affirme que *(Continued in English)* « [i]f the vessel arrived in Palma, it is highly unlikely that it did not have any fuel on board » *(Poursuit en français)* et, d'autre part, renverse sur l'Italie la charge de la preuve en disant que « it is up to the arrestor State to provide evidence by means of an inventory of all goods on board, including fuel, at the moment of the arrest ».[34]

(Poursuit en français) Que dire ? Le Panama regarde le doigt tandis qu'on lui a montré la lune, afin de détourner l'attention de sa propre responsabilité. Toutefois, plus le Panama cherche à éluder le sujet qu'on lui a mis sous ses yeux, plus il devient manifeste que l'Italie a touché un point sensible dont le Panama essaye de se débarrasser.

Enfin, en ce qui concerne la quantification des dommages pour le manque à gagner du propriétaire du « Norstar », le Panama s'appuie seulement sur un document figurant à l'annexe 18 de son mémoire, et sur le soi-disant *Charter Party Agreement*. Or l'annexe 18 n'est rien de plus qu'une liste des chiffres et de figures, dépourvue de la moindre explication. Devant tant d'incurie et de négligences, on est stupéfaits que, dans sa réplique, le Panama continue à défendre fermement son annexe 18 et à dire que ce sont les objections de l'Italie qui ne sont pas fondées[35]. Pour ce qui est du *Charter Party Agreement*, dans le mémoire, le Panama soutient (et lundi, Monsieur Morch l'a réaffirmé) que la date d'expiration du contrat n'est pas celle indiquée sur le contrat, mais – attention ! – celle que l'on devrait déduire d'une conversation entre Monsieur Morch, Monsieur Vadis et l'affréteur, Monsieur Valestrand[36]. Pardonnez-moi, mais l'affirmation me semble tellement grossière qu'elle ne mérite pas qu'on lui réponde.

Quatrième observation –

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

(*Break*)

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

MME GRAZIANI : Quatrième observation : dans de nombreux cas, le Panama n'estime pas nécessaire de nous présenter « le moindre » élément de preuve en soutien de ses revendications. Le Panama se contente de dire ce qui, en réalité, il devrait démontrer.

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[34] Ibid., par. 561.
[35] Ibid., par. 546 ; mémoire, annexe 18.
[36] *Mémoire* (voir note de bas de page 1), par. 205 ; annexe 2.

Cela arrive, par exemple, vis-à-vis du préjudice matériel et moral des personnes physiques, suite au procès pénal. Cela arrive encore par rapport aux dommages concernant le paiement des salaires aux membres de l'équipage, car dans sa réplique, le Panama se contente d'affirmer que c'est l'évidence qui porte à dire : *(interprétation de l'anglais)* : « qu'aucun navire ne peut naviguer sans équipage »[37], mais, en même temps, le Panama se garde bien de nous montrer les contrats de travail, la moindre facture ou la moindre pièce attestant de qui faisait quoi sur le « Norstar ».

De même, afin de soutenir l'idée que le « Norstar » était un navire « formidable », le Panama met l'accent sur les travaux de maintenance supportés par le propriétaire du « Norstar » avant la saisie, ainsi que sur les contrôles auxquels le « Norstar » aurait été soumis[38]. Mais là, et encore une fois, nous sommes censés croire seulement à la bonne foi du propriétaire du « Norstar », car le Panama ne nous montre pas l'ombre d'une preuve.

Pour justifier l'absence de documents, le Panama invoque toutes sortes d'excuses. Parfois, c'est la faute du passage du temps. Par exemple, en ce qui concerne les dommages pour le manque à gagner de l'affréteur, le Panama affirme, de manière candide, qu'il n'est pas en mesure de donner une estimation précise du montant total de ces dommages car, et je me réfère au paragraphe 566 de sa réplique *(interprétation de l'anglais)* : « les documents ne sont plus disponibles, en raison du grand nombre d'années qui se sont écoulées »[39]. Mais, laissez-moi dire que c'est à la Partie défenderesse de préparer un dossier crédible, d'autant plus que Monsieur Carreyó a menacé d'engager des poursuites devant le Tribunal depuis longtemps.

J'en viens à une deuxième excuse avancée par le Panama. C'est tout-à-fait paradoxal qu'au paragraphe 535 de sa réplique, le Panama prétend que c'est l'Italie qui avait accès à tous les documents concernant le « Norstar » ; documents que l'Italie aurait produit *(Continued in English)* « as suits its interests ».[40] *(Poursuit en français)* L'affirmation est inélégante et maladroite, mais le Panama insiste sur ce point aux paragraphes suivants de sa réplique, où il dit que, au moment de la saisie, l'Italie aurait dû faire un inventaire de tous les biens à bord du « Norstar »[41].

Or le Panama répète toujours la même erreur : ce n'était pas à l'Italie de faire l'inventaire des biens à bord du « Norstar ». Comme c'est l'Espagne qui a exécuté la mesure de saisie, c'était à l'Espagne de faire cet inventaire. Au lieu d'insister sur un point si faible, le Panama devrait nous dire, une fois pour toutes, pourquoi le propriétaire du « Norstar » ou son avocat n'avaient pas une copie de cet inventaire ou pourquoi ils n'ont jamais jugé opportun de demander une telle copie en 1998 ou après. Si l'inventaire des biens, y compris le carburant à bord du « Norstar », a mystérieusement disparu tout d'un coup, ce n'est pas à la porte de l'Italie que le Panama devrait frapper.

Monsieur le Président, Mesdames et Messieurs les juges, j'en viens à mes conclusions.

L'histoire racontée par le Panama est particulièrement riche en paroles écrites et orales. Si, par contre, on cherche des preuves concluantes et crédibles qui puissent étayer les revendications du Panama par rapport à quelque compensation que ce soit, on doit se contenter de très peu, à savoir de quasiment rien.

Ainsi se dévoile la finalité poursuivie par le Panama dans la présente affaire, c'est-à-dire celle d'obtenir des avantages économiques injustifiés.

L'Italie est confiante que le Tribunal ne se prêtera pas à de pareilles manœuvres.

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[37] *Réplique* (voir note de bas de page 2), par. 550.
[38] Ibid., par. 469 à 471.
[39] Ibid., par. 566.
[40] Ibid., par. 535.
[41] Ibid., par. 536 à 537.

Monsieur le Président, Mesdames et Messieurs les juges, je vous remercie de m'avoir écoutée si patiemment. Monsieur le Président, je vous prie de donner la parole à Monsieur l'agent Giacomo Aiello pour l'examen de l'expert italien, Monsieur Vitaliano Esposito.

Examination of experts
[ITLOS/PV.18/C25/7/Rev.1, p. 22]

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

May I then ask the Co-Agent of Italy, Mr Aiello, once again to confirm that Italy now wishes to examine an expert?

Thank you, Mr Aiello. The Tribunal will then proceed to hear the expert, Mr Esposito. He may now be brought into the courtroom.

MR VITALIANO ESPOSITO
EXAMINED BY MR AIELLO (ITALY)
[ITLOS/PV.18/C25/7/Rev.1, pp. 23-27]

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

(*The expert made the solemn declaration*)

THE PRESIDENT: Thank you, Mr Registrar.

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

I understand that the examination of the expert will be conducted by Mr Aiello.

Mr Aiello, you have the floor.

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

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

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

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

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

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

MR ESPOSITO (*Interpretation from Italian*)**:** No, absolutely not. What is necessary is that based on the reasons for the order, there is an explanation of an immediate link between the

thing that is the object of the seizure and the offence while this Decree has to be executed. The *fumus* is not requested for this type of measure, while it is requested for the other two forms of seizure – preventive seizure and conservative seizure. For these two forms of seizures, it is necessary to have the proof of the wrongdoing when the acts were committed. So probative seizure is completely different from conservative and preventive seizure.

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

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

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

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

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

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

MR AIELLO: Is seizure a surprise action?

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

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

MR ESPOSITO (*Interpretation from Italian*)**:** The enforcement takes place through a rogatory committee, so this probative seizure, so once you asked a foreign authority to enforce a seizure decree, then the enforcement of this seizure decree will be taking place pursuant to the rights of the requesting party and of the applicable conventions. A seizure enforcement has to comply with all these rules. Please let me add that in the instant case we had more guarantees than necessary. According to the Italian legislation, a probative seizure is a fact-finding activity, and under article 5 of the European Convention it was necessary to have proof of the *fumus*, so the

Public Prosecutor in his letter rogatory also provided a *fumus*, which, as I said, under Italian legislation was not requested.

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

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

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

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

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

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

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

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

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

MR ESPOSITO (*Interpretation from Italian*)**:** Law no. 117 of 13 April 1998 sets out the responsibility of the State concerning injuries that have been caused by them, so by the State, or for not respecting any special acts like, for example, upkeep. The State is responsible and

the State can actually require compensation to another subject, so there is an action by the State. The judiciary can actually intervene and can work together with a State. There is also another possibility, which is direct action towards the judiciary in case of, for example, important crimes. In any case, I would like to remind you that, as you know, Italy has subscribed to the European Convention on Human Rights, so within 180 days it was possible, it would have been eligible, to have actually a remedy vis-à-vis the European Court of Human Rights according to article 8 of the Convention, because actually the seizure is nothing other than an intermission in the life of people working on this boat. So if then the goods have been completely lost because they have been confiscated or for another undue act, there is article 1 of the European Convention on Human Rights, and together with this action it is also possible that there is a responsibility action which is actually cited in article 2043 of the Civil Code and the State can be requested to entertain this. This was only started in 2005. After 2005, the Italian State could actually have been cited, so it should have been necessary. This was independent from the responsibility of judges, and Italy actually could have been considered responsible for the damages and the injuries that it had caused to this vessel.

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

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

MR AIELLO: Mr President, we have finished.

THE PRESIDENT: Thank you, Mr Aiello.

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

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

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

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

MR VITALIANO ESPOSITO
CROSS-EXAMINED BY MR CARREYÓ (PANAMA)
[ITLOS/PV.18/C25/7/Rev.1, pp. 27-32]

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

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

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

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

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

MR ESPOSITO (*Interpretation from Italian*)**:** Yes, indeed, I have been for four years the Public Prosecutor of the Cassation Court, so I would like to say that I do not understand the reason for this question. I was not the chief of all the Public Prosecutors. I was the chief of the magistrate for the public judiciary of the Cassation Court because in Italian law the power of the Public Prosecutor is a very diffused power, which means that it is the power for each magistrate, which means that I, as a Public Prosecutor of the Cassation Court, could not intervene in any way with the judge who was working and was ordering the seizure. I could not have intervened in this situation, if this is what you mean by your question.

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

MR ESPOSITO (*Interpretation from Italian*)**:** No, absolutely not. I have learned about the seizure of this vessel on this occasion, but not even my predecessors, no one could intervene. The only possibility that we had for the general tribunal to be aware of this case could have actually come in case there would be actually a remedy or an appeal for this decision, but this was the only situation and in the case of the *"Norstar"* this did not happen because, if you read the decision, the first degree decision, you can see that the judge of the tribunal who ordered the seizure, in acquitting actually the person says that there is no discussion concerning the preventative measures because the preventative measures have been organized, have been

ordered in order to put in place, or because there were all the exhausted remedies in Italy, but these measures do not concern *"Norstar"*; these measures concern *"Spiro F"* vessel; for *"Norstar"* case there has never been an appeal to the judge of liberties or to other tribunals. So as a Public Prosecutor, I have never worked on this case. I could never have worked on this case, not even in an indirect manner.

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

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

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

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

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

MR CARREYÓ: Mr Landolfi was the Public Prosecutor –

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

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

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

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

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

MR ESPOSITO (*Interpretation from Italian*)**:** The Public Prosecutor, Mr Landolfi, for example, was the magistrate of the Public Prosecutor's office who was in charge of this case. In his position of Public Prosecutor, he could either order the probatory decree, as he did, so the probatory seizure; he could go on the boat in order to arrest the vessel. So he had all the powers as chief of the judiciary police, because, as I said before, when I spoke about this

monolithic block, we in Italy, the investigations are guided by the Public Prosecutor. The Public Prosecutor also has the judiciary police which is available for him to work with him, and there are several agents of the *Guardia di Finanza*, the finance police, who were working with the magistrate. Then there were the office secretaries, where there were the technical staff. There was a big group of magistrates, police agents, judiciary, also the finance police, the *Carabinieri*, the police forces. All of them could work with him and he could go on the vessel and he could require, he could issue the rogatory for the seizure order of the vessel. He could also go with the agreement of the Spanish authority in Spain and he could interrogate, he could examine whether he wanted to.

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

MR ESPOSITO (*Interpretation from Italian*)**:** Well, I do not actually know all the documentation of these proceedings but in order to order the probative seizure, it did not need any proof. No proof was necessary as to the guilt. What was necessary is that the judge should prosecute a crime, an offence, so there had to be a dossier with an offence or a crime that needed to be looked at, and it was also necessary to have the vessel that was related to the crime, so the alleged crime, and we have a ship, and the judge has to prove the relationship between the vessel and the charge, and the Public Prosecutor only needs to do – and this is quite different from the preventative seizure, because if we look at the documentation we can see that on 5 October the Public Prosecutor asked to the investigative judge – so this is the judge investigating and looking after the procedure – is asking for the preventative seizure. So in this order for the preventative seizure, all the charges, all the proof that existed at the time on the probability that the accused had actually committed a crime. I do not know whether what I have said is clear. These are two separate issues. If on 11 August 1998 there was immobilization because there was a rogatory demand, so the ship, the vessel, was arrested. On 5 October the Public Prosecutor that had some proof would ask the investigating judge to act on the seizure and the investigating judge would act on the seizure on 24 February, and on the same day, the judge, the Public Prosecutor, will through the consular authorities in Oslo based on the document that you have as Appendix 8, say, "If you would like to have the ship, you need to pay 250 million as security". This was requested only after the fact that the investigative judge had stated that the preventative seizure was necessary. It means the vessel could be seized should they have arrived at the conclusion and the seized asset, which means the vessel and the fuel, particularly the fuel, was necessary and to be used to pay for legal costs and as a guarantee of any possible cost attributed or as payment of damages if this was to be proven the case.

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

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

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

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

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

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

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

MR ESPOSITO (*Interpretation from Italian*)**:** I do not know what proof Mr Landolfi needed, and maybe he did not necessarily have to go to Spain to obtain it. Maybe he could have done so in Italy by interrogating all those that were involved, other vessels, other sailors, but this is not relevant because, given his activity, the Public Prosecutor, Mr Landolfi on 5 October asked the investigating judge the preventative seizure, and here he indicated all the reasons that he had and that was proof of the fact that the accused were in the wrong. Now, this was something that had been collected by the investigative judge, because we have the guarantee of a judge that checked everything that was done by Mr Landolfi and this measure dated 24 February was used and there was no re-examination that was asked for or the appeal to the Court of Cassation. So no measure was taken.

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

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

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

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

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

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

MR CARREYÓ: If you do not understand the reason for my question, then I will give it to you. The reason for my question is the following. The decision of this Tribunal decided that for Panama it was not necessary to exhaust local remedies – so if you read that decision and you already knew that this Tribunal had already decided that Panama did not necessarily have to exhaust local remedies in Italy, why is your statement in this Court that you feel that Panama had to go and exhaust local remedies in Italy?

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

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

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

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

THE PRESIDENT: Thank you very much.

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

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

PUBLIC SITTING HELD ON 13 SEPTEMBER 2018, 3 P.M.

Tribunal

Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

For Panama: [See sitting of 10 September 2018, 10 a.m.]

For Italy: [See sitting of 10 September 2018, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 13 SEPTEMBRE 2018, 15 HEURES

Tribunal

Présents : M. PAIK, *Président* ; MM. NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, Mme KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mme LIJNZAAD, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 10 septembre 2018, 10 h 00]

Pour l'Italie : [Voir l'audience du 10 septembre 2018, 10 h 00]

THE PRESIDENT: Good afternoon.

At the end of the morning sitting, the Agent of Panama, Mr Carreyó, was conducting his cross-examination of the expert, Mr Esposito. Before we continue, I wish to remind all Agents and Counsel examining the experts this afternoon to wait until the interpretation of the expert's answer into French is completed before asking the next question. I now give the floor again to Mr Carreyó to continue the cross-examination.

M/V "NORSTAR"

Examination of experts (continued)

MR VITALIANO ESPOSITO
CROSS-EXAMINED BY MR CARREYÓ (PANAMA) (continued)
[ITLOS/PV.18/C25/8/Rev.1, pp. 1-3]

MR CARREYÓ: Thank you, Mr President. Good afternoon to everybody. I hope you have had a nice lunch.

Mr Esposito, I assume you are aware of our time constraints, and I would therefore kindly appreciate, if it is possible, to go to the point of my questions and to be as concise as possible.

Mr Esposito, is it lawful to ground an order of arrest on one reason, and then to act differently?

MR ESPOSITO (*Interpretation from French*)**:** Once again, I don't understand the question you are asking me. There is a statement of grounds. The court set out the grounds and it acted in accordance with the rules of the law. So what is the inconsistency that you see in the conduct of the court? If you tell me that, then I can answer your question.

MR CARREYÓ: Thank you, Mr Esposito. I did not refer to any judge, but in order to clarify, I would refer to the Prosecutor – the Decree of Seizure particularly.

MR ESPOSITO (*Interpretation from French*)**:** The Italian Public Prosecutor issued a Decree of Seizure, a Decree of Seizure with its grounds. Panama had the right to challenge the court's grounds, which you did not do. So, what is the conduct of the court that is not acceptable, that did not comply with the law? That is what I do not understand.

MR CARREYÓ: Again, Mr Esposito, I am not referring to any judge; I am just referring to the Public Prosecutor – but let us move on. Was there any sense of urgency to arrest the *"Norstar"*?

MR ESPOSITO (*Interpretation from French*)**:** Certainly, certainly. If the court considers it necessary to have recourse to a Decree of Seizure, it is in the very nature of things that it must execute the seizure immediately because it is an act that cannot be repeated afterwards. It is an act with a view to searching for evidence. The Italian Public Prosecutor issued the probative decree with a view to searching for evidence. He was seeking evidence of the crime which he was prosecuting.

MR CARREYÓ: Mr Esposito, can you tell me what did I ask you? Can you tell me what just was asked to you?

MR ESPOSITO (*Interpretation from French*)**:** I think I have answered that the Decree is a surprise act. It is like a phone tap. If you need to carry out a phone tap, you do not wait for the person to get off the telephone. If you intend to tap a phone, you do it immediately. It is the same thing that the Italian Public Prosecutor did with the probative Decree of Seizure. It is a matter of preventive secrecy.

MR CARREYÓ: Thank you. My question did not refer to surprise but to urgency. Do you know the difference between surprise and urgency?

MR ESPOSITO (*Interpretation from French*)**:** I also worked at the Public Prosecutor's Office for many years. If I needed to execute an act, an act that I could not repeat again … The problem is that it is an act that you cannot repeat again. You have to take the property for evidentiary purposes. The evidence was the fuel on the vessel. We cannot get into the grounds of the court along the lines you wish.

MR CARREYÓ: Mr Esposito, could the Prosecutor have foreseen that damages would probably result with the arrest in this case?

MR ESPOSITO (*Interpretation from French*)**:** I think he would have needed a crystal ball to foresee the damage. The judge has to act in accordance with the rules of the law and the rules of procedure. If he did that, then I don't understand what damage could arise from a Decree of Seizure which had been executed in a Spanish bay, outside the sea … in Spanish territorial waters. What damage?

MR CARREYÓ: Did he have that crystal ball?

MR ESPOSITO (*Interpretation from French*)**:** No, I do not think he had the crystal ball – I don't think so.

MR CARREYÓ: Mr Esposito, does Italian law allow whole files of criminal cases to be requested as evidence to be used in another jurisdiction?

MR ESPOSITO (*Interpretation from French*)**:** You will have to explain to me what files you are referring to. Italy can use all the documents available to request judicial cooperation from another State. I am not quite sure what the purpose of your question is. I cannot answer.

MR CARREYÓ: Let me explain to you. A file has different documents, so I want to know if in Italy it is lawful to request the whole file with all the documents to be used in another case or jurisdiction – the whole files, not just one or two particular documents. It is possible?

MR ESPOSITO (*Interpretation from French*)**:** Yes, I understand your question. The law provides for this – the law. We can talk about whether this law is appropriate, and I am willing to do so, but in reality it must be acknowledged that the law makes it possible to transfer files from one case to another, having due regard to the rules, of course. But it is provided for by the law.

MR CARREYÓ: What is the juridical value of decisions of Prosecutors that have been revoked?

MR ESPOSITO (*Interpretation from French*)**:** Have they been revoked by the same court or by another jurisdiction, by another judge?

MR CARREYÓ: Whatever you want to elect.

MR ESPOSITO (*Interpretation from French*)**:** If you are referring to the matter of damage, I have already explained earlier – but perhaps I have to explain once again – that the legitimacy of each act must be assessed in the light of the context in which the matter arises and the stage of the procedure. If a probative or preventive decree, whatever, is subsequently revoked, this means that the situation, the evidence, has changed. If the situation has changed, it is not the

same situation as before. So there is no illegitimacy on the part of the court. If you tell me that courts have acted deceitfully, with serious misconduct, then I would concur, but if there is no fault or deceit, then the legitimacy of the act has to be established in the current state of the facts, the situation as it stands, with the evidence it has at that time and in the light of the fact that that evidence has changed over time. In any moment in time there is a situation that is different from the next situation.

MR CARREYÓ: So in this case do you believe that there was something wrong that was done by Mr Landolfi, the Public Prosecutor that was the reason for the revocation of this order?

MR ESPOSITO (*Interpretation from French*)**:** As far as I know, he never revoked his order – never. There has been no revocation of the order which he made, the Public Prosecutor, Landolfi. There were other authorities that revoked the order he had made. If you are referring to the fact that there was a decision of acquittal, a decision of acquittal is something entirely different. The evidence required to convict a person is not the same as for issuing a decree of seizure or some other decree, including a decree to deprive someone of his personal liberty.

MR CARREYÓ: Mr Esposito, I will refer now to a piece of evidence that has been filed as Annex 7 to the Memorial. It is a letter dated 4 September 1998, issued by the Service of Diplomatic Litigation Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy in the case concerning the arrest of *M/V "Spiro F"*. Are you familiar with that document?

MR ESPOSITO (*Interpretation from French*)**:** I am familiar with Annex 8, but if you tell me what Annex 7 is, I will be able to follow you. But I recall Annex 8; it is the letter which Mr Landolfi wrote saying that the security could be paid and that if the security was paid, the decree would be revoked.

Annex 7, I don't remember. If you tell me what it is about, I can talk about it.

MR CARREYÓ: If I told you it was a letter issued by the Service of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy?

MR ESPOSITO (*Interpretation from French*)**:** Very well.

MR CARREYÓ: In this letter –

INTERVENTION BY MR AIELLO
CO-AGENT OF ITALY
[ITLOS/PV.18/C25/8/Rev.1, p. 4]

MR AIELLO: I am sorry, Mr President, and distinguished Members of the Tribunal, but once again we are speaking about the *"Spiro F"* but it is not the object of this case; so I think that this question is not admissible.

THE PRESIDENT: Thank you, Mr Aiello. I must disagree with you on this issue because this incident was already referred to in the written pleadings, and also I do not consider this incident is totally unrelated or irrelevant to the present case. Therefore, I will allow the Agent of Panama to continue, but at the same time I ask the Agent of Panama to focus on the matter which has been dealt with by the expert in his examination.

Further, Mr Esposito has come to this hearing as an expert on Italian law. He was not involved with the seizure of *M/V "Norstar"*; therefore, I hope you will focus your cross-examination on the matters over which Mr Esposito has expertise and experience.

Mr Carreyó, you may continue.

MR VITALIANO ESPOSITO
CROSS-EXAMINED BY MR CARREYÓ (PANAMA) (continued)
[ITLOS/PV.18/C25/8/Rev.1, pp. 3-5]

MR CARREYÓ: Thank you, Mr President. Mr President, this is a document that is on the files, and the expert seems to know it, so I think that he might answer my questions.

In this document, Mr Esposito, it says that in the Decree of 13 July you said: "The arrest of the boat has been done in the contiguous zone, subject to the full jurisdiction of the State regarding fiscal and customs crimes."

Would you agree, Mr Esposito, with what was just read – the quotation? I will read it again to you: "The arrest of the boat has been done in the contiguous zone, subject to the full jurisdiction of the State regarding fiscal and customs crimes."

MR ESPOSITO (*Interpretation from French*)**:** I don't know what document you are referring to. I have read everything that was relevant to my statement from a legal point of view, as the President has made clear. In any case, what I know is that the first document relating to the *"Norstar"* is the Decree of 11 August. Not July. So, any document which relates to the month of July falls outside my knowledge and is not relevant to the case. The Tribunal will have to decide on this point.

In any case, we have the Decree of 11 August and we do not know where the vessel was at that time. What is certain is that the Decree was executed in Palma de Mallorca in September, so I am not quite sure what you are referring to, when I am not familiar with Annex 7. And I also believe – and just talking as an expert, not as a judge – he is talking about the Service of Diplomatic Litigation and referring to the *"Spiro F"*, but it is up to the Tribunal to decide this. It is a matter of equality of arms between you and the Italian delegation, of which I am not a member.

MR CARREYÓ: In this same document it says:

> We take this opportunity to remember you the importance to comply with the international rules, being the case a very delicate question, which involves from one side the custom interests of Italy, but on the other side the respect of the Maltese flag interests, and if there is any small mistake your action won't get any advantage.

Could you make this statement applicable to the case of the *"Norstar"* according to your opinion?

MR ESPOSITO (*Interpretation from French*)**:** I can only give you my opinion, and I would say straight away: no, it refers to Malta and it refers to the *"Spiro F"*. I think it is self-evident that it refers to the *"Spiro F"*. As I said, I do not have the competence to deal with the questions you are asking me. I can give you any information you like on the law or as regards international judicial cooperation, but in terms of the merits of the case, I am indifferent. To be frank, the fact that I am Italian has no bearing, of course.

MR CARREYÓ: Mr Esposito, I will now refer to a document that is on the files in Annex 12 of the Panamanian Reply. I will read it all to you:

> The matter in reference has initiated in the fall of 2001 with the communication hereby made by a Panamanian lawyer, Mr Nelson Carreyó, related with a claim of damages due to the arrest of the *"Norstar"*...

> For understandable reasons this information has been obtained and detailed from the Hamburg Tribunal in a confidential manner …
>
> The procedure for freedom of … has been established in article 292 of the Convention of Law of the Sea 1992 was conceived for urgent situations while in the referenced case the vessel is under arrest in Spain three years ago. [Party's own translation]

Would you, representing Italy, have made available this document to this Tribunal?

MR ESPOSITO (*Interpretation from French*)**:** Well, I have to ask you a question then. Is this a letter you wrote to the Service of Diplomatic Litigation? You wrote a letter to the Service of Diplomatic Litigation – right?

MR CARREYÓ: No, Mr Esposito, I explained to you that this was a letter sent by the Service of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy to the Public Prosecutor – received by the Public Prosecutor.

MR ESPOSITO (*Interpretation from French*)**:** Well, an initiative taken by the Service of Diplomatic Litigation. I do not know why it did this, but it is not usual for the Service of Diplomatic Litigation, a government organ, to turn to a court. And what is it asking the court? I do not understand what the Service of Diplomatic Litigation is asking the court in this document. What does it say? If you give me the document, I can answer you, but I am not Pico della Mirandola who remembers everything.

MR CARREYÓ: It has been a pleasure. Thank you very much, Mr Esposito.
Mr President, I pray you will pass the floor to Ms Cohen, please.

THE PRESIDENT: Thank you, Mr Carreyó, I give the floor to Ms Cohen to continue the cross-examination of the expert.

MR VITALIANO ESPOSITO
CROSS-EXAMINED BY MS COHEN
[ITLOS/PV.18/C25/8/Rev.1, pp. 6-7]

MS COHEN: Thank you, Mr Esposito, for your testimony here today. I will start with my first question. Respectfully, Mr Esposito, with a yes or no answer, in your opinion, are Italian authorities bound by Italy's international law obligations?

MR ESPOSITO (*Interpretation from Italian*)**:** Certainly. If that was the question, certainly they are bound.

MS COHEN: Would you say that the Public Prosecutor –

THE PRESIDENT: Ms Cohen, I am sorry to interrupt you but there is some problem with the interpretation. Can you continue?

MS COHEN: Yes, certainly, Mr President. I will repeat my question.
Would you say that the Public Prosecutor should be aware of the rules of international law that are binding on Italy and that a decree of seizure issued by a Public Prosecutor must comply with Italy's international law obligations?

MR ESPOSITO (*Interpretation from Italian*)**:** Naturally, if you do not tell me what is the breach, it is difficult for me because I cannot answer, because if you ask me if international law is binding, my answer is yes, but if you do not tell me what is the breach that we are talking about, I cannot reply; but if you tell me of which violation or breach we are talking, then okay, we can talk.

MS COHEN: Thank you, Mr Esposito. I am satisfied with the answer. I will move on to my next question. I will ask you a question about the relevant activities. We heard yesterday counsel for Italy state – and I quote the relevant part –

> The suspected criminal scheme which was investigated basically consisted of three elements: first, loading the tanker with fuel purchased from the Italian port of Livorno in exemption of excise duty and VAT; second, the subsequent resale to Italian and other European leisure boats stationed on the high seas off the coast of the Italian city of San Remo; third, the re-entry of the leisure boats into Italian territory and the internal waters with fuel on board, thus potentially eluding the payment of the fiscal duties due under Italian law.

Allow me to focus on the third element as stated by learned counsel of Italy, that is, I repeat: "the re-entry of the leisure boats into Italian territory and the internal waters with fuel on board, thus potentially eluding the payment of the fiscal duties due under Italian law." My question is: to your knowledge, Mr Esposito, what evidence, if any, was available to the Public Prosecutor that the fuel sold to leisure boats on the high seas re-entered Italian territory?

MR ESPOSITO (*Interpretation from Italian*)**:** I am not the judge, but what you are saying, it seems to me, is hypothetical. A breach occurred and you are prosecuting it accordingly, but you cannot ask me what was done and why.

MS COHEN: I understand, Mr Esposito. Thank you. My question was whether you had any knowledge of the evidence that was available, since it is part of the criminal scheme as mentioned by counsel for Italy. I move on to another question. Again, to your knowledge, would you know if the leisure boats that I have just mentioned were prosecuted in Italy?

MR ESPOSITO (*Interpretation from Italian*)**:** I repeat, I am not familiar with the procedures, and the questions you are asking lie outside my field of competence.

MS COHEN: Thank you. In your opinion, would you say that it is a possibility that one of the motivations for the issue of the Decree of Seizure was to stop the *"Norstar"*'s bunkering operations on the high seas?

MR ESPOSITO (*Interpretation from Italian*)**:** The same question, same answer, and I still cannot answer it. Mr President, I believe that we are now outside the purview of the questions that were originally put to me in my capacity as an expert.

MS COHEN: Please allow me to explain. My question is simply because the Decree of Seizure mentions "The repeated use of adjacent high seas by the foreign ship was found to be exclusively aimed at affecting Italy's and the European Union's financial interests", so my question was to try to obtain your opinion but I take your answer.

Thank you, Mr Esposito, for your testimony. Thank you, Mr President. I have no further questions.

THE PRESIDENT: Thank you, Ms Cohen.

An expert who was cross-examined by the other Party may be re-examined by the Party who had called the expert. Therefore, I ask the Co-Agent of Italy whether Italy wishes to re-examine the expert and, if yes, who will conduct the re-examination.

MR AIELLO: No, nothing, Mr President.

THE PRESIDENT: Thank you, Mr Aiello.

Pursuant to article 80 of the Rules of the Tribunal, the President and Judges of the Tribunal may also put questions to the expert. I was informed that Judges Lijnzaad, Kittichaisaree, Heidar and Pawlak wish to put questions to Mr Esposito. I therefore give the floor first to Judge Lijnzaad to put her questions.

MR VITALIANO ESPOSITO
QUESTION FROM JUDGE LIJNZAAD
[ITLOS/PV.18/C25/8/Rev.1, pp. 7-9]

Thank you, Mr President. Good afternoon, Mr Esposito, and thank you for all your efforts at clarifying matters to the Tribunal this afternoon.

I would like to ask you a few details with respect to Italian law and procedure concerning the arrest of ships. I have three questions but it is okay if you mention that this may not be exactly your expertise. I am wondering whether, when a ship is arrested in Italy in a criminal case, a report is made of that arrest, like a procès-verbale, by the authority executing the arrest and, if so, what kind of information is included in the report? Does it, for instance, say something about the cargo?

MR ESPOSITO (*Interpretation from Italian*)**:** Thank you for this question, because actually I can clarify a few things. In Italy the probative seizure can be either done on the initiative of the Public Prosecutor or on the initiative of the judicial police, so actually your question crosses the two questions. I am going to explain it better. The judicial police in Italy work with the Public Prosecutor's office. In each Public Prosecutor's office there is an office of judicial police, and in cases where matters are very urgent, or in particular cases, the judicial police actually can be made aware of a crime and can proceed to a probative seizure. In this case the judicial police officer must write a report in which he must, for example, write in detail everything – for example, the nomination of a guardian or a custodian or other details. For example, it is also possible to impose a security on the custodian and the security can be imposed in order, for example, to avoid more damages. This seizure proceeding that is made by the judicial police must be confirmed by the Public Prosecutor. So, as you very well say, we need to have a report and then the Public Prosecutor must read the report and then he can confirm the seizure.

After all that, we can do an appeal, we can do the re-examination and everything, but again I want to repeat that this monolithic block that I was speaking about, which is represented by the Public Prosecutor and the people who work with him, must actually respect all the articles of the Criminal Code, for example article 353 and others, and everything is regulated by the Criminal Code. There is not only the seizure order. We do have the decree of seizure, but I think you are referring to the execution of the seizure, which actually happened in Spain based on the rogatory that was issued by the magistrate. When there is a rogatory as an international rule, everything is regulated. The request is regulated by the demanding State, but

the execution is actually regulated according to the laws of the State in which this order is being enforced.

JUDGE LIJNZAAD: Do you know what happens with the ship's documents such as the papers relating to its IMO certificate or class certificate or logbook when the ship is arrested in Italy? Do they stay on board or go elsewhere?

MR ESPOSITO (*Interpretation from Italian*)**:** The main problem lies in the custodian nomination, which means that we need actually to impose a binding link. That means that the asset is not available any more; it is arrested. Together with this, we need to choose a custodian. All of these proceedings are then in the hands of the custodian, and if there is a problem, the custodian can talk to the Public Prosecutor in order to ask what is the line of action that the custodian should follow, and the same thing goes for the upkeep. If, for example, the custodian cannot go ahead with the upkeep of the boat, then the Public Prosecutor is still the decision-maker of the situation. The problem that we had here was that we had two different jurisdictions in charge. We had Italy requesting the arrest and Spain executing the order, so that is why we had these problems.

JUDGE LIJNZAAD: My final question to you is about the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters. When Italy would act on a rogatory letter and take action at the request of another State, after action has been taken and the ship arrested, would a report be sent to the requesting State or perhaps also to the flag State?

MR ESPOSITO (*Interpretation from Italian*)**:** I do not know this rule. What is the date of the Convention?

JUDGE LIJNZAAD: It is the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, which is at the basis of Spain's –

MR ESPOSITO (*Interpretation from Italian*)**:** Yes, yes, I understand. This is an act of the European Union. Yes, of course we need to write a report, absolutely.

JUDGE LIJNZAAD: Does it go to the requesting State or does it also go to the flag State? Do you know?

MR ESPOSITO (*Interpretation from Italian*)**:** I do not know, I am sorry. I am not aware. I do not know this.

JUDGE LIJNZAAD: Thank you very much, Mr Esposito.

THE PRESIDENT: Judge Kittichaisaree.

MR VITALIANO ESPOSITO
QUESTION FROM JUDGE KITTICHAISAREE
[ITLOS/PV.18/C25/8/Rev.1, p. 9]

Thank you very much, President.

Mr Esposito, thank you very much for being here. My questions centre on your expertise in Italian law as practised in judicial operations. You mentioned in your answer to

my colleague that there are two different jurisdictions. I would like to ask you about the normal practice or procedure in relation to Italy's request to a foreign government to enforce a decree of seizure. Does the foreign authority have to make an inventory of the conditions of the object of seizure at the time of the seizure, and does it have to provide a copy of the inventory to the Italian authority that has requested the seizure?

MR ESPOSITO (*Interpretation from Italian*)**:** Yes, of course. The authority of the State that needs to execute the order must actually respect all these laws. I do not know Spanish law but I am sure that in the case of seizure there is an inventory that is made. I am sure about this, but again I am not an expert in Spanish law. I can only imagine the general principle of European law. The country to whom the rogatory has been sent must of course write a report and give all the information concerning the vessel. The vessel's captain must give all the information and must help the country to execute the order in this case.

JUDGE KITTICHAISAREE: So, from the perspective of Italian law, your answer is: yes, according to the general principle of European law. For how long does the Italian authority in question keep a record of an inventory and where? What is the normal practice that you have?

MR ESPOSITO (*Interpretation from Italian*)**:** If it is a seizure that has happened in Italy, we have a series of rules that are inserted not only in the Code but also we have many regulations according to which all the information must be kept by the authorities, but this is actually based on Italian law. I do not know concerning Spanish law. This is what I can tell you about Italian law.

JUDGE KITTICHAISAREE: Thank you, Mr President.

THE PRESIDENT: Thank you.
Judge Heidar.

MR VITALIANO ESPOSITO
QUESTION FROM JUDGE HEIDAR
[ITLOS/PV.18/C25/8/Rev.1, p. 10]

Thank you, Mr President.

Mr Esposito, on 11 March 1999 the Public Prosecutor of the Court of Savona requested the Italian Embassy in Oslo to inform the owner of the *M/V "Norstar"* that it could be released on payment of a bond that amounted to 250,000,000 lira, approximately €129,000. My question is of a general nature and not limited to the *M/V "Norstar"*. Based on your experience, to what extent does the amount of a bond reflect and indicate the estimated value of the goods that had been seized?

MR ESPOSITO (*Interpretation from Italian*)**:** You refer to Annex 8, which has been introduced by Panama. On the same day as the preventative seizure is ordered, so it is a decree for which the vessel can be confiscated or for which the vessel actually may be considered as a guarantee for paying the trial expenses or maybe the injuries, so, on the same day, the PM writes to the Oslo Embassy and says that if the interested people want to free the vessel, they must pay €250,000. So it is clear that the Public Prosecutor needed to use the advice of an expert because he did not have the knowledge, the means, to evaluate the value, so for other vessels the security has been paid, but the evaluation that is done by the judge is based on the

preventative seizure, which means what can be future needs, which means that we need to pay expenses, trial expenses, and so for this we need to have the opinion of an expert in order to understand how much we need to pay.

JUDGE HEIDAR: Thank you.

THE PRESIDENT: Judge Pawlak.

MR VITALIANO ESPOSITO
QUESTION FROM JUDGE PAWLAK
[ITLOS/PV.18/C25/8/Rev.1, pp. 10-11]

Thank you, Mr President.

Good afternoon, sir. I have one simple question on Italian law. You spoke today about custodians. Under Italian law, who is responsible for taking care of the foreign ship while it is temporarily arrested as a means for criminal investigation? Who is responsible?

MR ESPOSITO (*Interpretation from Italian*)**:** We are giving the opposite hypothesis, which means that a foreign authority asks Italy about arresting a vessel. Is that it? Did I understand your question? I am asking you, if you will allow me, whether this is the question.

JUDGE PAWLAK: The question is simple. If Italy arrests a ship, who is responsible for taking care of the ship – the owner, the Italian authorities, other authorities?

MR ESPOSITO (*Interpretation from Italian*)**:** The general rule is whoever has issued the seizure order. It can be a Public Prosecutor but it can also be a judge. In this case the Public Prosecutor is the chief of the situation. He is the master of the situation, so the Public Prosecutor is in charge. He is in charge of the whole situation, naturally, and I can also give you more precise information. According to the Code, there is a rule for each phase of the procedure, so it is important to nominate a guardian to write all the reports, to seal the reports, and then naturally the custodian becomes the person in charge. The responsibility actually moves from the Public Prosecutor to the custodian, and if the custodian has problems that he cannot solve by himself, in this case the custodian can ask the Public Prosecutor what he needs to do, because the Public Prosecutor is still the person in charge until the trial is in the investigation phase. However, after that, the judge actually becomes the person in charge, and then if the custodian has problems, instead of referring to the Public Prosecutor, he needs to refer to the judge.

JUDGE PAWLAK: Thank you.

THE PRESIDENT: Thank you, Mr Esposito, for your testimony for a long time. Your examination is now finished and you may withdraw, sir.

(*The expert withdrew*)

I understand that Italy now wishes to examine the next expert. May I ask the Co-Agent of Italy again to confirm this?

MR AIELLO: Yes, Mr President.

MR GUIDO MATTEINI
EXAMINED BY MR AIELLO (ITALY)
[ITLOS/PV.18/C25/8/Rev.1, pp. 11-16]

THE PRESIDENT: Thank you, Mr Aiello.

The Tribunal will then proceed to hear the expert Mr Matteini. He may now be brought into the courtroom.

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

(*The expert made the solemn declaration*)

Thank you, Mr Registrar.

Mr Matteini, good afternoon. Can you hear the interpretation?

MR MATTEINI (*Interpretation from Italian*)**:** Yes.

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

I understand that the examination of the expert will be conducted by Mr Aiello.

You have the floor again, Mr Aiello.

MR AIELLO: Yes, Mr President. Thank you very much.

Mr Matteini, would you kindly explain your professional experience in the naval evaluation sector?

MR MATTEINI (*Interpretation from Italian*)**:** I am a sea captain, and since 1982 I am part of the national register for experts for naval evaluation – my activity is normally done on behalf of insurance companies – and I am also an expert for the Tribunal in Florence.

MR AIELLO: Have you assessed the value of the *"Norstar"* at the time of the execution of the seizure?

MR MATTEINI (*Interpretation from Italian*)**:** Yes, I did.

MR AIELLO: Would you mind briefly explaining the criteria and methodology you applied for assessing such value?

MR MATTEINI (*Interpretation from Italian*)**:** It was not possible for me to inspect the vessel, so I had to use estimates that are normally used in these cases. That means that, based on available data, I decided what the dry weight of the vessel was, considering the different materials – ferrous, non-ferrous, plastics – and then I calculated the average price – and these are market prices – also taking into account labour that is required for this.

MR AIELLO: On the basis of the above methodology, what is your assessment of the value of the *"Norstar"* at the time of its seizure?

MR MATTEINI (*Interpretation from Italian*)**:** Approximately 250 million of old lira.

MR AIELLO: That means in euro?

MR MATTEINI (*Interpretation from Italian*)**:** Well, if you take into account the exchange rate but also the effect or the impact that the euro had in Italy on the cost of living, we could consider it at a par, so 250,000 euro.

MR AIELLO: Does this assessment consider the technical updates and adjustments required by international conventions?

MR MATTEINI (*Interpretation from Italian*)**:** Obviously, yes, and I would like to refer more precisely to labour costs, all that had to be done would have been necessary in order to bring about the necessary work in order to comply with the measures that are required.

MR AIELLO: What technical updates and adjustments did the *"Norstar"* have to undergo?

MR MATTEINI (*Interpretation from Italian*)**:** Well, all the updates that would have been necessary for the *"Norstar"* would have entailed a double hull or a technical equivalent, so a double hull. That means there is a partial modification of the MARPOL that was introduced in 1992, and this innovation for existing ships, so had been built in earlier years, before it came into force, not just the duty to comply, but also a plan with timings in order to do these updates that would be referred to the year in which the boat or the vessel was built.

MR AIELLO: What was in your experience the potential working life of the *"Norstar"*?

MR MATTEINI (*Interpretation from Italian*)**:** Well, the average life of a vessel of the same type, so similar to the *"Norstar"*, would in general be estimated at around 20-25 years. Beyond this period of time, normally it is substituted with another vessel with similar characteristics, but obviously newer, so the vessel can be subject to works that would increase in terms of the operability of the vessel, so these improvements would lengthen the lifespan of the vessel. It is a sort of modernization – making it younger, if you like.

MR AIELLO: Are you aware whether the *"Norstar"* underwent any renewal action?

MR MATTEINI (*Interpretation from Italian*)**:** On the basis of the research that I did, the answer is no.

MR AIELLO: In your professional opinion, could the *"Norstar"* have been used for purposes other than the ones for which it was operated in 1998?

MR MATTEINI (*Interpretation from Italian*)**:** Personally, I would say this was not possible, both for technical reasons but also for commercial reasons, because when it comes to the technical specs and, more precisely, I am looking at the maritime regulations for the different sectors, which obviously have an effect on the vessel in terms of any updates that are done, which of course entail a cost and need to be assessed. As far as the commercial reasons, I am thinking of the pre-selection criteria that are normally done through a vetting system. This is obviously inspections of the vessel in order to assess and measure the performance and all the operability of the vessel and, in this case, even if we take into account the possible execution

of the updates and updating this vessel, in any case it would still have been a vessel dated 1966. It is not terribly interesting in terms of commercial interest compared to younger and newer and better-performing vessels.

MR AIELLO: Mr Matteini, allow me to show you some pictures, some photos. Are you able to tell the Tribunal their source and the time at which they were taken? You have them on the screen.

MR MATTEINI (*Interpretation from Italian*)**:** Yes. These photos had been published up till quite recently on not so much websites but platforms through which vessels all over the world are monitored, both in terms of traceability of their routes, their movements, and the sector of the goods they transport, but also in order to have a real-time status. These sources are Marine Traffic and Ship Finder – there are quite a few; there is a list that is available but in reality the content is the same on all of them, and the data are what they are and they are available on these portals.

MR AIELLO: Can you tell the Tribunal which sources did you use in this case?

MR MATTEINI (*Interpretation from Italian*)**:** Well, in particular Baltic and Marine Traffic were the sources and, as I said earlier, I would like to point out that, when you look at my calculations to make comparisons, also to prepare for this hearing, these photographs are no longer available, because we are talking of a ship that has been demolished, a lot of time has gone by, and only the shipowner can do this. The data has been cancelled and even though in my report I do state the sources, it is possible that some of these photos are no longer available online.

MR AIELLO: According to your opinion, in which time were these pictures taken?

MR MATTEINI (*Interpretation from Italian*)**:** As I said earlier, together with these photographs there are some sheets of paper or schedules on which the data relating to the last assessment are reproduced, so the date when that photograph is taken – and this should not be mixed up to be sure of when it was posted on the website, because it could have been posted later, but on the sheet, if there is data, that is referred to the photograph that is being shown.

MR AIELLO: How can we distinguish the fact if at the moment of the picture the boat was arrested or not?

MR MATTEINI (*Interpretation from Italian*)**:** I will repeat: the sheet that accompanies the photo, you have different data, amongst which there is the status, so if it says it is operational, it means that it is sailing, even though it could be moored somewhere, but somehow it is operational. Normally when a vessel is arrested, if there are reasons that are legal reasons or others, this is also stated, but this is an indicator that you see on the sheet. It is not something that can be changed or requested. It is either there or it is not.

MR AIELLO: Could you read in this case which is the definition of the state of activity of the ship? Could you read the word?

MR MATTEINI (*Interpretation from Italian*)**:** Yes. In the photograph that is posted on Marine Traffic that I see on the monitor, we see in the second column on the right at the top, if I can

read properly the status, it says "active". This means that it is operational, even though in the area I seem to recognize this is the port of Palma de Mallorca.

MR AIELLO: Distinguished Members of the Tribunal, we are not able to enlarge, but it is only for a technical problem. This is a public site and everybody can check that the status at this time was active.

(*To the expert*) Can I ask you which other definition could we find if the vessel would have been arrested?

MR MATTEINI (*Interpretation from Italian*)**:** I repeat that you could read either "non-active" or "arrested vessel".

MR AIELLO: Looking at these pictures, which is your impression about the state, the status of this boat? Could we consider it efficient or does it seem a little bit old?

MR MATTEINI (*Interpretation from Italian*)**:** Beyond the age, what appears quite clearly, also in other photos we saw earlier, one can see especially the one when you see the ship at the back, there is a hill, so we see the bow of the ship. We can clearly see that the steel of the hull has been hammered, so to speak. This is due to pressure or because it hit something or rubbed against something, which probably, during its working life, these are things that happened, but after that there was no re-fitting of any sort.

Also, one can clearly see that the submerged part of the vessel – we just see that layer which is almost green – shows a hull that is riddled with growth and other organisms that clearly show that there is a lack of careful maintenance – even ordinary maintenance. So I would say it was not being looked after terribly well.

MR AIELLO: I think that you had the occasion to see at the C M Olsen evaluation, estimation of the value of the ship, what I find is a significant difference of value. Do you agree or not with this valuation? If not, why?

MR MATTEINI (*Interpretation from Italian*)**:** First of all, I do not agree from a technical standpoint for the reasons that I have already explained. Secondly, to assess the value of a vessel means working on three indicators, and that is, the historical cost of the vessel – and historical cost means the new price that has been devalued over time and can then be re-evaluated if some improvements have been made to the vessel. The second indicator is the reconstruction value, and with this we mean what it would cost and what the value would be today if that vessel was to be reconstructed from scratch. That means using the technologies used at the time of the first construction, not the innovative technologies. The third indicator is a commercial value, which at the end of the day is probably the most important, but is one of the three that together assess the value.

So in the expertise done by the colleague it is said, from what I remember, that if the vessel had had a charter contract for a certain amount of time, and should there have been requests for transportation of that type of product, one could recognize to that vessel a market value and also a chartering value but, as we said earlier, there were many "ifs" and therefore an evaluation can be done based on some "ifs". However, this is based on assumption and not on fact, with due respect to the fact that to do a proper evaluation one would need to go on board, and this was not possible because the ship no longer existed.

MR AIELLO: This is my last but crucial question. What is your opinion on the reasons why the shipowner deemed not appropriate to pay the security of 250 million lira?

MR MATTEINI (*Interpretation from Italian*)**:** My spontaneous answer would be that at the time, as we said earlier, the total costs that had to be incurred in order to update it, the maintenance, and also if you take into account that the class was no longer available and therefore some certificates would have to be reissued, so in spite of this, if we take all these costs, could not justify a further payment in terms of security because the cost/benefit ratio would have clearly indicated that any entrepreneur would have withdrawn. I think this is probably the reason why.

MR AIELLO: So we could conclude that in this case the commercial value of the vessel has been divined directly from the shipowner, because the value was less than 250 million lira?

MR MATTEINI (*Interpretation from Italian*)**:** Yes, this is what I think.

MR AIELLO: I have no more questions. Thank you.

THE PRESIDENT: Thank you, Mr Aiello. We are approaching 4.30 and the Tribunal will now withdraw for a break of half an hour. The examination of the expert will have to be continued when we resume at 5 o'clock. The sitting is adjourned.

(*Break*)

THE PRESIDENT: Before we start, I wish to inform you that Judge Cot is prevented from attending the sitting for a reason duly explained to me.

Before the break, the Co-Agent of Italy concluded his examination of the expert Mr Matteini. Pursuant to article 80 of the Rules of the Tribunal, an expert called by one Party may also be examined by the other Party. Therefore, I ask the Agent of Panama whether Panama wishes to cross-examine the expert and, if yes, who will conduct the cross-examination.

MR CARREYÓ: Yes, your Honour. This cross-examination will be conducted by Mr von der Wense.

THE PRESIDENT: Thank you, Mr Carreyó.

I then give the floor to Mr von der Wense to cross-examine the expert.

MR GUIDO MATTEINI
CROSS-EXAMINED BY MR VON DER WENSE (PANAMA)
[ITLOS/PV.18/C25/8/Rev.1, pp. 16-23]

Thank you, Mr Matteini, that you allow me to put some questions to you. My first question is the following: have you, in terms of your education, any economic or legal background?

MR MATTEINI (*Interpretation from Italian*)**:** No. I am of a prevalently technical background.

MR VON DER WENSE: Can you repeat the answer, please?

MR MATTEINI (*Interpretation from Italian*)**:** No, I mainly have a technical background.

MR VON DER WENSE: Thank you. My next question would be that we learned that you did not have the opportunity to inspect the *"Norstar"*. I assumed that you would have had the opportunity to inspect the vessel, let us say, in 1997 or 1998. Would it have been an important impact on your estimation as regards the value of the vessel at the time of the arrest in 1998?

MR MATTEINI (*Interpretation from Italian*)**:** Considering this case, I think that this would have helped me to better evaluate the real circumstances under which the ship had been preserved, and this goes beyond the commercial and the economic aspects I have already illustrated.

MR VON DER WENSE: Am I correct – in other words, you already stated that you had no information about the investments that have been made; so if you would have had the information, for example, that the vessel received new machines, for example, was completely sandblasted in '89, got a new chain in '99 – would that have been an important impact on your evaluation?

MR MATTEINI (*Interpretation from Italian*)**:** I kindly ask to confirm if the word "sandblasting" meant what has been translated.

THE INTERPRETER: He is asking the interpreters if a specific translation for "sandblasting" can be confirmed in Italian – and the answer is "yes".

MR MATTEINI (*Interpretation from Italian*)**:** Good. So, as regards the sandblasting on the hull, this is an activity which would have been carried out anyway. This was needed because of the class of the ship. The last two letters are the class acronym and specify that this vessel had to undergo this activity on a regular basis, i.e. in order to appreciate the thickness of the metal plate, this activity had to be carried out. But if we have a look at the pictures which have been shown, especially the pictures that were taken in the period we are analysing, then in my view no sandblasting operation had taken place; otherwise all the aspects on which I have already expanded would not be there – all the things that I have mentioned earlier on.

MR VON DER WENSE: We will come to the pictures later, but I ask a question right now because you mentioned them. Would it change your mind if the pictures were taken, let us say, in 2012 or 2014?

MR MATTEINI (*Interpretation from Italian*)**:** Now, we have pictures that presumably go back to both dates, and they illustrate almost identical situations; so, frankly, I don't understand the meaning of your question.

MR VON DER WENSE: Earlier you said the pictures were not fitted with any dates – in the examination – or did I remember wrong, so perhaps you can correct me?

MR MATTEINI (*Interpretation from Italian*)**:** I recall that in the data sheets that accompanied the pictures there are date indications, hour indications, time indications. No matter when, then, the pictures were then uploaded onto the portal – so if I correctly remember, some pictures have been displayed on the screen and they had a clear indication of a date. Maybe we can display these pictures again so that we can confirm the date.

MR VON DER WENSE: It is not necessary because we have already seen the pictures and heard what you have said in the examination, but if I understand you correctly right now you say you have pictures taken into consideration which, in your remembrance, were made in the time of the arrest and at a later stage as well?

MR MATTEINI (*Interpretation from Italian*)**:** Yes, I think that is correct.

MR VON DER WENSE: Do you want to see the pictures again?

MR MATTEINI (*Interpretation from Italian*)**:** I perfectly remember the pictures, but if you so wish we can see them again.

MR VON DER WENSE: No, that is fine. In your examination you mentioned the IMO rules, especially the MARPOL rules, and you were talking about the *"Norstar"* not fulfilling the prerequisite of having a double hull. Can you tell us what kind of impact, in terms of money, this non-fulfilment has as regards to the value of the ship?

MR MATTEINI (*Interpretation from Italian*)**:** Well, if we consider the evaluation criteria in the nautical field, we can divide the ship into three portions: hull, fitting and the main structure. All these three elements represent one hundred per cent of the ship, and the hull accounts for 30 per cent of the ship as a whole. So, if we have to make sure that the ship is fully compliant with regulations on technical equipment, then technical update measures would have to be taken accounting for 30 per cent of the overall value of the ship, and then on top of that we would have had to consider additional expenses for reclassification purposes.

MR VON DER WENSE: Assuming that hypothetically, let us say, the ship does not need a double hull – because you consider the ship to have needed a double hull, if I understood you right – and assuming that this provision would not apply and the ship would also be allowed to run as a single-hulled ship, so what deduction did you make from the value because of the non-fulfilment of the double hull requirement?

MR MATTEINI (*Interpretation from Italian*)**:** If I have correctly understood the meaning of your question, I think that we should first consider that the ship had to be made compliant with the standards. The ship could have never resumed its operation under such conditions if it hadn't been correctly updated – so that is a basic prerequisite. It is a condition *sine qua non*, and the evaluation amounting to 250 million lira – and this goes back to the period when the arrest was enforced – I must point out that this evaluation took into consideration all the activities this ship had to go through in order to be compliant with the latest technical measure of MARPOL.

MR VON DER WENSE: My question was about the amount of deduction you have taken from the original value of the ship because of the non-fulfilment of the double hull requirement. I want to hear an amount, but if you cannot answer that, that is no problem – but I just want to make sure that I understand you right.

MR MATTEINI (*Interpretation from Italian*)**:** If I have correctly understood your question, let me ask you one question. Since the hull, as we said earlier on, accounts for 30 per cent of the overall value of the ship, and as part of my evaluation had already taken into consideration these update measures, so we just needed to deduct 30 per cent out of 250 million lira; and this

would lead us to the value of the ship in a non-compliant state with the MARPOL requirements going back to the period when the seizure was carried out.

MR VON DER WENSE: With regard to MARPOL, have you considered the fact that not all vessels which were capable of loading oil were subject to the regulations you mentioned?

MR MATTEINI (*Interpretation from Italian*)**:** As far as I am concerned, the *"Norstar"* was one of the ships that was obliged to fulfil this requirement. As I said earlier on in my statement, if we consider the ships that were already sailing, that were already operating before this period, then an update programme, an update scheme had already been planned; and this update scheme was referred to the year in which the ship had been built. This lapse of time stretches over a period of 20 to 25 years of time. So given the fact that this ship was built in 1966, then at the latest in 1996 this ship would have needed some technical upgrade.

MR VON DER WENSE: Even as a lawyer, the regulations of MARPOL are not easy to read. Have you personally scrutinized these provisions?

MR MATTEINI (*Interpretation from Italian*)**:** Sure. Frankly, I didn't really understood your statement – so even as a lawyer it is not easy to read MARPOL's requirements Have I correctly understood?

MR VON DER WENSE: At least for me. Okay, you did so. Thank you. Do you know the prerequisites for the MARPOL regulation concerning, for example, the cargo or the deadweight?

MR MATTEINI (*Interpretation from Italian*)**:** Sure. There are a lot of MARPOL provisions according to the type of the ship. In the instant case, the *"Norstar"* is what we call Annex No.1 to the MARPOL Convention. We – I actually – focused on this type of provision for the evaluation purposes. I would say that this prerequisite is binding from a commercial point of view. It can be easily understood that if somebody wanted to use the *"Norstar"* in the past to operate in this goods sector, then they would have been in a position to comply with all the technical requirements.

Panama, with its own registry, has very specific provisions, so it is not going to happen taking this into consideration, but I have given priority to the international aspects rather than national laws.

MR VON DER WENSE: Do I understand you correctly that you cannot tell, for example, what the deadweight limits of the MARPOL rules are right now? If you do not know, a "no" would be enough for me, but if you know them, perhaps you can tell us now the deadweight limits?

MR MATTEINI (*Interpretation from Italian*)**:** Yes, I would be able to reply to your question had I had the opportunity to have a look at the soundness index of the ship or the load index of the ship.

MR VON DER WENSE: Do you know the deadweight of the *"Norstar"*?

MR MATTEINI (*Interpretation from Italian*)**:** The dry weight, so had we taken the ship out of the sea and put the ship away, then I performed this calculation by using several mathematical nautical formulae, and then I took some more data from the survey of a

Norwegian colleague and also used some more publicly available information that I could find online.

MR VON DER WENSE: You do not know the deadweight of the *"Norstar"* right now and I understand that you cannot tell us this figure right now, approximately?

MR MATTEINI (*Interpretation from Italian*)**:** It is written.

MR VON DER WENSE: I am sorry.

MR MATTEINI (*Interpretation from Italian*)**:** We are talking about the gross deadweight, if I correctly understood?

MR VON DER WENSE: Okay.

MR MATTEINI (*Interpretation from Italian*)**:** All right. I indicated as a deadweight value. The value was indicated by the Norwegian colleague in his survey. On top of this, this data is also indicated in the portals, which we mentioned earlier on, where we have all the data sheets of the ship.

MR VON DER WENSE: Can I ask you for a short answer, if possible? In your view, is there a possibility that MARPOL did not apply to the *"Norstar"* in this regard about the double hull requirement – yes or no?

MR MATTEINI (*Interpretation from Italian*)**:** No, because the amendment to the Convention refers not just to the deadweight but also to the type of hydrocarbon that has been transported. MARPOL No. 1 sets forth which fuels can be transported. The inflammability index of fuels are analysed –

MR VON DER WENSE: Can I interrupt you? I am just asking about the double hull prerequisite, not about all the other regulations, so I am happy with your answer and I would like to proceed, if you do not mind.

MR MATTEINI (*Interpretation from Italian*)**:** You are welcome.

MR VON DER WENSE: As to your assumption that the ship was not suitable for other purposes, you referred to material regulations. Can you specify these material regulations? For example, can you say whether any additional provisions apply to the transport of waste of the fishing industry?

MR MATTEINI (*Interpretation from Italian*)**:** For fish and fishing industry waste, I am not able to reply to your question honestly when it comes to fishing industry waste. For all the other sectors, as I have already expounded in my previous statement, there are technical requirements that define different ways in which goods can be transported. I am thinking of sensitive goods like drinkable water or loose food products. All these goods are exposed to different requirements and this ship, the *"Norstar"*, was not compliant with these requirements unless a technical update was performed.

MR VON DER WENSE: I am very sure that there are purposes, for example the transport of dangerous goods, where additional provisions will apply on the equipment of the ship, but can you exclude that there might be other purposes where no additional regulations apply?

MR MATTEINI (*Interpretation from Italian*)**:** I repeat, every goods sector has its own rule and regulations. Dangerous goods, for instance, is one of the sectors where you have the strictest provisions. In the food sector, for instance, you have very specific requirements and these requirements do not just involve the flying State but they also need to take into consideration the commercial requirements that the recipient State has to comply –

MR VON DER WENSE: I am sorry to interrupt you again but I have a simple question. Can you exclude that there might be purposes with no additional obligations imposed on the ship – yes or no?

MR MATTEINI (*Interpretation from Italian*)**:** I cannot reply to this question because these are entrepreneurial decisions which would have involved the people concerned and not even the registry.

MR VON DER WENSE: You said that the lifespan is approximately 20 to 25 years. Again I would appreciate it if you could answer the question strictly. If the vessel is duly maintained and has all the certificates, from a purely technical point of view, do you see any reason why the ship could not be used any more?

MR MATTEINI (*Interpretation from Italian*)**:** Regular maintenance is, for sure, an added value for the ship in terms of residual lifespan, but again we need to consider what we said earlier on. If the ship does not comply with the rules and the requirements, it cannot be sailed. If the ship can be subject to other activities which do not fall within my remit, then we would have had to study all the possibilities one by one, and only then would have been in a position to reply to your question.

MR VON DER WENSE: Coming back again to the photographs, I understand that you took the photographs into consideration for your evaluation?

MR MATTEINI (*Interpretation from Italian*)**:** Sure.

MR VON DER WENSE: Do you know the author or authority of those photographs? Was it an official source or rather a private web page?

MR MATTEINI (*Interpretation from Italian*)**:** No. The websites that I mentioned which I used and all the other people performing similar evaluations use are websites connected to the IMO. They are official sites because they provide this information to coastal guards, ministries, States.

MR VON DER WENSE: So with regard to these ministries and officials on these web pages, can you exclude that these pages were kinds of ship-spotting pages, such as we know people have the hobby of plane spotting and ship spotting? Could it be that the web pages you refer to are such web pages?

MR MATTEINI (*Interpretation from Italian*)**:** The websites that I mentioned, I would exclude this categorically. It is true that there are other websites, private websites as you put it, where

you have in typical Facebook-style comments and pictures, and of course it is not reliable data at least for the type of enquiries that we are carrying out.

MR VON DER WENSE: I would now like to show you some photographs taken of the *"Norstar"* that are already filed in the written proceedings and I would ask you to look at them and give your impression of the state of the vessel that you can derive from those photographs.

MR MATTEINI (*Interpretation from Italian*)**:** Looking at these pictures – and I am not referring so much to the hatch that we have just seen – I can see that the deck, for instance, with the manifold of the load lines, the feed lines and the castles, was in good maintenance order. Unfortunately, I had not seen *these* pictures. *This* is the engine cabinet. It is quite clean. You can see the dashboard and the engine portion. For sure, had the vessel looked like that, then my evaluation would have been different, but again we would need to consider the necessary technical update that it had to comply with.

MR VON DER WENSE: I think that it will hardly be difficult to estimate the difference if you see the photographs right now from your valuation?

MR MATTEINI (*Interpretation from Italian*)**:** It would not have had the decay that I pointed out in my report, but this better maintenance would not have entailed an increase in the value because once a certain number of years has gone by, the value of ships tends to be quite stable. Even if ships are kept in good maintenance, the condition as we see in these pictures, this provides some added value. It makes the ships palatable to charterers, but on the whole the evaluation remains the same.

MR VON DER WENSE: You are contradicting yourself because one minute ago you said that if you would have seen the photographs it would have certainly changed the estimation?

MR MATTEINI (*Interpretation from Italian*)**:** No, I did not say that, I am sorry, or maybe if you understood, maybe I expressed myself in the wrong way. This was not the meaning of what I said earlier on, but again we do not have any time reference for these pictures, so it is very difficult to make a comparison. If you take a 16 year-old girl and a 60-year-old, maybe both are very beautiful women but there is a time difference.

MR VON DER WENSE: I will not comment on that! My last question is: do you know the types of bunker that the *"Norstar"* used to carry?

MR MATTEINI (*Interpretation from Italian*)**:** Yes, I know which bunkers the *"Norstar"* was actually carrying, based on the documents that I could read. It was gasoil that generally was used, so I completely exclude a bunker because one trip would have been enough to actually ruin the tanks and then it would have obliged the vessel to transport only this kind of fuel.

MR VON DER WENSE: That was my last question. Thank you very much.
Thank you, Mr President.

THE PRESIDENT: Thank you.
An expert who was cross-examined by the other Party may be re-examined by the Party who had called the expert. Therefore, I ask the Co-Agent of Italy whether Italy wishes to re-examine the expert and, if yes, who will conduct the re-examination?

MR AIELLO: No, Mr President. Thank you.

THE PRESIDENT: Thank you.

Pursuant to article 80 of the Rules of the Tribunal, the President and Judges of the Tribunal may also put questions to the expert. I understand that no Judges wish to put a question to the expert.

Therefore, Mr Matteini, thank you very much for your testimony. Your examination is now finished and you may withdraw.

(*The expert withdrew*)

This brings us to the end of this afternoon's sitting and concludes the first round of pleadings by Italy. The hearing will continue tomorrow afternoon at 3 p.m. with the second round of pleadings by Panama. I wish you a good afternoon. The sitting is now closed.

(*The sitting closed at 5.39 p.m.*)

14 September 2018, p.m.

PUBLIC SITTING HELD ON 14 SEPTEMBER 2018, 3 P.M.

Tribunal

Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

For Panama: [See sitting of 10 September 2018, 10 a.m.]

For Italy: [See sitting of 10 September 2018, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 14 SEPTEMBRE 2018, 15 HEURES

Tribunal

Présents : M. PAIK, *Président* ; MM. NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, Mme KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mme LIJNZAAD, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 10 septembre 2018, 10 h 00]

Pour l'Italie : [Voir l'audience du 10 septembre 2018, 10 h 00]

THE PRESIDENT: Good afternoon. Today we will hear the second round of oral pleadings by Panama in the hearing of the Tribunal on the merits of the *M/V "Norstar" Case*.

First, I give the floor to the Agent of Panama, Mr Carreyó.

Second Round: Panama

STATEMENT OF MR CARREYÓ
AGENT OF PANAMA
[ITLOS/PV.18/C25/9/Rev.1, pp. 1–17]

Thank you, Mr President. Being 27 minutes past the hour, I will start my presentation today. Good morning to all of you, distinguished delegates of Italy.

The justification for universally recognized provisions of maritime law stems from the 17th century when free trade via sailing vessels arose. This need has ultimately led to this Tribunal, which is charged with interpreting the actions of member States for their common good.

In this case, this Tribunal has not been called upon to reinterpret Italian law, but rather to judge whether or not, when applying its domestic statutes, Italy has acted in conformity with its obligations under the International Convention on the Law of the Sea as regards the *"Norstar"*.

During the past four days in these oral hearings we have discussed a large number of legal and factual issues. Now, Panama would like to take the opportunity to take a look once again at what we believe are the most salient features of this case.

Panama has asked the Tribunal to examine the Decree of Seizure of 11 August 1998 and related legal documents, as well as Italy's conduct in this case directly involving their international responsibilities for any violations of the international law of the sea.

The argument that Panama has been advancing is that the arrest of the *"Norstar"* and the subsequent events that led to its ultimate demise strongly indicate a breach of the United Nations Convention on the Law of the Sea.

The Convention has established a legal regime which is based on maritime zones. In this instance, the reasoning of Panama has been unambiguous and straightforward. All the evidence that has been presented has shown that the *"Norstar"* was operating on the high seas and that Italy's actions have interfered with its right to do so.

During this second round of oral proceedings Panama will refer to several of the arguments that Italy has brought forward in its first round, such as the alleged enlargement of the dispute, the breaches of article 87, the locus of the activities for which the *"Norstar"* was arrested, the location of the arrest in Spain and why this does not affect the basis for Italy having arrested this vessel. We will again refer to the concept of *corpus delicti*. We will also approach the alleged release of the *"Norstar"* to which Italy referred, and we will insist on Italy's breaching its duty to act in good faith. This will be covered by me. I will then pass the floor to the advocate Miriam Cohen who will first provide a summary of the arguments of Panama in light of some of the evidence heard in this proceedings.

She will then address Italy's statements regarding Panama's alleged confusion between national and international law and, finally, will argue that Panama has fully met its burden of proof. Advocate Mareike Klein will continue to explain why article 87 applies in this case and that there is indeed a violation of the freedom of navigation of Panama. She will particularly discuss the contents of the Decree of Seizure and will contest Italy's arguments in this respect, for approximately half an hour, and for the same length of time advocate Olrik von der Wense will respectively cover the question of reparation by way of compensation and some comments about article 300.

At this point in the proceedings, Panama notes that Italy has not brought a single new argument to be considered but has evidenced the same contradictions as before.

Because the *"Norstar"* was not arrested on the high seas but in Spanish internal waters, Italy believes that article 87 does not protect Panama.

STATEMENT OF MR CARREYÓ – 14 September 2018, p.m.

If the Convention is interpreted in a narrow sense, the conclusion could be that the right to freedom of navigation on the high seas may only and exclusively be exercised on the high seas – or, in certain cases, according to article 58, in the exclusive economic zone – and that therefore an infringement of article 87 is only possible there.

An argument often used for this interpretation is that the right of access to and from the sea was not guaranteed by article 87 but by article 125 of the Convention.

However, this provision grants the right of access only to land-locked States but not to coastal States. This again could lead to the conclusion that article 87 of the Convention did not protect vessels outside the high seas – and in certain cases the exclusive economic zone – except for vessels of land-locked States. Following this narrow interpretation, the *"Norstar"* also would not have been in the geographical scope of protection of article 87 at the time of the arrest, and for this reason there was no breach of article 87.

However, Panama would like to argue very clearly against such a narrow interpretation of the Convention.

We all know that the freedom of the high seas is one of the oldest principles of international law of the sea, and a fundamental concept of the Convention. Panama is convinced that the interpretation of the Convention should take into account the will of the contracting States to assert the principles of this Convention as effectively and as fully as possible.

Article 87 of the Convention reads: "The high seas are open to all States, whether coastal or land-locked."

This wording refers not only to immediate but also indirect interference with the freedom of the high seas. This strongly suggests that even if these interferences do not occur directly on the high seas but take effect from a different location, they still impact navigational freedom.

We are convinced that article 87 of the Convention on the Law of the Sea should be interpreted broadly. Article 87 must also effectively protect against interferences in the freedom of the high seas with the conscious aim of preventing that exercise, such as by way of seizure of a vessel or by imposing restrictions on its legal activities.

This is exactly what happened in the present case. Italy purposefully attempted to prevent Panama from exercising its freedom of the high seas, sanctioned and prevented legal bunkering activities by initiating criminal proceedings as well as by arresting the *"Norstar"*.

Italy has shown that it carried out the arrest in Palma de Mallorca Bay with full knowledge and intent, and deliberatively interfered with the right of a ship to exercise its freedom to navigate on the high seas.

Panama has not argued that Italy is unable to arrest a vessel in port in the course of its internal proceedings. However, what the evidence has shown is that the arrest was for acts occurring on the high seas and not within Italian territory.

In the *M/V "Louisa" Case*, Judge Cot's Dissenting Opinion at paragraph 24, page 98, reads:

> If the offence was committed in a location where the relevant Spanish legislation – in this case, the provisions of the Criminal Code ... particularly in its internal waters and territorial sea – is applicable, the Spanish judicial authorities may exercise criminal jurisdiction without infringing upon international law.

Read *contrario sensu*, this comment coincides with Panama's theory concerning the present case in the sense that, if the offence was not committed in a location governed by the Italian Criminal Code, particularly not within its internal waters or territorial sea, the Italian judicial authorities may not exercise criminal jurisdiction without infringing international law.

As we will show later, what matters is where the transactions for which the vessel was confiscated occurred and were conducted.

The *"Norstar"* may have purchased bunkers on the Italian coast and then conveyed them to the high seas where they were sold to mega yachts.

However, the fact that the goods were bought in the coastal State does not constitute illegal conduct. You still have to link it to something else, and that something else was the reintroduction by mega yachts into Italy.

Has Italy provided evidence about how many of all those mega yachts supplied with bunkers on the high seas went back to Italy in order to affirm that there was a suspicion of a crime of smuggling and tax evasion having been committed?

Or is Italy simply assuming that the *"Norstar"* and the persons connected therewith were accomplices of such mega yachts who reintroduced the bunker back into Italy?

At page 15 of its first round, lines 9-13, Italy stated:

> In fact, had the fuel been consumed by the *"Norstar"* and the leisure boats in question on the high seas and/or carried to ports located in the internal waters other than those of Italy or of other EU coastal States, such as Gibraltar, the resale of the fuel in question on the high seas would not have raised the slightest suspicion concerning offences of the kind in question.

Italy also stated that

> the sale of fuel on the high seas, did not constitute a suspected offence as such, but it was materially instrumental in grounding the suspicion that the fuel declaration – which was filed at the time of purchase on Italian territory – was false, and that the re-entry into Italian ports could amount to tax evasion. Here, again, the suspected offences would occur exclusively on Italian territory.

As we can confirm, Mr President and distinguished Judges of this Tribunal, Italy has had to admit that the sale of fuel on the high seas was "materially instrumental in grounding the suspicion."

Therefore, there is no doubt that the bunkering operations had been considered as part of the criminal acts that led to the arrest of the *"Norstar"*.

Italy then said that "the Decree did not target bunkering activities, which means activities carried out on the high seas". However, it is clear that without such bunkering activities Italy could not possibly say that there was a suspicion of any crime of smuggling or tax evasion because, as we have already demonstrated, a foreign element is intrinsic in the commission of such crimes. We will turn now to the alleged enlargement of the dispute.

Within the context of Italy's defence about an alleged enlargement of the dispute, Panama would like to recall that, in its first round of oral arguments, Italy has continued to differentiate between the Decree of Seizure and the request for its execution, on the one hand, and the execution or enforcement of that Decree, on the other, constantly using the phrase "the Decree of Seizure and the request for its execution", followed by a similar number of citations of those two conducts in the afternoon session.

In our first round we referred to the Rejoinder, stating that Italy had argued that only those damages derived from the Decree of Seizure and from the Request for Execution as such could be claimed, but not from the actual enforcement of the order of arrest. In its first round, Italy again referred to the same issue, quoting paragraph 122 of the Judgment of 4 November 2016.

With this argument, Italy is once again trying to deny its responsibility for the enforcement of the arrest by tacitly shifting all responsibility to Spain, even though Italy itself had requested the enforcement of the *"Norstar"*'s arrest.

Italy has ignored that in its Judgment of 4 November 2016 this Tribunal stated:

> In the view of the Tribunal, … the Decree of Seizure and the request for its enforcement by Italy were central to the eventual arrest of the vessel. It is clear that without the Decree of Seizure, there would have been no arrest;

and that in the preceding paragraph the Tribunal had not considered relevant

> the reference made by Italy to the distinction between a State's conduct that completes a wrongful act and the State's conduct that precedes such conduct and does not qualify as a wrongful act, stated in the *Gabčikovo-Nagymaros Project* case;

but rather stated that

> The present case, which involves the action of more than one State, fits into a situation of aid or assistance of a State in the alleged commission of an internationally wrongful act by another State.

Of particular importance is that this Tribunal also found at paragraph 167 that

> The Tribunal notes that the detention carried out by Spain was part of the criminal investigation and proceedings conducted by Italy against the *M/V "Norstar"*. It is Italy that adopted legal positions and pursued legal interests with respect to the detention of the *M/V "Norstar"* through the investigation and proceedings. Spain merely provided assistance in accordance with its obligations under the 1959 Strasbourg Convention. It is also Italy that has held legal control over the *M/V "Norstar"* during its detention. This is clearly evidenced by the communication that took place between Italy and Spain subsequent to the seizure of the *M/V "Norstar"*, including Italy's letter of request dated 18 March 2003 for the release of the vessel and its return to the owner following the judgment of the Court of Savona and Spain's letter dated 6 September 2006 asking for Italy's authorization to demolish the vessel. Accordingly, the Tribunal finds that the dispute before it concerns the rights and obligations of Italy and that its decision would affect the legal interests of Italy.

Italy has stated that Panama has been relying on this Tribunal's Judgment despite the fact that such decision was adopted in the Preliminary Objections phase of this case and that since we were in the merits phase we were not bound to respect those findings. Panama disagrees. Panama completely understands what this phase of the case on the merits means. However, we do not accept that the previous findings are of no importance. On the contrary, Panama considers those findings very valuable to understanding the subject matter of this dispute.

Would this Tribunal have accepted the present case if it believed that the enforcement of the arrest, as Italy stated, did not fall squarely within the framework of article 87?

Are we to believe that Italy is still trying to place its responsibility on Spain?

Let us stress again that this Tribunal stated, "[w]ithout the Decree of Seizure and the request of its enforcement, there would have been no arrest."

It is not valid to raise a distinction whether the damages were caused by the Decree of Seizure, the request for its execution or by its actual enforcement.

Let us also be perfectly clear that Italy is responsible for all three phases of the arrest and thus for all damages caused by them to Panama.

Italy, as usual, is trying to play with the language more than address the substance of the issue. Specifically, Italy is trying to greatly circumscribe article 87 and claim that it does

not apply to the Degree of Seizure which is all that it is responsible for. Let us briefly review the Italian breaches of this provision.

Italy has stated that Panama has not presented evidence that the *"Norstar"* was navigating in the summer of 1998. However, the witness Morch lucidly declared, under oath, that in July 1998 the *"Norstar"* was in Algeria.

Panama has recently received a copy of the declaration given by the former captain of the *"Norstar"* at the moment of the arrest, Mr Tor Tollefsen, who, on 22 February, made a declaration before the chief prosecutor in Alicante, Spain, corroborating what Mr Morch had just said in his declaration. This document is in Spanish and Panama will send a translated copy to the Tribunal, who, after seeking the views of Italy, may make a decision as to its admissibility.

Coming back to the main issue about article 87 applicability - that is, the location of the activities for which Italy arrested the *"Norstar"* - Italy insists that although it arrested the *"Norstar"* because it was bunkering on the high seas as part of the investigation concerning the commission of the crimes of smuggling and tax evasion in Italy, this conduct does not amount to a breach of article 87.

Italy has also insisted on characterizing the *"Norstar"*'s conduct as smuggling and tax evasion:

In the verbatim record of Wednesday 12 September, afternoon session, page 5, Italy regretfully insisted on characterizing the *"Norstar"*'s conduct as follows:

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

We do not have any doubt that this Tribunal will have something to say about the way Italy, in spite of the fact that there were no crimes at all, is still using the same arguments that refer to the *"Norstar"* and the persons connected therewith as criminals. We have been respectfully warning Italy about this procedural conduct all along the written and during these oral proceedings.

Nothing forbade the *"Norstar"* from buying the bunkers in any coastal State and taking them within its own tanks to the high seas to sell them there or anywhere on the globe. Italy has not presented a single piece of evidence about any of the mega yachts that were supplied with bunkers on the high seas being fined or prosecuted because they returned to Italy.

We would like Italy to answer these and other questions tomorrow.

If some of those mega yachts did return, what control did the *"Norstar"* have on such a decision? Could Italy have demanded that the *"Norstar"* had some sort of registry over such mega yachts?

Page 5 of the 12 September verbatim record, afternoon session, shows that Italy used an analogy with trucks to assume illegal conduct when this has not been the case. This example reinforces Panama's thesis because it concludes that the illegality was committed in the country where the fuel was "illegally sold" and the sale of the bunker was on the high seas.

Although on page 3 of 12 September's verbatim record, afternoon session lines 36-39 Italy states that article 87 is not concerned with territoriality or extraterritoriality, but rather only with interference with navigation. We all know that if a State applies its jurisdiction (prescriptive or enforcement) it can do it territorially (in its own territorial waters) or extraterritorially (on the high seas or in the territorial waters of another State). The latter is precisely what Italy did. It applied its custom law and its enforcement jurisdiction to acts carried out on the high seas by the *"Norstar"* and all the persons connected therewith.

The other main issue in this case concerns the location of the arrest.

STATEMENT OF MR CARREYÓ – 14 September 2018, p.m.

The Italian argument that article 87 is not applicable to vessels in port is not tenable.

When Italy appointed an expert in Italian law, Panama expected that all our questions concerning this case would be resolved. It was disappointing to see how unfamiliar Mr Esposito was with the law of the sea, but what is more important is that neither is he familiar with the records of this case.

These proceedings have left many unanswered questions from Italy. Panama would have liked to have the opportunity to pose them in a formal way to Italy before this stage of the proceedings or during the first round with the object of obtaining answers. However, we understand that the rules of procedure do not provide for such a valuable procedural instrument.

Since Panama could not ask the Italian legal expert those questions either, for the reasons just explained, we will pose some of them now to Italy in the expectation that tomorrow we will have answers.

First question: did the fact that the *"Norstar"* moved from the high seas to the territorial waters of a foreign state change the rationale for arresting this vessel in the first place? Panama contends that the fact that the *"Norstar"* moved from the high seas where it operated did not change the underlying reasons for which the arrest order had been issued in the first place. Those reasons have been stated in the Decree of Seizure itself.

Second question: is it not legally necessary in Italian criminal law to confirm the existence of a criminal offence before issuing a Decree of Seizure against a foreign vessel?

The Italian legal expert yesterday said that, since it was a probatory seizure, for a prosecutor to arrest a foreign ship, the existence of a crime did not have to be proven. So our first question to Italy will be: in Italy, for a foreign vessel to be arrested, even for probatory purposes, is it not necessary to have proven the existence of a criminal offence?

Although for Panama this is very strange proceeding, because in Panama, in order to arrest a person or a chattel, even for probatory purposes, the arresting party within criminal proceedings has to prove first the existence of a criminal offence. I honestly believe this is a universal rule.

What was the crime that had objectively been proven that supported the arrest of the *"Norstar"*?

The consequence is that, according to the Italian legal expert and Italian criminal law, you first arrest a foreign ship, and after the arrest, you then investigate if a crime has been committed. Panama believes that it should be the other way round.

Third question: if, as Italy has accepted, in this case the arrest order was issued because of the alleged offences of smuggling and tax evasion, and that it would have been unlawful to arrest the *"Norstar"* on the high seas, what difference does it make to arrest on the high seas or in Spain if the offences for which the arrest was issued were the same?

By the same token, would Italy consider an arrest of a foreign vessel unlawful on the high seas, but lawful on the territory of a third State, for the very same offence?

Fourth question: if, as Italy has admitted, the arrest of the *"Norstar"* on the high seas would have been a breach of article 87, and the arrest order was based precisely on the fact that it had to be "performed in the international seas and hence beyond the territorial sea and the contiguous zone", as we will see the Decree of Seizure said, would it still consider such an order lawful, and why?

Fifth question: can an arrest order of a foreign vessel be legally based on the fact that it has to be performed beyond its international seas and its contiguous zone, and later decide to execute it within the territory of a third State?

Was there any sense of urgency to arrest the *"Norstar"*, particularly considering that the arrest order was issued after it had been freely bunkering for several years in the same location?

Although Italy insists that paragraph 2 of article 87 only concerns Panama, it would be necessary to remind Italy that the fact that Italy does not exercise the right to freedom of navigation does not mean that Italy, as a coastal state, does not conduct itself with due regard to the interests of Panama in its exercise of such right, which is precisely what article 87, paragraph 2, is designed for.

Let us turn to the examination of Panama's appointed witnesses.

In its first round of oral arguments in Thursday morning's session, Italy stated that the case of the *"Spiro F"* had nothing to do with the present case. The Italian Co-Agent even interrupted our examination of a witness relying on the same argument.

However, as can be confirmed, Panama introduced a reference to this case firstly in the Memorial as Annex 6, with a transcript of the deposition of Silvio Rossi addressed to and received by the prosecutor of Savona on 18 September 1998, before the arrest of the *"Norstar"* had been enforced.

On page 2 of this piece of evidence Mr Rossi cited article 255 of the Italian Custom Book as follows: "For what concerns the use of the foreign and exported national ship supplies, the Italian and foreign ships that are sailing in the territorial waters are considered outside the Customs territory."

He also declared that on page 4 he referred to the Istanbul Convention that in its C annex says: "The fuels and the propellants inside normal pleasure vessel tanks are admitted duty free at the importation without being subjected to any prohibition and restriction."

He also stated on page 7 that

> the gas oil inside the tanks, present on board of the vessel at the moment of its entering the State territorial waters that ... may have been boarded in any communitarian or extracommunitarian place, o[r] moored in ports or staying in high sea ... as at the moment of entering of the vessel the territorial waters said supplies have been considered by the Italian Customs law in foreign state … as extracommunitarian goods.

On page 8 he added that

> In view of all the above reasoning, it is to conclude that the activity of all the pleasure vessels that have been refuelled in extra-territorial [international] waters is absolutely right and it cannot absolutely be considered as a contraband activity.

Finally, on the following page he concluded that

> for years and years the pleasure vessels have entered the Italian ports having inside their tanks gas oil on-boarded in foreign ports (activity still continuing) without the need of releasing any declaration to the Customs purposes and without suffering any penalty.

I have decided to bring this to you, Mr President and honourable Judges, to confirm the knowledge, experience and consistency of the opinions given by this witness in his oral deposition when he referred to the bunker supplied by the *"Norstar"* as a "naval provision", confirming that the legal tax regime that governed the bunkering in Italy was circumscribed to four articles: articles 252, 253, 254 and 255 of the Customs book.

He again explained on page 13 of the verbatim record, in a very detailed fashion, that in order to co-operate with the police, he "used to give the position of the boat" and that this was "22-23 miles off the coast, far away from the border of the national waters."

When we asked him about the "real reasons" the Public Prosecutor had for arresting the *"Norstar"*, he said on page 15 that "he did not know if it was done for ignorance of for bad

faith", but that they "confuse national product, national fuel, with foreign fuel. They confuse consumption with supply."

When he was asked about the application of the Italian Criminal Code he stated on page 16 that "when you have a ship in the middle of international waters, for sure this is not national fuel – it is foreign fuel." When the witness asked if he could use his memory, the Co-Agent of Italy abruptly interrupted the declaration.

We did not learn what the document was about because the witness had been interrupted by the Co-Agent of Italy and we reminded the President about the agreement we had reached with him about not interrupting the declarations. In spite of that, the Co-Agent of Italy interrupted once again later on. Fortunately, this time the President called him to order.

The President then asked Panama if it knew whether the document had already been introduced before the closure of the written proceedings, but we could not answer because we had not been allowed to ask the witness what this document was about. The document in question was disallowed, but we could find out afterwards that the document was the same as Annex 6 of the Memorial to which we have just referred.

The witness was then again abruptly interrupted by the Co-Agent of Italy when the witness referred to the *"Spiro F"*. We were then asked to confine our questions to this case but this evidence had been part of the previous pleadings, as you can confirm.

On page 19 of the verbatim record, this witness confirmed that the evidence of the case in Savona would not have changed at all if the *"Norstar"* had not been arrested.

When asked about how he felt about the fact that Italy had filed some documents stating that he had masterminded a criminal plan, this witness confirmed on page 15 that he felt concerned, and that this was a situation "not so nice to be in" and on page 18 that he had "suffered three years of investigation". He also confirmed he had to pay $40,000 to lawyers to defend his case in the Italian proceedings.

This witness answered all questions in such a way that showed his competence, and he even explained why he was so experienced in Italian customs laws and even French law.

With reference to the witness Morch, Italy only tried to discredit his declaration by asking whether he had prepared it himself, failing to show a conflict of interest on his part as part of the Panama delegation.

Yet in its oral statements, Italy has insisted on proclaiming that the suspected crime consisted of three elements: first, loading the tanker with fuel in Livorno; second, to subsequently reselling this fuel to Italian and other European leisure boats stationed on the high seas, off the coasts of San Remo; and third, allowing these leisure boats to return to Italy.

Even though, Mr President, we kindly asked Italy to refrain from referring to the activities of the persons involved in the operation of the *"Norstar"* as crimes, Italy has insisted on revictimizing and aggravating their suffering publicly when it refers to instances of false declarations.

Turning to the question of *corpus delicti*, on page 17 of the morning session of Wednesday 12th, Italy gave a definition from its Criminal Code stating that it is "an instrument to be used in the further investigation of suspected smuggling and tax evasion."

As you may recall, Mr President, Panama had already asked the question until when Italy was going to continue calling the *"Norstar" corpus delicti* if we already knew that the suspicions that smuggling and tax evasion had been committed did not exist any more after the final decision of the Genoa Tribunal in 2005.

However, Italy has insisted on tacitly characterizing the conduct of the persons involved in the operation of the *"Norstar"* as criminals. This, again, Mr President, should not be allowed in these proceedings any more.

We heard from the Italian legal expert that in order to execute an arrest it was not necessary to have evidence of a crime because it was a probative seizure.

However, as Advocate Klein will show, although the Decree of Seizure stated that the *"Norstar"* had "an intrinsic probationary nature", in its considerations the Public Prosecutor stated that the *"Norstar"* as *corpus delicti* was part of the "objects through which the investigated crime was committed".

In other words, it was not, as the Italian legal expert stated, that the arrest was only for probatory purposes.

Italy has been acting as if it had been an enforcement of its release order. Panama contends that in the same manner in which the prosecutor had sent a Request to Spain by means of an international letter rogatory, Italy should have sent another letter rogatory to Spain to request the enforcement of the judgment of the Tribunal of Savona, and not a simple note dated 18 March 2003, and that this could have only been made once the Savona judgment had been final after the confirmation by the tribunal of Genoa in 2005.

Italy has portrayed the idea that, because the appeal did not refer to the *"Norstar"*, this vessel was no longer detained. It is worth remembering that one of the communications to the owner was to threaten him on 21 March 2003 with auctioning the *"Norstar"* if he did not retrieve it within 30 days.

However, we know that this is not the case, because once an appeal is filed, the outcome of the judgment that is the object of such appeal has to be suspended until the appeal is decided.

This is contrary to what Italy has been stating over and over, i.e., that since the arrest order of the *"Norstar"* was not mentioned on the appeal, the release order became final.

However, the contrary has been confirmed by the Genoa Court of Appeal, when on 31 October 2006 this high court of Italy stated, making reference to the Savona Tribunal judgement that

> Having noted that this judgment obviously has to be enforced and there is no decision to be taken given that the destiny of the vessel, after having been given back to the party entitled, does not fall within the competence of this Court (and in any case, given that the first instance judgment was confirmed, any issue on the enforcement of the said judgment would be the competence of the Court of Savona pursuant of Article 665 of the Code of Criminal Procedure). (Annex 14 to the Memorial).

Panama still does not understand how Italy may refer to the retrieval of the *"Norstar"* as an unfulfilled obligation of Panama or the shipowner, as it has been stating all through these proceedings.

Panama contends that all references to the alleged communications from Italy to the shipowner concerning the release of the *"Norstar"* either in 1999 or 2003 fall down with this clear and unambiguous declaration made by the Appeal Tribunal of Genoa in 2006.

After this date, Mr President, Italy did not make any single effort to communicate with Panama or the shipowner concerning the enforcement of the release order. On the contrary, Italy evaded all communications that Panama tried to make with them, when they had a duty to act in good faith.

On page 14, lines 32-35, of the verbatim record of 12 September, afternoon session, Italy considers that its conduct

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

If Panama claims that article 87 has been breached by Italy, it is only logical that from the very moment that this occurred on September 1998, due to the 11 August 1998 issuance of the Decree of Seizure, all of Italy's conduct should be according to the standard of good faith.

If Italy, having breached article 87, also behaved in such a manner that also shows that it has not acted in good faith, it is more than obvious that a breach of article 300 is duly linked to another provision of the Convention and is not used as a standalone norm.

Panama takes issue with Italy's reference to article 283 because, contrary to what Italy proposes, there were no negotiations at all. Italy has not presented any evidence to support its assertion that Panama made any settlement proposals. What Panama did was to demonstrate its willingness to obtain at least an answer to any of its communications, not even to its contents but to the fact that Italy had been receiving them. This is simply called "acknowledgment of receipt".

But Italy was incapable of even doing that. It preferred to keep silent. It was not until several attempts, and particularly one made through diplomatic channels, that Panama decided that it could not wait any more for such acknowledgement.

The Italian excuse of the lack of an authorization to represent Panama as its Agent was characterized by Italy as "a legal mistake" and an "error on the law" for which it considers that it has been sanctioned by the Tribunal with the rejection of Italy's arguments in this regard.

Panama disagrees. The Tribunal has not imposed any sanction on Italy. The rejection of its Preliminary Objections was as a consequence of its lack of substance, and because of the procedural aspects that were thoroughly debated at such stage of this case. They do not have anything to do with the duty to act in good faith.

Although Panama considers this duty as a substantive standard, it does not mean that it may also be claimed in respect of the procedural stages of the case. Panama contends that Italy has not been conducting itself in such a manner as to say that it has complied with its duty to act in good faith, as has been expressly explained in the first round of oral proceedings and in all of its pleadings.

On the question of silence, for instance, Italy's failure to respond to all the communications sent by Panama is considered by Italy as a form of opposition. Panama disagrees. Panama responds that if Italy had at least acknowledged receipt of any of the communications sent by Panama then the Italian argument that silence was some sort of opposition could have been valid. But not in the absence of any of the communications, because this did not give Panama any certitude about the fact that Italy had received those letters. Let us remind ourselves that it was not until Panama instituted proceedings that Italy for the first time acknowledged their receipt.

This has been the Italian pattern of conduct, for instance, also when Panama has asked for its collaboration with reference to its criminal proceedings. Let us remember that Italy opposed the request for evidence concerning such files. Italy stated that Panama was under the procedural obligation to particularize any of the documents that it needed before Italy could consider disclosing them.

Panama disagrees with this answer, because it has been Italy who has had access to and control of all evidence concerning this case. This is a very important issue. Panama has had to rely on the documents that its goodwill has allowed to be presented.

However, this conduct has not been supported even by the expert on Italian criminal proceedings, who candidly accepted that all the files in a criminal case are allowed to be used as evidence in the proceedings of another case jurisdiction. Therefore there was no valid reason to accept excuses for not allowing Panama to have access to all the files in such criminal proceedings. A lot of questions would be answered with that information.

This expert also agreed with Panama that Italy should have presented as evidence the letter sent by the Diplomatic Litigation and Treaties Services of its Ministry of Foreign Affairs, presented as evidence in Annex 12 of the Reply, where the name of the Agent of Panama had been mentioned, and where this office of the Italian Government stated that

> This Service, which the General Secretariat has requested deal with the matter, has been involved since last September corroborating the effective legal situation in which the matter in question took place. For understandable reasons, information and details have been obtained from the Tribunal in Hamburg, in a confidential manner.

If this letter was received by the Public Prosecutor on 18 February 2002, and such office had been dealing with the matter since last September (2001), Panama considers that it should have been disclosed by Italy during some stage of the present proceedings.

Furthermore, when Italy offered a list of documents to allow Panama the possibility to choose among those on the list the ones that Panama would like to be given access to, Italy again omitted this document. This conduct demonstrates a clear lack of compliance with a duty to act in good faith.

The same applies to the letter from the same Diplomatic Litigation and Treaties Services of its Ministry of Foreign Affairs, presented as evidence by means of Annex 7 to the Memorial, where, although concerning the *"Spiro F"*, the head of such office advised or warned the Public Prosecutor of Savona of the fact that Italy did not have a contiguous zone and that he took the opportunity

> to remember you the importance to comply with the international rules, being the case a very delicate question which involves from one side the custom interests of Italy but on the other side the respect of the Maltese flag interests, and if there is any small mistake your action won[']t get any advantage.

Italy stated that "there is a difference between detention, that is, enforcement action, and acts that are the logical precedents to the enforcement action".

All the Italian reasoning points to the alleged fact that "damage would stem from the enforcement of the Decree, not from the Decree and the Request for Execution." With this statement Italy demonstrates two aspects: Italy only wants to discuss the legality of the order itself, not the arrest, but on the other hand it admits that damage stemmed from the arrest enforcement of the Decree and not from its adoption and Request for Execution.

Panama's contention is that, while damages may have only been a final consequence of the arrest enforcement, the unlawfulness of the issuance or adoption and of its request for its execution were central to its execution and

> its judicial authorities never said that the Decree of Seizure was in any way unlawful because of its extraterritorial application or for any other reason. It is therefore a logical fallacy to say, as Panama does, that, because those involved with the *"Norstar"* were acquitted, then article 87 of UNCLOS was breached and that Italy cannot *venire contra factum proprium.*

But let us see what the Italian tribunals have said about the lawfulness of the prosecutor decree.

Five years after the Decree of Seizure, the Court of Savona held that

> (5) The purchase of fuel intended to be stored on board by leisure boats outside the territorial sea line and for its subsequent introduction into the territorial sea shall not be subject to the payment of import duties as long as the fuel is not consumed within the customs territory or unloaded on the mainland[1]

and that

[1] Rejoinder, Annex F.

> Whoever organizes the supply of fuel offshore –it does not really matter whether this occurs close to, or far from, the territorial waters line –does not commit any offence even though he/she is aware that the diesel fuel is used by leisure boaters sailing for the Italian coasts…Nor is there an offence…when diesel fuel, either sold or transshipped offshore, has been purchased on the Italian territory with a relief from the payment of excise duties because the fuel was regarded as a store. These goods are then considered to be foreign goods once the ship leaves the port or at least the territorial waters line.

This Italian first instance tribunal referred to the "elements of the conduct" as "the purchase of oil products in non EU countries or in Italy and in other EU ports but under a customs-free regime, for such products to be then used to refuel ships or vessels outside Italian territorial waters."[2]

The Savona Tribunal then confirmed that the purchase "outside the territorial sea line" for its subsequent introduction into Italy, "no matter whether this was close to, or far from, the territorial waters line", and whether it had been "purchased on the Italian territory", was not a crime.[3]

Contrary to what Italy is now trying to assert, this Italian judicial authority clearly recognized that:

> (6) In light of the above remarks, before asserting any kind of criminal liability, a preliminary test is needed as to where the provision of supplies occurred because if it took place outside the line of territorial waters no one of the offences charged does actually exist.[4]

Consequently, the Tribunal of Savona ruled that the arrest of the *"Norstar"* was wrongful precisely due to the location of the vessel when it was bunkering. For this reason, the Public Prosecutor's order of arrest was revoked and the vessel was ordered to be returned to its owner.

On 18 August 2003 the Public Prosecutor filed an appeal against this decision, basically repeating all of its legal and factual arguments, the same arguments that Italy has been using before this Tribunal in the present case. For instance the Public Prosecutor stated: "We are not contesting whether the vessels seized could carry out bunkering operations, but we are contesting that the activity carried out was quite different from actually being bunkering".[5]

Those words used in these proceedings by Italy are the same.

Another quotation from the Public Prosecutor:

> giving wilfully and consciously to the product they sold a destination different from the one for which they had obtained the tax exemption (with reference to the product bought in Italy, mainly by "NORSTAR, that was therefore reintroduced artificially into the customs' territory).[6]

Let us now revisit what the High Tribunal of Genoa decided:

The Genoa Tribunal unequivocally decided: "the appeal is unfounded."[7]

The Genoa Tribunal also determined that

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[2] Tribunal of Savona Judgment, p. 6; Memorial, Annex 10, and Counter-Memorial, Annex M.

[3] Rejoinder, Annex F, para. 5, p. 10.

[4] *Ibid.*, para. 6, p. 10.

[5] Appeal submitted by the Public Prosecutor against the Court of Savona Judgment, p. 2, Memorial, Annex 13, p. 2.

[6] *Ibid.*, p. 3.

[7] Preliminary Objections, Annex K.

> A recreational vessel may load abroad fuel constituting ship's stores, both in case of foreign goods and Italian exported goods, and is relieved from paying duties upon returning in the waters of Italian ports, unless it is unloaded or consumed inside the customs borderline.[8]

Italy has continuously proposed that article 87 is not applicable and therefore has not been breached because the vessel and the persons connected therewith had carried out their conducts within Italy.

However, in addition to the Savona Tribunal, the Genoa Higher Tribunal also declared:

> That the purchase by recreational vessels of fuel intended to be used as ship's stores outside the limit of territorial sea and its subsequent introduction inside it does not entail any application of duties so long as the fuel is not consumed within the customs line or landed; that no offence is committed by anyone who provides bunkering …

– this is the *"Norstar"* –

> on the high seas, even in full knowledge that the gasoil will be used by leisure boaters bound for Italian coast; that there is not any possibility of establishing the offence provided for, and punishable under … when the gasoil, which has been sold or transshipped on the high seas, has been purchased under exemption from payment of the excise duty for being ship's stores (such goods are certainly to be considered foreign goods once the vessel has left the port, or once it has gone beyond the limit of territorial waters).[9]

The Genoa court concluded that: "The consumption of fuel in Italian territorial waters does not amount to smuggling."[10]

Clearly, this Italian final and definitive judgment confirms that anyone who provides "bunkering on the high seas", as Panama has repeatedly characterized the activity of the *"Norstar"*, and for which, in turn, it has been roundly criticized by Italy, has not committed any punishable offence.

In other words, the Court of Appeal judgment strongly supports Panama's case in this dispute, while refuting Italy's.

This would certainly explain why Italy has chosen not to rely on this piece of evidence at all, and Panama hopes that in its second round Italy can also explain this.

Due to the time restraints, Mr President, I would like now to call advocate Miriam Cohen, who will cover the issues of Italy's statements regarding Panama's alleged confusion between national and international law, and how Panama has fully met its burden of proof. Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Carreyó.

Since we started half an hour late, for which I apologize, the sitting will continue until 5 p.m., when we will take a break.

Now, I give the floor to Ms Cohen to make a statement.

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[8] *Ibid.*, p. 9.
[9] *Ibid.*, p. 9.
[10] *Ibid.*, p. 8.

STATEMENT OF MS COHEN
ADVOCATE FOR PANAMA
[ITLOS/PV.18/C25/9/Rev.1, pp. 17–26]

Thank you, Mr Carreyó.

Distinguished President, Members of the Tribunal, it is an honour to appear again before you to submit arguments on behalf of the Republic of Panama in the second round of oral proceedings in the *M/V "Norstar" Case*.

My task before you today is to make submissions on three points.

I will first overview the main arguments of Panama, in light of the evidence presented in the hearings, and the principal issues that still divide the Parties.

Secondly, I will briefly address Italy's argument regarding remedies under domestic law and its claim that Panama confuses "Italian domestic national and international law"[1], an argument which is ultimately based on Italy's misconstruction of Panama's claims;

Finally, I will demonstrate that Panama has met its onus of proof and, through written and oral evidence, has sufficiently proved its case;

I will proceed to highlight the main arguments of Panama in relation to the issues that still divide the Parties and review some of the evidence presented in the oral hearings:

During its first round of pleadings, Italy has devoted a great deal of attention attempting to blur the issues in the present case, especially as it concerns articles 87 and 300 of the Convention. Opposing Counsel stated that this is a "simple and narrow"[2] case. Panama submits that rather than simple and narrow, the case before the Court is rather clear, despite Italy's efforts to paint another picture. Italy, by its own actions, violated articles 87 and 300 of the Convention, incurring international responsibility for which it must provide reparations to Panama in the form of compensation. Panama also adds that this is a very important case, one that establishes: the scope of article 87 – freedom of navigation – a freedom upon which the law of the sea is founded; the concept of good faith and abuse of rights, enshrined in article 300 of the Convention; and the limits of a State's jurisdiction not to interfere with the freedom of the high seas.

Panama's arguments on the law, in a nutshell, are, and have always been, as follows. First, Italy, through its Public Prosecutor, issued a Decree of Seizure that was contrary to Italy's obligations under international law, namely article 87. The reason is clear: the Decree of Seizure related to activities performed on the high seas, that is, bunkering activities of the *"Norstar"* in international waters. The Decree of Seizure explicitly, expressly, says so. To rebut any further argument from Italy in this regard, my colleague Ms Klein will address this very point: the text of the Decree of Seizure leaves no room for confusion that the activities that were the object of the Decree occurred on the high seas. Panama has presented ample evidence that the bunkering activities the *"Norstar"* was performing took place on the high *seas*, as Panama's Agent has just stated. Italy itself admitted so[3]. Italy has also accepted – and how could it not – that bunkering on the high seas is a completely lawful activity[4].

What Italy now tries to claim is that the Decree of Seizure pertained to activities within Italian territory. If Panama has established that the *"Norstar"* carried out – lawful – activities on the high seas, it is unsurprising that Italy's only hope is to misconstrue, misinterpret, essentially change the words of the Decree of Seizure to claim that it aimed at activities carried out in Italian territory. But Italy cannot change history, and it can certainly not modify the clear facts of this case.

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[1] ITLOS/PV.18/C25/5, p. 1.
[2] ITLOS/PV.18/C25/5, p. 24.
[3] ITLOS/PV.18/C25/5, p. 15.
[4] ITLOS/PV.18/C25/5, p. 15.

Italy paints a distorted picture of the factual matrix of this case in the hope of convincing the Tribunal that the acts for which the vessel was seized happened within its jurisdiction, in order to evade responsibility under the Convention. Why is Italy claiming that the activities which the Decree of Seizure was targeting happened within Italy's territory? It is simple: Italy knows that as a Party to the Convention it cannot arrest a vessel flying a foreign flag for activities performed on the high seas, even if the actual arrest happened in port. That is a contravention of the freedom of navigation; and that, Mr President, Members of the Tribunal, is exactly what happened in this case.

Ms Klein will discuss in more detail the facts and evidence that prove, uncontestably, that article 87 was violated in the present case.

Panama also claims that Italy violated article 300 in connection with Italy's violation of article 87. Although Italy claims that Panama has failed to demonstrate a link between articles 87 and 300, this is again a blatant distortion of Panama's position and another attempt to minimize clear arguments to the contrary. I will briefly go back to this point, in a few minutes.

Panama claims as well that reparation is due for all the damages incurred as a consequence of Italy's violation of its obligations under the Convention. My colleague, Mr von der Wense, will address this point later in our submissions.

In relation to the claim for reparation, Italy repeatedly suggested that the vessel was in a bad state already at the time of its arrest, in 1998. It provided, however, no convincing evidence of such claim – none whatsoever. What stems clearly from the record is that the *"Norstar"* was a fully operational and well-functioning ship. Panama's witnesses, Mr Morch, Captain Husefest and Mr Rossi, testified about the seaworthiness and well-maintained condition of the vessel. To recall Mr Morch's testimony, he made it clear that:

> [d]uring the operation in the offshore market with supply of gasoil to mega yachts, maintenance and presentation of a ship in good condition was always important. The vessel was always clean, newly painted and very well maintained … There were no outstanding items from DnV when the ship arrived at Palma de Mallorca with gasoil from Malta in April 1998. … Also the cargo tanks were completely cleaned, and, if necessary, painted prior to loading. … Only clean products could be delivered to mega yachts. Samples were taken during each delivery, as this was part of the routine[5].

Concerning the seaworthiness of the *"Norstar"* in the period prior to the arrest, we also heard unequivocal testimony, from Mr Morch and also from Captain Husefest and Mr Rossi, that the vessel was navigating in perfectly well-maintained condition. In response to my question in this regard, Mr Morch stated on Monday that

> [t]he ship had, prior to the Italian arrest, all valid certificates such as Panamanian national certificate, trading certificate, load line certificate, and had passed the annual survey in 1997.
> …
>
> The ship was during summer 1998 bunkering mega yachts in a designated position given by Spanish authorities, 24 nautical miles between Mallorca and Ibiza[6].

Panama has also provided photos of the vessel, dating prior to the arrest, which essentially corroborate Mr Morch's testimony about the state of the vessel. It has submitted charter contracts. The evidence in the record is abundant in this regard. Italy has tried to discredit Panama's witnesses, suggesting that their testimony should be questioned. The fact

[5] ITLOS/PV.18/C25/1, p. 28.
[6] ITLOS/PV.18/C25/1, p. 29.

remains that their testimony prove that the vessel was fully operational at the time of its arrest, and would continue to be, if it were not for Italy's unlawful detention of the vessel.

Importantly, Italy's own expert witness, Mr Matteini, in cross-examination was asked to review the photos submitted by Panama regarding the vessel prior to the arrest. When confronted with the pictures, Mr Matteini affirmed, unequivocally, that:

> The deck … the feed lines and the castles, was in good maintenance order … this is the engine cabinet. It is quite clean. You can see the dashboard and the engine portion. For sure, had the vessel looked like that, then my evaluation would have been different[7].

In other words, the vessel "was in good maintenance order"[8]. Those were the exact words of Italy's own expert. That is clear, Mr President, Members of the Tribunal. He also stated, unequivocally, that he had not seen these picture of the vessel before, and that had he seen these photos his evaluation "would have been different" – again, his exact words. Now, it is not difficult to understand why Italy did not show these pictures to Mr Matteini before – or that Mr Matteini had not seen these pictures before. Obviously, he would have provided a different valuation of the vessel, as he stated – one that is not convenient for Italy's deceptive and distorted arguments about the state of the vessel.

Panama asks: what has Italy demonstrated? Italy filed photos of the ship, which, Panama has made abundantly clear in these proceedings, dated from at least a decade after the arrest took place. I will simply recall again that Italy's own expert Mr Matteini referred to these photos and clarified that "The dat[e] that the photograph is taken, and this should not be mixed up to be sure of when it was posted on the website … but if there is a dat[e], that is referred to the photograph that is being shown."[9]

During Mr Morch's examination on Monday, he confirmed that the pictures Italy submitted to this Tribunal date from more than 10 years after the vessel had been in detention[10].

Continuing on the question of the damages suffered as a result entirely of Italy's conduct, Italy has also tried to claim that Panama and the shipowner have, essentially, been the cause of their own misfortune. Why? Because they failed to maintain the vessel, and retrieve the vessel in 1999, and in 2003. Panama has already addressed these claims in its written and oral pleadings, as well as, importantly, through oral testimony. I will limit myself today to affirming three points:

First, it was Italy, and not the shipowner or Panama who had the responsibility to maintain the vessel after its arrest. This is not only a legal conclusion, but it is also a logical one. If Italy had total control over the *"Norstar"* after its arrest – and we have heard Mr Morch state that access to the vessel was denied, "everything was locked" – then it can only be Italy that has the obligation to maintain the vessel in good working order during the detention. In response to Judge Pawlak's question, Mr Esposito, Italy's own expert, confirmed that: "The general rule is that whoever has issued the seizure order… is in charge of the whole situation." In fact, "If Italy arrests a ship" whoever has issued the seizure order is responsible for taking care of the ship." [11]

Secondly, it also became clear during these proceedings, through the examination of witnesses, that Italy had the obligation to name a custodian, and that this person was responsible for the vessel after its arrest (in Mr Esposito's words: "The responsibility actually moves from

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[7] ITLOS/PV.18/C25/8, p. 22.
[8] *Ibid.*
[9] ITLOS/PV.18/C25/8, p. 14.
[10] ITLOS/PV.18/C25/1, p. 29.
[11] ITLOS/PV.18/C25/8, p. 10.

the Public Prosecutor to the custodian."[12]) Well, we do not know that any custodian was appointed in this case. Mr Morch, in response to a question posed by Judge Lucky, confirmed that there was no information about a custodian being appointed to oversee the ship[13]. But we do know that no one, I repeat not the Public Prosecutor, not a potential custodian, took care of the ship, which led to its ultimate deterioration.

Thirdly, I will restate that in 1999, it was a conditional release against a bond of 250,000,000 lira. We heard from Mr Morch's testimony that, regarding the payment of the amount of the bond: "[t]he owners had no option. They could not pay the bond. In this situation all involved had to wait until the Public Prosecutor had lost his case"[14].

He further stated that:

> The *M/V "Norstar"* could not continue its commercial activity after the arrest and thus was not in a position to secure its release. Inter Marine Company S/A had no other ships to compensate for the loss of income … [It] also did not have any option to provide security through its bank … Therefore, the owner had neither the opportunity to pay the bond or to provide a bank guarantee[15].

So we have evidence, the sworn testimony of Mr Morch, that the shipowners were not in a financial state to pay the bond.

Panama thus makes two assertions in regard to the vessel at this point. The first is that it has been proven in this case, through, *inter alia*, the testimony of various witnesses, that the vessel was in perfect working condition prior to the arrest. Italy's arguments are totally contradictory on this point. I ask again: if the vessel was in the derelict condition that Italy describes, how could a bond of 250 million lira (approximately €125,000) be placed on it? The answer is simple – the vessel was a perfect working vessel, for which Italy had requested this significant amount of money for its release.

The second assertion is that the vessel, unsurprisingly, deteriorated after its arrest and due to Italy's own fault, for having failed to "take care" of the ship when it had the legal obligation to do so after it had (albeit unlawfully) arrested the vessel and kept it under its control for an unreasonably long period of time. For these reasons, Mr President, Members of the Tribunal, Italy has to repair the damages caused to Panama.

I turn now to Italy's argument regarding remedies under domestic law and its claim that Panama confuses national and international law.

Learned counsel for Italy claimed on Wednesday that Panama failed "to appreciate the relevance to the present dispute of the distinction between domestic law and international law"[16]. This is not only a distortion of Panama's arguments but it is also another attempt by Italy to muddy the waters in relation to the clear fact that, by its own actions, and specifically the Decree of Seizure, it has contravened the Convention. Panama perfectly understands the relationship between domestic and international law. It also appreciates, Mr President, Members of the Tribunal, the relevance of explaining how Italy, through its domestic proceedings, has blatantly violated its international law obligations. Italy is ready to state its commitment to respect international law and "international adjudication"[17].

Italy's expert, Mr Esposito, stated that the Public Prosecutor is bound by international law and that a "Decree of Seizure issued by a Public Prosecutor must comply with Italy's

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[12] ITLOS/PV.18/C25/8, p. 10.
[13] ITLOS/PV.18/C25/2, p. 13.
[14] ITLOS/PV.18/C25/1, p. 36.
[15] ITLOS/PV.18/C25/1, p. 37.
[16] ITLOS/PV.18/C25/5, p. 4.
[17] ITLOS/PV.18/C25/5, p. 1.

international law obligations"[18]. That is hardly surprising. However, what has been made clear in these proceedings is that the Decree of Seizure applied to activities having taken place on the high seas. Of this fact, there can be no doubt. This is not, Mr President, Members of the Tribunal, in compliance with Italy's obligations under international law.

Rather than this unfounded and unsustained claim that Panama "confuses" domestic and international law, Panama asks the Tribunal to focus on the true reason why Italy insists, against the clear text of the Decree of Seizure, contrary to all the evidence Panama has presented, despite the clear testimony of Panama's witnesses (Mr Rossi, Mr Morch and Captain Husefest), that the Decree of Seizure was directed at activities having taken place on Italian territory. The reason is clear: Italy knows too well that to issue a Decree of Seizure concerning activities on the high seas is a clear violation of article 87. This is the reason for insisting that Panama confuses the Decree of Seizure and its execution.

The Parties agree that the Decree was enforced in Spain. In fact, Panama has never argued that the Decree was enforced elsewhere than in the port of Spain. Panama also knows very well that the port of Spain is not the high seas. But this argument misses the point. The key question in this case, however, is that the activities concerned by the Decree, entirely legal as they were, *occurred on the high seas*, beyond the zones of jurisdiction of Italy, or any other State. We heard oral evidence of this. Mr Morch confirmed it, and so did Mr Rossi. In any event, how can Italy now claim that the activities targeted by the Decree of Seizure were carried out on Italian territory, as the Agent has already explained? What evidence has Italy provided for this assertion? None, whatsoever.

In this regard, Italy also seems to focus on the date on which the Decree was issued, and whether the *"Norstar"* was on the high seas, or, as Italy claims, in port on the date of issuance. This seems to suggest that according to Italy, if the vessel was on the high seas when the Decree was issued, then it would have constituted a violation of the Convention. Panama agrees. I shall review the evidence on which Italy relies. Italy refers to a newspaper article, which Panama submitted in the proceedings, to say that, "from March 1998 to the date of the article, so August 2015, the *'Norstar'* never left once the port of Palma de Mallorca"[19]. Panama's witness, Mr Morch, was cross-examined about this newspaper article. In response to Italian Counsel, Mr Morch unequivocally stated that the vessel had left during this period to "call the port of Algeria to load the cargo and supply the vessels". That was his answer. The article is thus, "definitely wrong" about never having left the port of Palma for 17 years[20].

May I recall that Mr Morch provided to the Tribunal a sworn declaration. He is a credible witness who knows the details of the facts that led to this case. Mr President, Members of the Tribunal, Panama respectfully submits that his testimony should be given more weight than a newspaper article, a vague newspaper article, whose author cannot be examined, or cross-examined in this Tribunal, to ascertain the accuracy of the information, and, importantly, the dates mentioned in the article.

Mr President, considering we are one minute short of five o'clock, and I will turn to another argument, may I suggest that we pause for now?

THE PRESIDENT: Indeed. Thank you very much, Ms Cohen.

We have reached five o'clock. The Tribunal will withdraw for a break of half an hour. We will continue the hearing at 5.30 p.m.

(*Break*)

[18] ITLOS/PV.18/C25/8, p. 6.
[19] ITLOS/PV.18/C25/2, p. 6.
[20] ITLOS/PV.18/C25/2, p. 6.

THE PRESIDENT: Ms Cohen, would you please continue?

MS COHEN: I will now turn to briefly address Italy's insistence on the availability of local Italian remedies. Indeed, Italy has devoted a great deal of energy to this question, both in its pleadings and during the examination of its expert witness, Mr Esposito. I will not burden the Tribunal with lengthy arguments in this respect and will limit myself to just the main points. First, Italy asked its own expert to confirm that there are available remedies under "Italian law for the damages allegedly caused by the behaviour of the Italian judiciary"[21]. However, Panama has never claimed that there are no available local remedies under Italian law when a miscarriage of justice has occurred; one would hope that this is the case. Italy misses the point. This question has been settled in law by the Tribunal in its Judgment on Preliminary Objections.

So, in insisting that Panama had available local remedies to which it has not resorted, Italy once again is trying to deviate the attention of the Tribunal to irrelevant questions and attempting to fault Panama where no fault is due.

I will move on to discuss Panama's burden of proof and submit that Panama has amply met its onus to prove the violations of the Convention and the damages due.

Italy makes a number of misplaced and erroneous claims concerning Panama's onus and standard of proof. Italy first argues that "Panama advances a significant number of factual and legal contentions which are unsupported by a sufficient standard of proof." Then, Italy claims that Panama "tries to shift the burden of proof on to the defendant"[22] – well, the Respondent, Italy, in this case.

Panama has never denied that as the Applicant in this case it has the legal burden to prove its claims, and it has done so both through written evidence as well as through the testimony of witnesses called by both Parties.

Italy affirms that Panama has not met its burden of proof, and this is simply not correct.

Italy seems itself confused about the evidence which the Tribunal is to take into account in the present case. Panama has not only provided written evidence of its claims but also, and importantly, during the past four days has provided credible, convincing evidence through the oral statements of all witnesses examined and cross-examined before this Tribunal. Italy conveniently fails to take into account all of the evidence presented in this case, both oral and written.

Furthermore, Panama has already argued, both in the written submissions as well as the first round of these oral proceedings, that while it bears the burden to prove its case, Italy has failed to provide, in spite of the numerous requests from Panama, important documents and information that are under the control of Italy and that only Italy can access, as Panama's Agent has already stated. This, Mr President, Members of the Tribunal, is a completely different matter than "shifting the burden of proof", as Italy mistakenly claims. As I already noted on Monday, Panama has requested Italy to provide a copy of the criminal files relating to the Decree of Seizure and the arrest of the *"Norstar"*. Italy has refused. Panama was as specific as it could have been as to what documents it was requesting considering that it had not seen the entire files. I refer you, Mr President and Members of the Tribunal, to a *note verbale* filed in the record of the case, dated 27 August 2018. Respectfully, the receipt of these files is a matter still pending before the Tribunal.

Panama has continuously and tirelessly tried to obtain more clarity about the criminal process that took place in Italy. In light of the refusal of Italy to comply with Panama's requests and to provide any clarification in these hearings, or at any time in these proceedings in relation to Panama's requests, Panama has resorted to Italy's expert witness, Mr Esposito, to seek to

[21] ITLOS/PV.18/C25/7, p. 24.
[22] ITLOS/PV.18/C25/5, pp. 9, 10.

obtain some answers. Alas, as it turned out, Mr Esposito was also unaware of the details of the criminal investigation, the evidence available to the Public Prosecutor, or the motivation of the Public Prosecutor who issued the Decree of Seizure. He does not know. So who knows about this evidence, this motivation? Panama remains in the dark in relation to the specific files and evidence related to the criminal process in Italy.

The same is the case regarding the logbooks and documents that were in the vessel. These are documents containing very relevant information about the ship. Where are these logbooks? Italy, once again, did not give back the logbooks to the shipowner or Panama. What is even more astonishing is that Italy now pretends that it was not its responsibility to have these books or to give them back. How can that be the case when Italy detained the ship when the logbooks were inside it and neither the shipowner, the crew members or Panama had an opportunity to retrieve them? How can an alleged investigation into an alleged crime take place without examining a ship's documents and its logbooks?

In response to a question put to him by Judge Lijnzaad concerning the "ship's documents such as the papers relating to its IMO certificate or logbook", Mr Esposito answered that "the asset is not available anymore; it is arrested." He also confirmed, importantly, that the "same thing goes for the upkeep. If … the custodian cannot go ahead with the upkeep of the boat, then the Public Prosecutor is still the decision-maker of the situation"[23].

But the absurdity of the Italian conduct does not stop there. Italian counsel, in cross-examination of Mr Morch on Monday, repeatedly asked about very specific information of very specific dates of the whereabouts of the *"Norstar"* in the summer of 1998. Allow me to remind you, Mr President, Members of the Tribunal, that the dates in question are from approximately 20 years ago. Had Panama or the shipowner obtained access to the logbooks of the *"Norstar"*, all the information so insistently requested by Italian counsel would be readily available.

If the referred documents and information are under the sole control of Italy, how can Panama possibly have access to them? The answer is simple – it cannot. In response to a question by Judge Lucky, we heard Mr Morch state that

> the area was completely closed after the detention in Palma de Mallorca. We had no access to anything; it was denied. We could not pass the gate because it was closed … it was impossible to go on board the ship. Everything was closed. The keys were taken and everything was closed[24].

Mr President, Members of the Tribunal, I thank you for your kind attention this afternoon. With your permission, Mr President, I would now like to call Ms Mareike Klein, Advocate for Panama, to continue Panama's submissions on article 87 of the Convention.

THE PRESIDENT: Thank you, Ms Cohen.

I now give the floor to Ms Klein.

Ms Klein, you have the floor.

[23] ITLOS/PV.18/C25/8, p. 8.
[24] ITLOS/PV.18/C25/2, p. 13.

M/V "NORSTAR"

STATEMENT OF MS KLEIN
ADVOCATE FOR PANAMA
[ITLOS/PV.18/C25/9/Rev.1, pp. 26–31]

Distinguished President, Members of the Tribunal, it is an honour for me to plead one last time before you on behalf of the Republic of Panama, my country, in the *M/V "Norstar" Case*.

During the past two days we have heard Italy argue that article 87 of UNCLOS on the freedom of navigation does not apply, for two reasons. First, Italy states, that the arrest of the *"Norstar"* was due to its activities in territorial waters, not for activities carried out on the high seas. Second, Italy contends that article 87 only applies if there is a physical interference on the high seas and not if a vessel is arrested in port. According to Italy, in port vessels are not protected by the right to freedom of navigation.

I will address now Italy's first argument, and I want to make this very simple. The reasons for the arrest are stated in the Decree of Seizure. You can find the Decree of Seizure in Annex 3 of the Memorial of the Republic of Panama and you can also see it now on screen. Let us read that order again together, because I would like to comment on the main parts.

The Decree of Seizure dated 11 August 1998 reads:

> It was also found that the *M/V "Norstar"* positions itself beyond the Italian, French and Spanish territorial seas, mostly inside the contiguous vigilance zone and promptly supplies with fuel (so-called "offshore bunkering") mega yachts that are exclusively moored at EU ports. Thus, they willingly and consciously give the sold product a destination that differs from the one for which the tax exemption was granted … while being fully aware that the product will certainly be subsequently introduced into Italian territory and that no statement for customs purposes is issued by the purchasers.

Let me rephrase this part of the Decree. According to this part of the Decree, the *"Norstar"* did bunker other vessels offshore. Those other vessels would then return to Italian customs territory without issuing a statement for customs purposes, thereby evading taxes, according to this Decree; and the persons connected to the *"Norstar"*, like Captain Husefest, are accused of being aware that the other vessels that the *"Norstar"* supplies with fuel offshore, after being bunkered, return to territorial waters of Italy without issuing a statement for customs purposes.

This means that the *"Norstar"* was arrested and the persons connected to it accused, because it was doing offshore bunkering. The Decree even goes further, stating the rationale behind this, to justify the seizure. Let us continue reading:

> Having noted that the seizure of the mentioned goods must be performed also in international seas, and hence beyond the territorial sea and the contiguous vigilance zone, given that: -actual contacts between the vessel that is to be arrested and the State coast were proved … which implied infringements of the customs and tax legislation as a result of the previous sale of smuggled goods in the State territory (so-called "constructive or presumptive presence").

We can therefore see that the Decree of Seizure explicitly refers to the constructive presence doctrine as the basis for its jurisdiction. What does constructive presence mean? Here is a definition from a dictionary:

> The doctrine of constructive presence allows a coastal State to exercise jurisdiction over a foreign flag vessel that remains seaward of coastal State waters but acts in concert with another vessel (contact vessel) … that violates coastal State laws in waters over which the coastal State may exercise jurisdiction. In order to exercise jurisdiction over a "mother ship" located seaward

> of coastal State waters, the contact vessel must be physically present in coastal State waters or be subject to coastal State jurisdiction under the doctrine of hot pursuit.

So in this case it means that the *"Norstar"* was the mother ship, which operated on the high seas, and that the vessels bunkered by the *"Norstar"* returning to territorial waters of Italy were the contact vessels because they came into contact with the coastal State's jurisdiction and were subject to hot pursuit. The Decree even makes reference here, as we can see, to article 111 of UNCLOS on hot pursuit. The other day, one of Italy's counsel suggested that a reason why the *"Norstar"* was allegedly arrested for activities carried out in territorial waters was that the Decree relied on the doctrine of hot pursuit. However, what Italy failed to see here is that the right to hot pursuit originates from the contact vessels, those returning to the territorial waters, and not the *"Norstar"*, the mother ship operating on the high seas.

Therefore, the doctrine of constructive presence, the basis for this Decree of Seizure, as we can read, takes by itself a holistic approach, and now Italy tries to wrongly separate the elements of this holistic approach.

This is the rationale behind the Decree of Seizure. This is not some supplementary document, but the Decree of Seizure itself relies on the doctrine of constructive presence, as we have just read together.

The use of this doctrine in the Decree of Seizure in itself proves that the *"Norstar"* was not seized for activities in the territorial waters of Italy. There would have been no need to make explicit reference to the doctrine of constructive presence if the vessel was seized for activities in territorial waters, because there would be no element of transshipping, otherwise referred to as mother vessel and contact vessel.

For the last two days, Italy has relied on the argument that the *"Norstar"* was arrested for activities carried out in its territorial waters. Mr President, Members of the Tribunal, this is clearly not what this Decree of Seizure, which is at the heart of this dispute, actually says.

Furthermore, the doctrine of constructive presence is inextricably linked to the concept or existence of the contiguous zone, a zone to which the Decree makes reference. The Max Planck Encyclopaedia of Public International Law, under "Hovering Acts" states the following:

> It is apparent that the modern doctrine of the contiguous zone, as recognized both in treaty and customary international law, has its historical origins in the hovering acts promulgated by Great Britain and other countries. … There is also an echo of the early hovering acts in the formulation and interpretation of the doctrine of constructive presence for the purposes of the exercise of the right of hot pursuit in the modern law of the sea. In its orthodox manifestation this permits pursuit of a vessel which had not been in the zone of national jurisdiction in question but which had used its boats to carry out prohibited activities there.

Of course, no prohibited activities were carried out in this case.

Well, Italy based the entire Decree of Seizure on the assumption that it could also exercise its jurisdiction for custom matters in the contiguous zone. This is what this means.

All of this to tell you, Mr President, Members of the Tribunal, that Italy did not even have a contiguous zone at that time, and this fact has been undisputed throughout these proceedings by Italy. You can find the proof in Annex 7 of the Memorial of the Republic of Panama, containing a letter from Telespresso dated 4 September 1998 issued by the Service of Diplomatic Litigation, Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy to the prosecutor who signed the Decree of Seizure in front of you, stating:

> pls note that the Contiguous zone exists when a State officially promulgates it but Italy did not avail herself of this opportunity.

> Our law actually provided till 1974 a contiguous zone of 6 miles over the territorial waters ... according to the Geneva Convention ... on the territorial sea.
> Later [so from 1974 onwards] the territorial waters became 12 miles so the contiguous zone was [e]nglobed in the territorial sea.
> For this reason at the moment [1998] ... the only zone under the State control is the territorial sea.

Therefore, the *"Norstar"* was operating always on the high seas and was arrested for it.

Moreover, the Decree explicitly makes reference to the activities carried out on the high seas:

> the so-called "genuine link", which underlies the mentioned international law institution, unequivocally emerges from the overall content of the investigations ordered, as summarized above: the repeated use of adjacent high seas by the foreign ship was found to be exclusively aimed at affecting Italy's and the European Union's financial interests.

Italy has throughout these proceedings denied any foreign element in connection with the seizure, but this Decree, as we have just read, proves the contrary. The prosecutor refers explicitly to this "link", which in this situation means the element of transshipment.

I will now respond to Italy's second argument, that article 87 only applies if there is physical interference on the high seas, and not if a vessel is arrested in port. According to Italy, in port vessels are not protected by the right of freedom of navigation.

First of all, I would like to clarify that Panama's position when referring to the right to navigate again towards the high seas, is of course based on the fact, that in this case, the *"Norstar"* was arrested for lawful activities performed on the high seas, as established before. That is the difference between the *M/V "Norstar"* and the *M/V "Louisa" Case*, and Panama's position is the fact that the *"Norstar"* was seized for activities carried out on the high seas, that alone already triggers a violation of article 87 on the freedom of navigation, especially because the Decree states that the authorities would be ready to interfere, and would be justified in interfering, for the same purpose, on the high seas.

Does the freedom of navigation not protect Panama, the flag State, from such measures? Because the Decree of Seizure is a measure.

In the Dissenting Opinion on the *M/V "Louisa" Case*, Judge Wolfrum states the following when it comes to the protection of the rights of coastal States:

> 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.

This opinion demonstrates how a rule would utterly fail to protect the interests of coastal States. The opposite extreme would be a rule that completely fails to protect the interests of flag States.

Mr President, Members of the Tribunal, what would be the opposite extreme of that example? The opposite extreme is if the coastal State orders the arrest of a vessel in a port for its activities carried out on the high seas, which in this case were completely lawful, and if this would not trigger a breach of article 87, because a violation of article 87 would encompass only arrests that have taken place on the high seas. It would mean, in fact, that a coastal State could circumvent article 87 on the freedom of navigation and be free to abuse its right to seize vessels

for this purpose by waiting to arrest them in port. The coastal State could rely on the concept that article 87 can only be breached if the interference takes place on the high seas. That is the other extreme.

Italy is holding on precisely to that argument. Italy has stated in its pleadings that a violation of article 87 on the freedom of navigation requires interference, which, according to Italy, did not occur in this case. Italy thereby contended that the term "interference" refers to interference on the high seas. So according to this contention, Italy avoided interference, in form of a seizure, by arresting the vessel in a port of a third State but, as mentioned before, the Decree emphasizes that the authorities would be justified and ready to interfere, for the same purpose, on the high seas.

Without prejudice to the aforementioned, I would like to say one more thing on a form of actual interference with the bunkering activities of the *"Norstar"* on the high seas prior to its arrest.

Mr President, with all due respect, would you allow me to clarify briefly the relevance of the harassment incidents described by former Captain Mr Husefest in his witness testimony?

THE PRESIDENT: Yes.

MS KLEIN: The forms of harassment described by the witness testimony of Mr Husefest do represent a form of interference on the high seas, while the *"Norstar"* was carrying out its bunkering activities, and that is why it is relevant to the argumentation of this case. Contrary to what one of the Italian counsel suggested, that there is no evidence, well, a witness testimony is a form of proof.

Let me now come to my last point on the Decree of Seizure. When it comes to reviewing the measures taken by Italian national authorities, I would like to address the Decree's probationary nature.

Yesterday Mr Esposito answered several questions on probative seizures. Let me recite his statement concerning probative seizures:

> In this case [of a probative seizure] the judicial police officer must write a report in which he must, for example, write in detail everything ... we need to have a report and then the Public Prosecutor must read the report and then he can confirm the seizure.

From Mr Esposito's statement we can deduce that there must be some degree of reasonableness in order for the prosecutor to confirm the seizure, in particular because the prosecutor must be presented, as Mr Esposito said, with a "detailed report" before confirming it.

But what does reasonableness mean in international law? Yesterday one of Italy's counsel mentioned already the meaning of reasonableness in his pleading, and Panama agrees with the definition, saying that

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

So, in international law, reasonableness encompasses the principles of necessity and proportionality.

Let us go back to the Decree of Seizure and see what the Decree tells us about the use of this principle in this case.

The second page of the Decree of Seizure reads as follows: "Having noted that the seizure of the mentioned goods must be performed, as it has an intrinsic probationary nature, with no need to assess whether the order is necessary (reference to domestic case-law: Cass.SS.UU...)."

The Decree is basically saying that this probative seizure does not even entail a minimal assessment of necessity for issuing the order. I respectfully ask this learned Tribunal, how can the issuance of this order be in accordance with international standards of due process, be reasonable, if there is no assessment of necessity at all?

Panama respectfully asks this Tribunal to take due note of that provision in the Decree when reviewing this measures taken by Italian national authorities, and whether they acted in conformity with international law, in accordance with principles such as necessity, reasonableness and appropriateness.

I now am at the end of my pleading, and would respectfully ask you Mr President, to call Mr von der Wense to continue Panama's pleadings. Thank you.

THE PRESIDENT: Thank you, Ms Klein.

I now give the floor to Mr von der Wense to make a statement.

STATEMENT OF MR VON DER WENSE
COUNSEL FOR PANAMA
[ITLOS/PV.18/C25/9/Rev.1, pp. 31–36]

Thank you, Mr President. Mr President, Members of the Tribunal, in the next few minutes I would like to discuss the oral statements and the testimonies of the witnesses, as far as they concern the question of the compensation of damages.

Italy objects that Panama has not proved all the facts that are the basis of the action. However, despite the considerable difficulties involved in the burden of proof after a lapse of 20 years, Panama has provided numerous documents in this process that are capable of proving the important facts.

Of course, it is not only possible to prove facts through written documents only. The Rules of the Tribunal expressly provide, *inter alia*, in article 44 and article 72 and the following, that the parties may also provide evidence by witnesses or experts. This evidence has an equal value.

The testimonies of the witnesses called by Panama in this case, Mr Morch, Mr Rossi and Mr Husefest, were particularly strong evidence because the witnesses were directly involved in the events surrounding the *"Norstar"* and had extensive knowledge of the facts concerning the vessel and its activities. During my work as a lawyer I have heard numerous witnesses who could only insufficiently answer the questions they had been asked, because they only noticed the events marginally. By contrast, the testimonies we heard here were comprehensive, informative, and credible in every way.

Italy has complained that the witnesses had partially read off their answers. I would like to remind Italy that in the consultations between the Tribunal and the representatives of the Tribunal on 26 June 2018 the President informed the Parties that for translation purposes each Party was asked to transmit to the Registrar, at the latest one hour before the hearing, copies of all oral statements to be made by witnesses and experts by the Party on that day. It was not only optional but necessary that the witnesses prepared their answers in writing, and that is exactly what the witnesses did, but then it does not matter if the witnesses have read their answers or recited them by heart. The only thing that matters is that the answers are the truth of what the witnesses asserted in their solemn declaration. There is absolutely no reason to doubt that the witnesses spoke the truth.

Italy also doubted the accuracy of the expert's report given by Horacio Estribí. However, these doubts are unfounded. First of all, I should like to emphasize that the expert, Mr Estribí, was asked to give an economically valid calculation of the damage, including the complex calculation of the interests, which is of considerable importance here due to the long time span. This is why Mr Estribí was called as an economic expert.

The fact that some figures have changed in comparison to previous calculations is simply because Mr Estribí was not involved in the case from the outset and has made a more accurate and detailed interest calculation and that some calculation bases - such as the legal fees - have changed during the procedure. However, these bases of calculation are not a question of calculation, but have been proved by witnesses and other evidence.

Mr President, Members of the Tribunal. I now come to the question of compensation, in particular the condition of the vessel at the time of the arrest.

As you remember, we saw various photos of the vessel in the course of the hearings. These photos can be divided into two groups: The first group are photos filed by Panama that show the *"Norstar"* in a very good condition, which is undisputed. I will show you one of these photos now on the screen. And you will find it also in Annex 1 of the printout of my statement, as well as the whole set in Annex 4 of the Reply of Panama. Italy has expressed the opinion

that these photos show a "brand new" vessel in the Oral Statement. The expert of Italy confirmed yesterday that the photos show a ship in very good condition.

He said:

> Looking at these pictures - and I am not talking so much to the hatch that we have just seen – I can see that the deck, for instance, with the manifold of the lines, the lines and the castles, were in good maintenance order. Unfortunately, I had not seen these pictures. This is the engine cabinet. It is quite clean. You can see the dashboard and the engine helping. For sure, had the vessel looked like that, then my evaluation would have been different.

Contradicting himself, he later denied making that statement. However, the protocols thwart the attempt to undo this.

However, Italy claims that these photos date back to 1966, brand new, when the vessel was new.

This is not correct. Rather, these photos show the *"Norstar"* shortly before the arrest, proving that the *"Norstar"* was in very good and seaworthy condition at that time. The photos were taken in the short period in which the *"Norstar"* of the charterer Nor Maritime Bunker Ltd. was used for bunkering activities, that is between 20 June 1998 and 24 September 1998.

The witness Arve Morch has explicitly confirmed this in his interrogation and has therefore proved this fact.

But you can also recognize this by another detail. Please look at the enlargement of the photo I have just shown to you, and I show also on the screen. On this photo you can see a car in the background. This is obviously not a model from the 60s, 70s or even 80s.

Thus, the testimony of Mr Morch, together with the analysis of the photos – it has been proved that these photos are not captured in 1966, as Italy claims, but show the *"Norstar"* shortly before the arrest, and that they are in very good shape and seaworthy state. Italy has even acknowledged that the *"Norstar"* on these photos was not only in a very good condition, but looks like "brand new".

Mr President, Members of the Tribunal, let us now turn to the photos taken by Italy as evidence of the ship's poor condition at the time of the arrest.

The photos that Mr Matteini showed can be seen in the webcast protocols. He has commented on these photos that they are no longer available on the Internet. Well, we did a research tonight, and this is the first of several allegations by Mr Matteini that are not correct.

In Annex 2 of my present statement you will find current excerpts from the internet, which show these photos to which Mr Matteini referred yesterday. He has confirmed that he has based his calculations on the fact that these photos show the condition of the *"Norstar"* at the time of the arrest. Mr Matteini has also confirmed that the photos show the vessel in a state of decay.

Italy claims that these photos were taken in some cases in the period before the arrest and should therefore prove that the *"Norstar"* was in a very poor condition at the time of the arrest.

The fact that the photos show the *"Norstar"* in a very bad condition corresponds to the presentation of both parties and is therefore undisputed. The only dispute is about the dates when the photos were taken.

Contrary to Mr Matteini's claim, however, these photos do not show the ship before the arrest or shortly after.

As you can see from screenshots in Annex 2 of my statement, these photos come from the Internet. As I said, we did research tonight, and what you see on the screen is the actual live image from the Internet and not the printout. Perhaps you can see it on your printout a little bit better. We can see here, this photo, for example, you can see was captured on 25 October 2004.

If you go to the left please, with the mouse: "Captured 25 October 2014." And added on the right column, you can see that it was added on 7 November 2014.

If we take the next one, we see the same result. We see this picture was taken in 2010 and it was added in 2012.

For the sake of completeness we can have a quick look at the next two photos, please. This photo was taken in 2012; the next one please. This is marinetraffic – the web page that Mr Matteini explicitly referred to – and you will see that in the right column this photo was taken, in the right column, in 2015, uploaded in 2015. The expert referred to web pages as baltictraffic.com and marinetraffic.com. However, in Annex 2 and on the screen you are seeing the original source of these photos, which were linked to the web pages mentioned by Mr Matteini. These original photos show, as I have shown you shortly before the dates the photos were actually taken.

So we have seen the photos were taken in between 2010 and 2015 and not at the time of the arrest of the vessel.

To prove that the pictures were taken before the time of the arrest, Mr Matteini pointed out that the status of the ship on the website was given as "active" instead of "arrested". However, this is completely wrong. We may have a look on the Internet again, and this simple look shows, as we can see – this is balticshipping.com and you can see there it is a live picture from the Internet. The status of the ship is actually active. This is rather surprising unless you believe in the resurrection of ships.

Therefore, this information is no proof of the age of the photos.

Also, the websites mentioned are - unlike what Mr Matteini said - no official sites or websites filled with official data. In fact these are internet sites owned by private companies. You can see this from the information attached to the written transcription as Annex 4.

To summarize: the photos and the testimony of the witnesses Arve Morch, Silvio Rossi and Tore Husefest prove that the ship was in a very good, seaworthy state at the time of the arrest and then got worse and worse in the following years due to the arrest, the immobilization and the lack of maintenance.

Mr President, Members of the Tribunal, this leads me to the next important point concerning the statement of the Italian expert, Mr Matteini. This statement is, I must say, anything but sound. In detail:

The first point is that Mr Matteini – partly without his fault - assumed false presuppositions. As Mr Matteini explained, he did not receive all the information from his client - Italy – but only the information that is favourable for Italy, namely the photos showing the ship in a state of decay captured between 2010 and 2015. The other ones, in which the ship is seen in good, seaworthy condition (looking like brand new), were evidently not disclosed to Mr Matteini. This behaviour of Italy is – again – a behaviour of bad faith. Mr Matteini, while contradicting himself, later in his statement, has clearly confirmed that his assessment of the vessel would have had a very different result if he had known these photos.

Secondly, Mr Matteini does not seem to have any knowledge of the legal requirements for ships like the *"Norstar"*. This is fatal for the validity of his results since he based his assessments critically on *"Norstar"*'s failure to comply with the double-hull legal requirements established by the MARPOL 73/78 Convention.

Mr Matteini has stated that his assessment has been considerably lower because of this fact, namely at least 30 per cent plus an additional amount for reclassification purposes.

However, what Mr Matteini does not seem to have tested at all is the fact that the MARPOL Convention 73/78 provisions concerning double-hull are only applicable to oil tankers of a deadweight of 5,000 tonnes and above, or of deadweight of 600 tonnes and above. However, the *"Norstar"* had – it is undisputed – a deadweight of less than 500 tonnes.

In addition, the application of the aforementioned regulations also fails due to other requirements of MARPOL, for it is undisputed that the ship did not transport heavy oil. In addition, the gasoil was not a cargo but a naval provision.

Obviously, Mr Matteini does not have any knowledge of technical requirements for other potential uses of the vessel, although he has – nebulously enough – stated that there are special regulations for other potential uses. However, this blanket claim is wrong and Mr Matteini could not cite a single regulation allegedly regulating such requirements. I just want to put it right: for example, for the transport of bio-products or waste of the fishing industry, no single special requirements were to be fulfilled. *"Norstar"* could have been used for this purpose without any further precautions. Mr Matteini had no knowledge of this.

I may summarize. First, the expert, Mr Matteini, has assumed false assumptions regarding the ship's condition.

Second, the expert, Mr Matteini, has assumed false legal and technical requirements with regard to the operational capability of the ship.

Third, the expert had never seen the vessel itself.

By contrast, the Olsen report of value is a sound assessment since they had inspected the *"Norstar"* prior to the arrest and they had photos that were actually from the time prior to the arrest and not 15 years later.

At the end of my statement I would now like very briefly to talk about the question of the causative links.

Italy reiterates its argument that the damage claimed by Panama is too remotely linked. By way of comparison, Italy cites the example of a seaman falling from board and injuring his leg. I can only repeat what I said in the first round: when a ship carrying out bunkering activities is arrested, then it is not only likely, but almost compelling, that the charterer and the owner suffer a loss of revenue. A comparison with any unlikely damage does not fit in the present case in any way.

Finally, Italy cannot argue that the owner disrupted the causative link by not paying the bond, since the demand for the bond was illegal in terms of Italian domestic law as well the Convention. Italy cannot successfully claim that the owner has broken the link. This brings me to the end of my statement.

I am afraid, due to the lapse of time, I will refrain from my statement about article 300; and I may ask to pass the floor to our Agent Nelson Carreyó, please.

Thank you Mr President.

THE PRESIDENT: Thank you, Mr von der Wense.

We have reached 6.25 p.m. and Panama has exhausted all the time allocated. I understand this was the last statement made by Panama during this hearing.

MR VON DER WENSE: Yes.

I would like to pass now to Mr Carreyó.

THE PRESIDENT: Article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read that Party's final submissions. A copy of the written text of these submissions, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other Party.

Therefore, I now invite the Agent of Panama, Mr Carreyó to take the floor to present the Final Submissions of Panama.

STATEMENT OF MR CARREYÓ
AGENT OF PANAMA
[ITLOS/PV.18/C25/9/Rev.1, pp. 36–37]

Thank you, Mr President. Before doing that I would like to state only briefly that Panama knows that the Tribunal has a precious opportunity to set a precedent in order to avoid similar situations to any other members of the Convention. It has been a long way between 1998 and today and it has involved a great deal of effort and resources. Panama also wants to say that it does not harbour any hard feelings against the members of the Italian delegation and praises their work. As a consequence of the above-mentioned, Panama wishes to express its apologies to all present for any harshness in our written or oral statements, and would like to also express its gratitude to the honourable Judges for patiently listening and asking questions, which we are confident will serve to clarify the debate.

Finally, I would like to express a word of gratitude for the extraordinary work of all the staff of this judicial corporation and Mr Registrar as well.

Thank you, Mr President.

Panama requests the Tribunal to find, declare and adjudge:

First, that by *inter alia* ordering and requesting the arrest of the *M/V "Norstar"*, in the exercise of its criminal jurisdiction and application of its customs laws to bunkering activities carried out on the high seas, Italy has thereby prevented its ability to navigate and conduct legitimate commercial activities therein, and that by filing charges against the persons having an interest on the operations of this Panamanian vessel, Italy has breached the right of Panama and the vessels flying its flag to enjoy freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as set forth in article 87, paragraphs 1 and 2, and related provisions of the Convention;

Second, that by knowingly and intentionally maintaining the arrest of the *M/V "Norstar"* and indefinitely exercising its criminal jurisdiction and the application of its customs laws to the bunkering activities it carried out on the high seas, Italy acted contrary to international law, and breached its obligations to act in good faith and in a manner which does not constitute an abuse of rights as set forth in article 300 of the Convention;

Third, that as a consequence of the above violations, Italy is responsible to repair the damages suffered by Panama and by all the persons involved in the operation of the *M/V "Norstar"* by way of compensation amounting to US$ 27,009,266.22, as capital, plus US$ 24,873,091.82, as interest, plus €170,368.10, plus €26,320.31 as interest;

Fourth, that as a consequence of the specific acts on the part of Italy that have constituted an abuse of rights and a breach of the duty of good faith, as well as based on its procedural conduct, Italy is also liable to pay the legal costs derived from this case.

Mr President, I forgot to mention something important, which I also may have asked Mr von der Wense to say, namely that Panama, in a document that it has filed there, has requested United Nations in New York to pay Panama's costs, and we are waiting for an answer. I think that it would be unethical not to disclose in these proceedings that Panama has also requested that forum to pay the costs of this. In case that happens, I will of course ask you to take it into account.

Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Carreyó.

This completes the second round of the oral arguments of Panama. The hearing will be resumed tomorrow at 3 p.m. to hear the second round of oral arguments of Italy.

The sitting is now closed.

M/V "NORSTAR"

(*The sitting closed at 6.33 p.m.*)

15 September 2018, p.m.

PUBLIC SITTING HELD ON 15 SEPTEMBER 2018, 3 P.M.

Tribunal

Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

For Panama: [See sitting of 10 September 2018, 10 a.m.]

For Italy: [See sitting of 10 September 2018, 10 a.m.]

AUDIENCE PUBLIQUE TENUE LE 15 SEPTEMBRE 2018, 15 HEURES

Tribunal

Présents : M. PAIK, *Président* ; MM. NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, Mme KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, Mme CHADHA, MM. KITTICHAISAREE, KOLODKIN, Mme LIJNZAAD, *juges* ; MM. TREVES, EIRIKSSON, *juges* ad hoc ; M. GAUTIER, *Greffier*.

Pour le Panama : [Voir l'audience du 10 septembre 2018, 10 h 00]

Pour l'Italie : [Voir l'audience du 10 septembre 2018, 10 h 00]

THE PRESIDENT: Good afternoon. Today we will hear the second round of oral pleadings by Italy in the hearing of the Tribunal on the merits of the *M/V "Norstar" Case.*

I give the floor to the Co-Agent of Italy, Mr Aiello.

Second Round: Italy

STATEMENT OF MR AIELLO
CO-AGENT OF ITALY
[ITLOS/PV.18/C25/10/Rev.1, pp. 1-2]

MR AIELLO: Mr President, distinguished Members of the Tribunal, it is once again an honour for me to address this Tribunal and a pleasure to represent my country, Italy, in this concluding argument. I would like to take the opportunity to congratulate His Excellency Mr Paik for the impeccable stewardship of these hearings and for his patience.

On Wednesday, I acknowledged, on behalf of the Italian Government, the authority of this honourable Tribunal, and I have confirmed Italy's continuous support of the Tribunal's role as a major adjudicative body in charge of inter-State dispute settlement, as testified by Italy's declaration of acceptance of the Tribunal's jurisdiction under article 287, paragraph 1, of the Convention. Italy's appreciation of this Tribunal has only deepened throughout the course of these proceedings.

However, I must express my regret as Co-Agent of the Italian Government and as a State Attorney, for certain behaviour and some of the assertions made by opposing Counsel. These were neither pertinent nor adequate to the case, which is instead characterized by extremely delicate and judicially important matters.

My colleagues will soon demonstrate the absolute inconsistency in the Applicant's arguments, their lack of fulfilment of the burden of proof and the unsoundness of the request.

Yesterday, the Agent of Panama stated that

> In this case, this Tribunal has not been called upon to reinterpret Italian law, but rather to judge whether or not, when applying its domestic statutes, Italy has acted in conformity with its obligations under the International Convention on the Law of the Sea as regards the *"Norstar"*.

On the contrary, Mr President, Members of the Tribunal, all the arguments made by the Applicant consisted in a critical analysis of the judicial and administrative proceedings adopted by various Italian authorities.

Even the correspondence between the Italian Ministry of Foreign Affairs and the Public Prosecutor of Savona regarding a completely unrelated event to the one discussed before this Tribunal has been analysed in depth by the counter-party.

Mr President, distinguished Members of the Tribunal, my question to both myself and your Excellences is: are these matters your prestigious Tribunal deserves to discuss?

Mr President, distinguished Members of the Tribunal, this concludes my presentation, and I kindly ask you to call Professor Tanzi to the podium. Thank you for your attention.

THE PRESIDENT: Thank you, Mr Aiello.

I then give the floor to Mr Tanzi to make his statement.

STATEMENT OF MR TANZI
LEAD COUNSEL AND ADVOCATE FOR ITALY
[ITLOS/PV.18/C25/10/Rev.1, pp. 2-21]

Mr President, Members of the Tribunal, it is a privilege to be appearing, once again, before you representing Italy, my country, in the last phase of the present proceedings.

Opposing Counsel yesterday affirmed that this case was a clear one. If there is anything on which the parties agree, it is this. It is clear, Mr President, that this case is one about a temporary probationary decree; that the decree has been adopted for the purpose of investigating alleged crimes; that the suspected crimes were allegedly committed in Italian territory; that the decree was adopted in August 1998, at a time when the *"Norstar"* was in Spain's internal waters; that the *"Norstar"* did not leave those internal waters until the decree was executed by Spain in September 1998; that the decree was lifted, first conditionally in February 1999, and then finally March 2003; and that the accused have never been imprisoned and that they have all been acquitted.

Mr President, distinguished Members of the Tribunal, the case that Panama has advanced before you this week remains as misconceived as it was in Panama's written pleadings. Italy has already provided comprehensive responses to Panama's confused submissions, both in its written pleadings and this week. I will therefore confine my rebuttal speech to highlighting just the most fundamental failures in Panama's case.

My speech is organized in four main parts: in the first part I will address five main flaws which characterize Panama's case. They are the following: (a) Panama continues to enlarge the scope of the dispute, as defined by this Tribunal in its Judgment of 4 November 2016; (b) Panama characterizes article 87 as a provision without geographical limits; (c) Panama attempts to plead a breach of article 87 without demonstrating any interference which could impinge on the freedom of navigation; (d) Panama misunderstands the relevance of the acquittals of the accused; (e) Panama baselessly accuses the Italian Public Prosecutor of arbitrariness.

The second part deals with Panama's improper approach to the present proceedings. To that end, I will consider: (a) Panama's false allegations of imprisonment; (b) the boldness of Panama's claim; (c) Panama's delays in commencing this case; and (d) Panama's gross and repeated inflation of its damages claim.

The third part of my speech will rebut to Panama's allegations concerning the Prosecutor's conduct. In particular, I will address: (a) the reasonableness of the Prosecutor's actions; (b) the limitations on the Prosecutor's responsibility for the execution of the Decree of Seizure.

In the fourth part, Mr President, I will consider briefly the valuation of the *"Norstar"*. I will then end with the conclusions that Italy draws from Panama's approach to the case and its conduct as Applicant throughout the proceedings.

Mr President, distinguished Members of the Tribunal, you have already heard Counsel for Italy, including myself, criticize Panama's attempts to exceed the boundaries of the current dispute on a number of occasions this week. I will therefore be brief on this but I must emphasize this point here again because it is foundational to the scope of the judgment you will deliver on the merits, and because Panama continues to ignore those boundaries.

Panama had launched this case on the basis that the subject of the dispute, as Panama described in its Application, "concerns a claim for damages against the Republic of Italy caused by an illegal arrest of the *M/V 'Norstar'*".[1] That claim is no longer before the Tribunal. As you made clear in your November 2016 Judgment, in paragraphs 122 and 132, as I recalled earlier

[1] *Application of the Republic of Panama*, 16 November 2015, para. 3.

this week, the Tribunal's jurisdiction is limited to determining the legality of Italy's Decree of Seizure and request for its execution under articles 87 and 300 of the Convention in relation to article 87. What that means in short, Mr President, and recalling the further detail in my speech on Wednesday, is the following.

Panama's continued attempts to make this case about the arrest of the *"Norstar"* must fail; it is the Decree of Seizure, together with the request for its execution, which are relevant acts to the present dispute. Meanwhile, the execution was carried out far from the high seas in Spain's internal waters and such acts cannot be attributed to Italy. In other words, the key event upon which Panama brought this claim in the first place is no longer relevant to this dispute.

Panama's continued attempts to plead breaches of articles 92 and 97 of the Convention must also fail; these articles lie beyond the scope of the Tribunal's jurisdiction as defined in its November Judgment. Panama has failed to prove the contrary.

Panama's attempts to plead breaches of various human rights obligations, which it maintained in its written pleadings and somehow in its oral pleadings, must again fail; the Tribunal has no jurisdiction to determine breaches of such obligations, which are contained in separate treaties that have their own enforcement regimes. However, Italy is pleased to have had the opportunity and the privilege to illustrate before this Tribunal the full conformity with the basic principles of fair trial and due process of law by its judiciary.

Mr President, Members of the Tribunal, I will now address how Panama characterizes article 87 as an obligation with no geographical limits. In so doing, Panama carries out its attempt to enlarge the obligation under this article to an extent which is not tenable. On Monday, Mr Morch vaguely asserted, without any substantiation, that the *"Norstar"* had made a voyage to Algeria in July 1998, but neither Mr Morch nor anyone else on the Panama side has substantiated that the *"Norstar"* was anywhere but in Palma de Mallorca from the time of the Decree of Seizure, namely 11 August 1998, to the time of the *"Norstar"*'s arrest, 25 September 1998. That is the only time period that can be relevant in light of the jurisdictional boundaries of this dispute.

Yet, Mr President, Panama's case revolves around the claim that Italy's Decree of Seizure and request for its execution somehow breached Panama's right to freedom of navigation on the high seas. My colleague, Professor Caracciolo, extensively demonstrated on Wednesday why Panama has failed to establish a breach of article 87. It suffices to recall as a general matter that Panama's attempts to ignore the actual location of the *"Norstar"* at the time of the conduct that it challenges is gravely misconceived.

Mr President, this amounts to a fully-fledged attempt at re-writing article 87 of the Convention, as if it applied anywhere and everywhere that a ship may be – even in internal waters – so long as the ship sometimes traverses the high seas. That is clearly wrong, and Panama has failed to set down any way in which this extraordinary enlargement of article 87 may be reasonably confined, nor has Panama paid any attention to the dramatic consequences its new interpretation of the law would have for a State's sovereignty, including its enforcement powers to investigate and adjudicate crime in its internal or territorial waters. Panama's failure to recognize the geographic limits of article 87 is fatal to its claim.

As is well known, the law of the sea is characterized by a fragile balance between the powers of the coastal State and jurisdiction of the flag State, a product of centuries of State practice and difficult negotiations. This is why the Convention and freedom of navigation should be handled with care. Commentators on UNCLOS in the literature agree that the Convention strikes a carefully considered balance:

> One of the enduring characteristics of the Law of the Sea Convention is the manner in which it skillfully balances rights and duties in an equitable manner and advances global interests for the benefit of the common good. This balance is very much evident in the key provisions of the

> Convention, [including] the many ambulatory references to the freedom of navigation in the Exclusive Economic Zone and on the high seas that permeate the entire text of the Convention.

Mr President, Members of the Tribunal, I should further add that Panama claims that article 87 should be intended as entitling a ship to gain access to the high seas, even when the ship is legally detained in port. Panama attempts to distinguish the *M/V "Norstar" Case* from the *M/V "Louisa" Case*, in which the Tribunal has already rejected the claim that Panama is now attempting. According to Panama, the difference lies in the fact that the in the *M/V "Louisa" Case* the relevant conduct occurred in territorial waters, whereas in this case the conduct occurred on the high seas. Let me answer this argument by Panama by quoting the opinion of a distinguished Member of this Tribunal:

> Article 87 covers freedom of the high seas and, in particular, freedom of navigation. But the existence of a basic freedom does not prohibit the coastal State from exercising the powers of its police and judiciary in its own territory. … The Parties argued about the location of the alleged criminal activities. Internal waters? Territorial sea? Exclusive Economic Zone? The Applicant maintained that its scientific research activities had been conducted within the area covered by the Spanish permit, i.e., the internal waters and the territorial sea. The Respondent did not dispute this. But is the issue truly relevant?

No less remarkable, Mr President, is Panama's further attempt to enlarge article 87 by bringing a claim based on no actual interference with freedom of navigation. The simple reality of Panama's claim is that the only relevant conduct of Italy before this Tribunal – the Decree of Seizure and the request for execution – had no effect whatsoever on the *"Norstar"*'s navigation on the high seas. Panama is so well aware that no interference at all occurred that it tried yesterday to propose a concept of indirect interference which de facto re-asserts Panama's claim that to investigate conduct on the high seas or extend to the high seas the legislation of a coastal State, amounts per se to an interference with the freedom of navigation. Mr President, this is plainly wrong.

In order to make up for its inability to prove any interference, the Panamanian narrative went on so far as to submit, for the first time in this proceeding, and after having seen how Italy pleaded this point in its written pleadings, that the *"Norstar"* was harassed. On this point, the witness statement of Mr Husefest is vague and unreliable about time and circumstances. For the record, the question is not whether the *"Norstar"* experienced any interference on the high seas at any point in its life, but whether the Decree of Seizure and the request for its execution determined any interference.

Interference did not occur even in the tenuous form of a "chilling effect". I recall that Mr Esposito confirmed on Thursday that a probationary seizure of an object, such as a ship, is secret until it is carried out. This necessarily means that no one involved with the *"Norstar"* knew, or could have known, of the Decree before it was actually enforced in port – no way that the Decree could display any chilling effect.

A further point concerning extraterritoriality. The Tribunal asked whether the Decree of Seizure and its request for execution with regard to activities carried out by the *"Norstar"* on the high seas amount to a breach of article 87. Italy wishes to stress once more that extraterritorial exercise of jurisdiction, which Italy has not exercised in this case, does not in any event amount to automatic interference with freedom of navigation. While there may be conduct by a State that breaches at the same time article 87 and those distinct provisions of the UNCLOS prohibiting extraterritoriality, such as articles 89, 92 and others, no breach of article 87 can occur unless there is some sort of interference with navigation. Thinking otherwise, Mr President, is contrary to ordinary principles of interpretation of the UNCLOS

such as *effet utile* and interpretation in good faith, inasmuch as it deprives article 87 of its characterizing purpose.

Mr President, Members of the Tribunal, I will now address Panama's misunderstanding of the relevance of the acquittals by the Savona and Genoa courts in 2003 and 2005 respectively. Agent and Counsel for Panama have repeatedly invoked the acquittals of those involved with the *"Norstar"* by the Tribunal of Savona as somehow proving Panama's case, but I have already illustrated on Wednesday and repeated on Thursday, this is wrong for at least two reasons.

First, it is the Tribunal of Savona's decision to acquit the accused that is relevant for our purposes, because it was on the same judicial occasion that the Decree of Seizure was definitely lifted. That decision was entirely separate from any assessment of lawfulness or otherwise of the Decree of Seizure in question. Indeed, the Tribunal of Savona did not say anything about the lawfulness of the Decree of Seizure, and that is unsurprising. It is ordinary. It is the law. That is the due process of law. The fact that an accused is ultimately acquitted does not mean that the investigation of that individual that led to its acquittal was unlawful.

Mr President, let me repeat, once again, on Panama's view of the law, investigatory measures, such as the probationary seizure of property, retrospectively become unlawful every time the accused is acquitted. That would produce disastrous effects on the investigation of suspected crime and must be wrong. Logically and legally wrong.

Second, even if the acquittals of those involved with the *"Norstar"* did somehow, only *arguendo*, mean that the probationary seizure was unlawful under Italian law, that would obviously not mean that Italy had breached international law. It would serve to demonstrate the very non-arbitrariness of Italy's conduct under international law. As the ICJ put it in the *ELSI* case, "[i]t would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law".[2]

Mr President, that point ties in with one of the recurring themes of Panama's submissions, both in its written submissions and this week, which has been Panama's accusation that the conduct of the Italian Public Prosecutor was arbitrary. Thus Mr Carreyó accused Italy, through that Public Prosecutor, of arbitrarily preventing the *"Norstar"*'s access to the high seas. Panama even accused the Prosecutor of pursuing an investigation knowing that there was no lawful basis for it.

Mr President, distinguished Members of the Tribunal, these are serious allegations, which Panama has fallen well short of establishing. To take just one of Panama's gross failures to discharge its burden of proof, the Tribunal may recall Mr Carreyó's attempts to cross-examine Italy's Italian law expert, Mr Esposito, about whether the Public Prosecutor in this case gathered any evidence from the *"Norstar"* during its probationary seizure. That was a strange line of questioning in the first place, given that Mr Esposito served as an expert witness and not as a fact witness in this case. It was therefore unsurprising that Mr Esposito could not comment on the matter.

But what is important is that Mr Carreyó's line of questioning underscored in crystal clear terms the remarkable difficulty of Panama's efforts to find evidence to sustain its bold assertions of prosecutorial arbitrariness in this case. In other words, having advanced no evidence of its own, Panama tried to fish for such evidence from an expert witness. The baselessness of Panama's attempts to criticize the conduct of the Public Prosecutor should not go unnoticed by the Tribunal.

On the contrary, and as will be discussed in further detail shortly, the conduct of the Italian authorities, including the Public Prosecutor, was not only in good faith, it was at all

[2] *Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15 ff., para. 124.

times reasonable and proportionate, and was carried out in conformity with Italian law, and the European and international due process of law and fair trial obligations and standards.

As I illustrated on Thursday, Mr President, I must make one important clarification here. The Agent for Panama has asserted that Italy is impermissibly seeking to set up its own domestic law as a justification for its conduct under international law. But that is not what Italy is doing. Italy is simply relying on its domestic laws as providing critical facts for this Tribunal when assessing its conduct in light of international law.

Mr President, allow me to turn again to the *ELSI* case, which I hold particularly dear, and, in particular, its definition of arbitrariness under international law as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety".[3]

That definition underscores the importance of looking at the seriousness with which a State's authorities take legal processes. Panama, as will be discussed shortly, has no basis for alleging that the Italian Public Prosecutor, or any other public authority, wilfully disregarded the relevant legal processes.

Mr President, Members of the Tribunal, having outlined those fundamental misconceptions with Panama's claims in this case, I now wish to make some remarks about Panama's improper approach to the procedure of this case. It is important that I underscore these aspects because, if the five fundamental misconceptions in Panama's claim were not enough, Panama's improper approach to the procedure of this case reinforces the lack of seriousness of Panama's claims

Mr President, Panama launched this case with the allegation under the rubric "legal grounds" in its Application that: "[a]fter imprisoning members of the crew of the *M/V 'Norstar'*, the Italian Republic has (up until this date) evaded to account for this event."[4] As I have already told the Tribunal, Panama has now conceded that no-one involved with the *"Norstar"* was ever imprisoned in connection with the *"Norstar"*'s arrest, or after.[5] Panama must have known this, or should have known this, at the time it made its Application. I know, Mr President, that I have already addressed this point; but allow me to underline that, whether someone has been imprisoned or not is not a point on which there can be any ambiguity. Yet Panama knowingly made that false allegation and thereby attempted to aggravate the dispute before this Tribunal. It is also to be emphasized that these false allegations were reiterated in the Memorial, and it was only after Italy noticed the falseness of its contentions that, in its Reply, Panama withdrew such allegations. That, Mr President, tells a lot about Panama's fast-and-loose approach to matters of evidence in this dispute, and about the recognition by Panama of the weakness of its case without such an allegation, as well as Panama's fast-and-loose approach to matters of evidence in this dispute at large.

Panama, as well as launching this case on the back of false assertions, also more broadly launched this case without any evidential foundation.

Panama's continued attempts to blame Italy for Panama's inability to furnish adequate evidence in this case, including this week, reveals that this case has been knowingly built riskily and without foundation. You may recall that Panama's overbroad document requests were expressly premised on its lack of evidence. As Panama explained in the Request for Evidence that it filed with its Memorial: "Taking into account the lapse from the date of the initiation of damages (nearly 20 years) and due to other different factors (time, distance, language and economy) it has proved difficult to examine and provide the Tribunal with documents concerning this case."[6]

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[3] *Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, p. 76, para. 128.
[4] *Application* (see footnote 1), para. 10.
[5] *Reply of the Republic of Panama*, 28 February 2018, para. 21.
[6] *Memorial of the Republic of Panama*, 11 April 2017, Part IV.

I know about the difficulties that Italy had in order to find its documentation about a very old case, but it was not our case, Mr President; it was Panama's case.

Italy has made significant efforts to cooperate with Panama and respond reasonably to Panama's document requests, including those made in Panama's Memorial, notwithstanding their lack of specificity. Italy even offered to provide a list of documents it held so that Panama could provide proper, specific document requests. Panama refused to take up that undue cooperative proposal.

Panama must now bear the consequences of that refusal. It is not for Italy to provide Panama with all the evidence it needs to build its case. Numerous authorities confirm that basic principle of litigation, including Professor Robert Kolb in his chapter on *General Principles of Procedural Law*:

> The principle [of cooperation] is limited by its aim, which is to allow the fulfilment of the object and purpose of the proceedings, that is, a proper administration of justice. It obviously does not extend as far as to ask the parties to share information or to compromise their "egoistic" interests as opposing parties. For this would again be incompatible with the object and purpose of the proceedings, which is litigation from the standpoint of contrary interests ("adversarial proceedings").[7]

The adversarial nature of these proceedings did not seem to have escaped opposite Counsel, nonetheless.

The Tribunal recognized this principle by rightly rejecting Panama's over-broad document requests. Panama still refuses to accept that decision, as shown by the vague questions put this week by its Counsel to Mr Esposito about the circumstances in which a criminal file could be requested in Italy. However, it remains the case that Panama cannot shift the blame to Italy for its own failure to provide adequate evidence in this case. It is worth mentioning that Mr Morch could have asked the Tribunal to have access to all the files and documents pertaining to the criminal proceeding, as the Italian Code of Criminal Procedure prescribes in article 111. He and his lawyers, his attorney, for which we have evidence that there was retention and fee, have not taken action to that effect but are asking Italy to make up for that – if there was anything to make up for, Mr President. Nor can Panama make up indeed for its evidential failures through the oral testimony of self-interested witnesses.

Mr President, Members of the Tribunal, we heard opposing Counsel insist yesterday that Panama had met its burden of proof because

> [t]he testimonies of the witnesses called by Panama in this case, Mr Morch, Mr Rossi and Mr Husefest, were a particularly strong evidence because the witnesses were directly involved in the events surrounding the *"Norstar"* and had extensive knowledge of the facts concerning the vessel and its activities.[8]

We reject, Mr President, that the evidence of these witnesses provided was at all compelling in respect of the key facts in dispute in this litigation, and we will discuss at various points today why that is so. But I also want to challenge the strength of that oral evidence as a general matter based on well-accepted principles in international dispute settlement affirming that the evidence of individuals that have an interest in a case – and especially a financial interest – has less value than the evidence of those who do not have such an interest. I recall here the statement of the ICJ in the Nicaragua case, as follows:

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

[8] ITLOS/PV.18/C25/9, p. 31, lines 14-17.

> In the general practice of courts, two forms of testimony which are regarded as prima facie of superior credibility are, first the evidence of a disinterested witness – one who is not a party to the proceedings and stands to gain or lose nothing from its outcome – and secondly so much of the evidence of a party as is against its own interest.[9]

I should add, Mr President, that this case involves a State exclusively, if not preponderantly, bringing a claim not for itself but for the financial benefit of Mr Morch, a Norwegian national, and his associates, including Mr Rossi, an Italian national; and those witnesses have given evidence not to vindicate the legal rights of their home State – or perhaps not really even of the flag State – but in order to obtain financial compensation for themselves. We ask the Tribunal to have close regard to this feature of the case when assessing the credibility – or lack thereof – of these witnesses.

Nor, Mr President, can Panama blame the lapse of time for its evidential difficulties given these have followed from its own tardiness in commencing this case. This was despite Mr Carreyó having powers of attorney since 2000 and threatening almost immediately to file a prompt release claim or otherwise against Italy before international adjudication while the case was pending before Italian courts. We also know from Panama's damages claim that Mr Morch, as I have alluded to, had retained other legal counsel following the arrest of the *"Norstar"*.

In particular, it has become apparent in the course of the oral proceedings that Panama's case fails to meet the required standard of proof on certain critical aspects, including, for instance, that the ship was actually on the high seas at the time of the Decree of Seizure and the request for execution.

It was in this connection that, during re-direct examination, the Agent for Panama asked Mr Morch whether the whereabouts of the *"Norstar"* would be known for certain, had the logbook been available. Mr Carreyó's suggestion is perhaps that it is due to Italy's fault that some crucial documents, such as the ship logbook, are no longer available. It is important to stress, Mr President, that this is not the case.

In his re-direct examination of Mr Morch, Mr Carreyó asked: "Do you know what happened to the books …?"[10] His answer was: "The logbooks were still on board in 2015 under Italian detention."[11] One part of Mr Morch's testimony is certainly wrong: the ship in 2015 was not under Italian detention. In 2003 Italy lifted the seizure of the vessel, unconditionally.

However, Mr President, let me focus on the other part of Mr Morch's testimony: "The logbooks were still on board in 2015."[12] If Mr Morch, acting with Panama, intended to bring a case against Italy concerning the arrest and detention of the *"Norstar"*, why did he not recover these documents, which he testified were on the bridge in 2017, when the Application introducing this case was filed? More generally, it was not for Italy, especially after 2003, to take care of the conservation of evidence concerning the *M/V "Norstar"*, which, from the Italian perspective, was concluded in 2003, 15 years before.

Further still, why did Panama wait until November 2015 to bring a case against Italy, namely three months after the *"Norstar"* was destroyed, and all related evidence dispersed? Panama had 18 years to bring this case against Italy. During all this time, the documents of the ship would have been available; the ship itself would have been available. Certainly, any lack of evidence in this case is not of Italy's making, and it should not be imputed to Italy.

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[9] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, p. 43, para. 69.
[10] ITLOS/PV.18/C25/2, p. 12, lines 23-24.
[11] *Ibid.*, line 30.
[12] *Ibid.*

I should add here that, in its November 2016 Judgment, the Tribunal recognized that principles like extinctive prescription and acquiescence are general principles of international law, and that the Tribunal is to take them into account in light of article 293 of the Convention. While the Tribunal found that Panama's claim was not time-barred due to the lack of a specific time limit for the operation of extinctive prescription in international law, this does not mean that the Tribunal should not take into account for other purposes the fact that a long time has elapsed since the facts that are at the basis of the *M/V "Norstar" Case* in its merits stage.

This is especially the case in circumstances in which the unreasonable delay in commencing this case is imputable to Panama, and not to Italy. Professor Robert Kolb, in describing the rationale of extinctive prescription of a claimant's claim, observed that: "There are many legal reasons for some limitation in the legal order [including] 'equitable considerations', since it may become difficult to defend a case after a long time, the relevant pieces, evidence and proof not being available anymore."

Those considerations apply equally when assessing the state of the evidential record following a long lapse of time. As the Tribunal in the *"Gentini"* case recalled, "great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence".[13]

Mr President, Members of the Tribunal, one of the most abusive features of this case, which you have no doubt already noted, is the dramatic way in which Panama has grossly and repeatedly inflated its damages claim. In its Application, Panama quantified its damages at above US$ 6 million plus interest.[14] That became US$ 13,721,918.60 in Panama's Memorial.[15] By the time of Panama's further submission that it inappropriately filed outside of the procedural schedule and on the same day as Italy filed its Rejoinder (on 13 June 2018), and in sums that it outlined yesterday, Panama's claim had risen to US$ 27,009,266, plus almost US$ 25 million in interest, plus €170,368 in legal fees, plus €26,320 in further interest.[16] Mr President, that is over US$ 50 million in total – in other words, Panama's damages claim has increased over 800% during the course of this dispute.

Mr President, there is little that could undermine a claim more than the fact that the party making that claim has no idea of what it has lost. That Panama's damages claim has just happened to have continuously skyrocketed upwards betrays Panama's claim as nothing short of opportunism and contradicts any suggestion that Panama has ever been interested in the legitimate settlement of this dispute.

Mr President, Members of the Tribunal, I will now address Panama's contentions regarding the Public Prosecutor. I will first deal with allegations regarding the lack of reasonableness of the Prosecutor's action. I will then address the issue of the limitation of responsibility of the Prosecutor was not responsible for the execution of the Decree and the custody of the *"Norstar"*.

Counsel for Panama continued to make numerous assertions regarding the conduct of the Public Prosecutor that are devoid of any evidential foundation and which are contradicted by basic principles of criminal justice.

In particular, Panama yesterday elaborated at length on the Decree of Seizure adopted by the Public Prosecutor of Savona. What Panama did was to provide a misleading portrayal of selective fragments of the Decree. The result was a narrative that does not correspond to the actual factual and legal circumstances grounding the Decree.

Excerpts of the Decree are shown on the screen but it is unreadable to me, and I suppose by the Judges as well – and I regret that, but I am sure that this being the heart of the disputed

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[13] *Gentini* case (1903) *X RIAA 551*, p. 561.
[14] *Application* (see footnote 1), para. 11.
[15] *Memorial of the Republic of Panama*, 11 April 2017, para. 260.
[16] "*'Norstar'* Damage Claim", 13 June 2018, p. 11.

facts, distinguished Members of the Tribunal and the President will have no difficulty in retrieving this text. As far as the marked parts of the text are concerned, if allowed we will be pleased to submit a version with marking.

Around this text, Mr President, Italy intends to respond point by point to Panama's misinterpretation.

First, Panama reiterated its assertion that Italy aimed the Decree at targeting bunkering activities on the high seas carried out by the *"Norstar"*. Italy once again is obliged to recall that bunkering is lawful under Italian law and that none of the crimes mentioned in the Decree consist of refuelling gasoil off-shore. As Italy has maintained since the beginning of the merits phase of this proceeding, the Italian fiscal police were instead investigating several suspected illegal offences, fiscal offences under Italian law, on Italian territory.

In addition to Italy's pleadings earlier this week, I may refer you specifically to Annex A to Italy's Counter-Memorial,[17] which you will find on the screen, perhaps in more readable conditions. You have there the fiscal police's investigation report of 24 September 1998. In jargon, it is called under Italian law *notitia criminis*. This document reports the outcome of the investigations as of 24 September 1998, and it clearly demonstrates that bunkering was not the activity under investigation. On the contrary, that report shows that the Italian fiscal police had reasonable grounds to suspect that the alleged fiscal offences were part of a unitary composed criminal plan, put together by an Italian national, Mr Silvio Rossi, and involving the participation of the management of foreign companies, including Inter Marine, as well as the master of the *M/V "Norstar"*.

In summary, Mr President, that suspected criminal plan included several phases: (1) the loading of the *"Norstar"* with fuel in Livorno, Italy, in exemption of excise duties and VAT, as ship's stores; (2) the re-introduction of the fuel into Italian territorial waters and/or internal waters; and (3) the sale and purchase of fuel in Italy, avoiding the payment of the fiscal duties due under the Italian law.[18]

None of that conduct has anything to do with bunkering on the high seas.

Let me be clear, Mr President: if you search for the word "bunkering" in Annex A, the report of the investigations, you will find it. However, the investigation of bunkering per se was not the rationale of the investigation, as we heard yesterday. Rather, the fiscal offences that occurred in the Italian customs territory, including internal waters and/or territorial sea, were clearly the rationale of the investigations.

It is on the basis of these investigations that the Public Prosecutor adopted the Decree, which is at the centre of your attention. Yes, the Decree was adopted shortly before but, as I and Mr Esposito confirmed, there was close contact between the Public Prosecutor and the investigating authorities who had been working back to back for almost a year; and that is the *rationale* of the pertinent criminal procedural rules on the issue.

Second, Mr President, Panama underlines that the Decree of Seizure refers explicitly to the constructive presence doctrine and hot pursuit. There is no denying that, Mr President. According to Panama, constructive presence and hot pursuit constitute the "rationale behind the Decree of Seizure". Panama also asserted that the reference to this doctrine shows that "the use of this doctrine in the Decree of Seizure in itself proves that the *'Norstar'* was not seized for activities in the territorial waters of Italy." However, Panama's assertion is wrong. Even if the Public Prosecutor referred to constructive presence and hot pursuit, these did not form the operative part of the Decree. Such references did not form the operative part of the Decree, which was instead based on the prosecution of the alleged offences plainly committed in Italian territory.

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[17] *Notification of notitia criminis against Silvia Rossi and Others by the fiscal police of Savona*, 24 September 1998 (*Counter-Memorial of the Italian Republic*, 11 October 2017, Annex A).

[18] *Ibid.*, p. 7.

In addition, most importantly, Mr President, as we have repeated time and again, the fact of the matter is that the *"Norstar"* was never arrested on the high seas. In particular, as far as hot pursuit is concerned, which was never carried out, by the way, this nonetheless indicates that any intention to arrest the *"Norstar"* on the high seas involved doing so in compliance with the right to hot pursuit under article 111 of UNCLOS. If there were to be any arrest on the high seas under this Decree, it would have been carried out only under the requirements of article 111 of hot pursuit.

Third, Mr President, Members of the Tribunal, Panama recalled Annex 7 of the Memorial, containing a letter, dated 4 September 1998, issued by the Service of Diplomatic Litigation or Legal Directorate of the Ministry for Foreign Affairs of Italy to the Prosecutor who signed the Decree of Seizure.[19] As the Counsel for Panama notes, the Decree of Seizure in question refers to the "*Spiro F*", flying the flag of Malta.

It is not the first time Panama attempts to introduce the *"Spiro F"* case into the present case with the aim of blurring and confusing the facts and the legal context. Panama suggests that Italy has somehow been evading the "*Spiro F*" case, but what Italy and its Agent has objected to was that the *"Spiro F"* case is a fundamentally different case; and I am pleased to have the opportunity, Mr President, to underline that difference in light of Panama's insistence on the *"Spiro F"*. This difference is simply that, while the *"Spiro F"* was arrested on the high seas, this did not occur in the *M/V "Norstar" Case*. This again underscores one of the core failures of Panama's claim for a breach of article 87 in this case.

Moving beyond the Decree itself, Mr President, Panama also continues to badly understand how probationary seizure works. Counsel for Panama thus complained yesterday that:

> The Italian legal expert yesterday said that, since it was a probatory seizure, for a Prosecutor to arrest a foreign ship, the existence of a crime did not have to be proven. So our first question to Italy will be: in Italy, for a foreign vessel to be arrested, even for probatory purposes, is it not necessary to have proven the existence of a criminal offence?[20]

Mr President, Members of the Tribunal, of course it is not necessary to have proven the existence of a criminal offence before a probationary seizure. It is to investigate the seized property precisely in order to determine whether there is evidence of the existence of a criminal offence. As Counsel to Panama accepts, Mr Esposito confirmed this in his testimony and Panama did not challenge it in cross-examination. Thus, when Mr Carreyó asked Mr Esposito, "Is the guilt of the accused person necessary for the adoption of a probative seizure?",[21] Mr Esposito answered, "No, absolutely not".[22] Panama's continued attempts to challenge this clear law is not only nonsensical; it also flies in the face of the evidence.

Panama also contests the reasonableness of the Public Prosecutor's Decree on the basis that it was not justified by necessity. Panama refers to the passage of the Decree, stating: "Having noted that the seizure of the mentioned goods must be performed, as it has an intrinsic probationary nature, with no need to assess whether the order is necessary."[23]

As explained by the expert in Italian law, Mr Esposito, on Thursday, probative seizure is different from precautionary seizure, and so are the respective requirements for legitimacy and lawfulness. While the precautionary seizure requires "urgency", the former only requires

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[19] *Seizure order by the public prosecutor of the Tribunal of Savona, 11 August 1998* (*Counter-Memorial* (see footnote 17), Annex I).
[20] ITLOS/PV.18/C25/9, p. 8, lines 5-9.
[21] ITLOS/PV.18/C25/7, p. 22, lines 21-22.
[22] *Ibid.*, p. 22, line 24.
[23] *Seizure Order* (see footnote 19).

a reasonable suspicion that a crime has been committed, that is the *fumus boni iuris*, on the ground of which you engage in investigation or continue investigation in order to search for and obtain the truth, which would lead to condemnation or acquittal. Therefore, *fumus boni juris* is to ground the investigative necessity to gather information and collect evidence. In this sense, it is urgent and necessary inherently per se. Mr Busco, referring to the Italian Court of Cassation, covered this point on Wednesday, and I may refer you to his very clear speech. I may only add here that in any criminal justice system, decisions on whether to move forward with investigations, and probationary seizures that are part of those investigations, are not based on considerations of urgency, as may be the case, for example, with preventative seizure taken to prevent the destruction of property.

Mr President, Members of the Tribunal, let me address one point raised by Panama yesterday concerning the fact that the probative seizure would be a measure exclusively peculiar to the Italian legal order. This is patently wrong. The probative seizure is an act well known in the legislation of other States. I refer, inter alia, to the British, German, Spanish, and US legal systems.[24] It may come as a surprise to Panama that article 252 of its Code of Criminal Procedure contains a similar measure. Article 252 is akin to article 253 of the Italian Code of Criminal Procedure in providing a measure aimed at the gathering of all evidence needed to substantiate an allegation; and I suppose that Counsel for Panama are also familiar with the difference between article 252 of the Code of Criminal Procedure and article 259 of the Code of Criminal Procedure of Panama.

Mr President, Members of the Tribunal, the *"Norstar"* was put under probative seizure on 25 September 1998 on the basis of the Decree of Seizure of 11 August 1998. Thus, urgency was not a requirement, whereas necessity followed inherently from the finding of the *fumus* without having to be separately established.

As for *fumus*, Panama asked yesterday: "Has Italy provided evidence about how many of all those megayachts supplied with bunkers on the high seas went back to Italy in order to

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[24] **Germany:** Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette [*Bundesgesetzblatt*] Part I p. 1074, 1319) Section 94 [Objects Which May Be Seized](Par. 1): "Objects which may be of importance as evidence for the investigation shall be impounded or otherwise secured."
Spain: *Ley de Enjuiciamiento Criminal* (R.D. de 14 de septiembre de 1882), Art. 334(1): "El Juez instructor ordenará recoger en los primeros momentos las armas, instrumentos o efectos de cualquiera clase que puedan tener relación con el delito y se hallen en el lugar en que éste se cometió, o en sus inmediaciones, o en poder del reo, o en otra parte conocida". "The investigating judge will order to collect without delay the weapons, instruments or goods of any kind that may be related to the crime and are in the place where the latter was committed, or in its vicinity, or under disposition of the accused, or in another known place."
United Kingdom: The Police and Criminal Evidence **Act** 1984 (**PACE**): article 19, General power of Seizure:The constable may seize anything which is on the premises if he has reasonable grounds for believing— (a) that it has been obtained in consequence of the commission of an offence; and (b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed. (3) The constable may seize anything which is on the premises if he has reasonable grounds for believing (a) that it is evidence in relation to an offence which he is investigating or any other offence; an (b) that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.
United States: Constitution: Fourth Amendment: "The right of the people to be secure in their persons, …, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, *but upon probable cause,* …, and particularly describing the place to be searched, and the persons or things to be seized." Dumbra et al v. United States (1925) "In determining what is probable cause … [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit … for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant." Brinegar v. United States (1949): "Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed".

affirm that there was a suspicion of a crime of smuggling and tax evasion having been committed?"[25]

Mr President, Members of the Tribunal, one would suppose that one of the main reasons for conducting investigations complained of would precisely that of trying to assess, ascertain, find out, these kinds of facts. But if we leave suppositions aside, Mr President, it turns out from the investigation report, to which I referred a while ago and that you find in Annex A of Italy's Counter-Memorial, that the investigations led to the assessment within a timespan of 10 days, namely between 3 August 1997 and 13 August 1997, that eight yachts that had been refuelled by the *"Norstar"* and entered the Italian territorial waters. What is also of particular interest for us to know from that document, which again you find in the same Annex A, is that we find out that the fuel sold to those Italian buyers was invoiced to foreign fake buyers, including Nor Maritime Bunker, for the purpose of avoiding the payment of VAT and income taxes.

Panama also continues to make irresponsible assertions about the alleged motives underlying the Public Prosecutor's actions, including referring to Mr Rossi's accusation that this was done in bad faith for the purpose of carrying out prosecutorial zeal, but it is not acceptable for Panama to rely on such accusations without any supporting evidence; and, of course, the Tribunal well knows that bad faith cannot be presumed. The Public Prosecutor set out the reasons for his Decree in that Decree and the results of the complex investigations are described therein, which go in the same direction. I should also add briefly that yesterday Counsel for Panama criticized Mr Esposito for not knowing the motivations of the Public Prosecutor, but such criticism is misguided. Mr Esposito, as you well know, is an expert witness here to give testimony on the principles of Italian law; he is not a fact witness who could possibly comment on the Public Prosecutor's motivations.

I can add, though, Mr President, that the rigorousness of the Public Prosecutor's conduct is underscored by the speed with which he progressed his investigations of the seized property. Recall that after the *"Norstar"* was seized in September 1998 the shipowner applied for its release in January 1999. The Public Prosecutor turned down that request because there were still investigative exigencies, investigative needs, outstanding. Yet five weeks later, in February 1999, the Public Prosecutor accepted the conditional release of the vessel. To put it another way, Mr President, whereas the shipowner took about four months to even request the lifting of the seizure, the Public Prosecutor was able to complete the investigation in only five further weeks, and he had no personal interest in the *"Norstar"*, as his owner was supposed to have; and certainly, Mr President, that is not the mark of an unreasonable Public Prosecutor looking to abuse his power. I note in this connection that we heard nothing yesterday about the erroneous descriptions that Panama had given earlier this week, describing this temporary seizure as a confiscation that was *sine die*, because a confiscation, that is not a seizure, is *sine die*. As Panama now appears to accept, there was clearly nothing confiscatory or *sine die* about the seizure.

Yesterday Panama vehemently asserted that Italy is hiding behind Spain and attempting to evade its responsibility behind Spain.

Mr President, it is important that I draw your attention to the applicable legal regime under the 1959 European Convention on Mutual Assistance in Criminal Matters. Panama does not dispute that this is the applicable legal regime to the request for execution of the Decree. Let me recall article 3 of that Convention, which is the key provision in the instant case. It provides:

> The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting

[25] ITLOS/PV.18/C25/9, p. 3, lines 45-47.

> Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.

Thus, for the European Convention, the fundamental principle governing the execution of a letter rogatory is that of the *locus regit actum*. The meaning of the maxim is that the law of the place governs the execution of the request for mutual assistance, as opposed to the principle of the *forum regit actum*.

The principle of the *locus regit actum* is not peculiar only to the European Convention that I have just mentioned and which applies in the instant case, but rather is well established and widely utilized by States in cooperation in criminal matters worldwide.

The International Court of Justice discussed this principle dealing with an agreement between Djibouti and France in the case of *Certain Questions of Mutual Assistance in Criminal Matters* of 4 June 2008.

More specifically, the Court stated that

> the obligation to execute international letters rogatory laid down in article 3 of the 1986 Convention is to be realized in accordance with the procedural law of the requested State. Thus, the ultimate treatment of a request for mutual assistance in criminal matters clearly depends on the decision by the competent national authorities, following the procedure established in the law of the requested State. While it must of course ensure that the procedure is put in motion, the State does not thereby guarantee the outcome, in the sense of the transmission of the file requested in the letter rogatory.[26]

Mr President, I may note that article 3 of the Convention in hand basically reflects article 3 of the Strasbourg Convention of 1959.

Mr President, Members of the Tribunal, coming back to the instant case, it clearly emerges from article 3 of the 1959 European Convention that once Italy issued the Decree of Seizure and requested the Spanish authorities to execute the Decree of Seizure, the Italian letters rogatory were executed by Spain according to its internal rules and procedure. In detail, from the arrest onwards, all measures adopted towards the *M/V "Norstar"* were governed by the Spanish legislation, such as: all modalities for the physical apprehension of the vessel; the appointment of the custodian; the inventory of all goods on board the *M/V "Norstar"*, including fuel; and the decision on the ordinary vessel's maintenance.

Thus, Mr President, it is not by chance that the custodian, as we know for sure from the facts of the case, was the Spanish Port Authority of Palma de Mallorca. Equally, it is not by chance that, contrary to the Panama's assertions, after the decision of the Tribunal of Savona in 2003, which released the vessel finally and definitely, Italy could not but rely on Spanish authorities for having executed the release and the return of the *"Norstar"* to Inter Marine SPA.

In conclusion, Mr President, Panama's assertions that Italy manipulates Spain in order to evade its responsibility is simply and patently unfounded.

To be sure, Italy does not dispute that, as the Tribunal found in its November 2016 Judgment, it was up to Italy to later request Spain to lift the seizure. However, that does not change the fact that Spain was responsible for the execution of the seizure and the custodianship of the vessel until the time that Italy requested the lifting of the seizure. Indeed, that is why Italy had to request Spain to lift the seizure. That can only be understood if Spain was in control of the ship until Italy requested Spain to lift that seizure.

Mr President, I should briefly respond here to the mischaracterization of Mr Esposito's evidence by opposing Counsel yesterday. Yes, in response to a question from Judge Pawlak,

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[26] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 177, p. 222, para. 123.

Mr Esposito said that "[t]he general rule is that whoever has issued the seizure order … is in charge of the whole situation" and that "[i]f Italy arrests a ship, whoever has issued the seizure order is responsible for taking care of the ship". However, Mr President and Members of the Tribunal – and I cannot emphasize this enough – Mr Esposito was clear that this was his opinion "[i]f Italy arrests the ship", which was not the case.

Indeed, Judge Pawlak's question was: "If Italy arrests a ship, who is responsible for taking care of the ship – the owner, the Italian authorities, other authorities?".[27] Opposing Counsel disappointingly misled the Tribunal by omitting that crucial context, which changes everything. To be clear: Mr Esposito was opining on what would happen within Italy if Italian authorities arrested a ship at the request of the Italian Public Prosecutor. Mr Esposito was clearly not opining on which State bears responsibility for executing a request for seizure from another State and the modalities of custodianship thereafter under the Strasbourg Convention.

Mr President, Members of the Tribunal, Italy strongly opposes the argument made by Panama since its Application, including yesterday, that the judgment of the Tribunal of Savona of 2003 "was not full and final"[28]. It would not have been full and final, according to Panama, because

> The Savona Prosecutor appealed the decision in front of the Court of Appeal of Genova, despite having full knowledge of its illegal conduct when ordering and requesting the arrest of the *M/V "Norstar"*, as well as of the aggravation of the damages that would accrue for its unlawful decision over the passage of time.

Mr President, this is simply not the case, and this is a matter of Italian law, which is a clear-cut matter of fact before this Tribunal for which Italy has abundantly proved evidence, but Panama keeps ignoring Italy's evidence, keeps ignoring Italian law, keeps complaining about Italy pleading Italian law while Panama wrongfully pleads Italian law when we are supposed to be pleading international law, and the facts speak for themselves. The revocation of the Decree became final on 20 March 2003. The appeal lodged by the Public Prosecutor did not concern the release of the *M/V "Norstar"*. Indeed, the Public Prosecutor did not request the Court of Appeal of Genoa to suspend the order to return the vessel.

The judgment by the Genoa Appellate Court of 2005 concerned only the acquittal of the accused, which was plainly upheld.

In sum, Mr President, once the Tribunal of Savona had decided on the unconditional release of the vessel and once that decision had been transmitted to Spain, the Italian judicial authorities no longer had jurisdiction regarding the *"Norstar"*.

It is for this reason, Mr President, that on 31 October 2006 the Genoa Appellate Court answered to the Spanish authorities that it was not for it to decide on the demolition of the vessel.

Mr President, I see that it is approaching 4.30. I need to stay on my feet for about 10 to 15 more minutes. May I continue or allow you to decide to take a break?

THE PRESIDENT: Mr Tanzi, since you are approaching the end of your statement, I will allow you to continue your statement.

MR TANZI: Thank you very much, Mr President. That is what I will do.

Mr President, Members of the Tribunal, opposing Counsel referred yesterday to the Italian naval expert as follows: "First, the expert, Mr Matteini, has assumed false assumptions

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[27] ITLOS/PV.18/C25/8, p. 10, lines 30-31.

[28] *Application* (see footnote 1), para. 8.

regarding the ship's condition. Second, the expert, Mr Matteini, has assumed false legal and technical requirements with regard to the operational capability of the ship."[29]

I may note, Mr President, the pictures presented by Panama in yesterday's hearing have been extracted, as indicated by opposing Counsel, from private rather than official websites. I may recall that Captain Matteini had stated during his testimony that his information was acquired from official websites recognized by the IMO.

The statement given by Captain Matteini is in line with the article of "Diario de Mallorca", produced by Panama.[30] The article attests that the vessel had entered the port of Mallorca in March 1998, and was in a state of abandonment in April of the same year.

The photographs presented by Panama portray close-ups of the decks of the vessel and the engine room. However, there is no record of the source and dates of these photographs. The captions of the photographs appear to have been added at a different time.

Yesterday, Panama reported a part of Captain Matteini's testimony, omitting a crucial part of it. Opposing Counsel quoted Captain Matteini as stating that "For sure, had the vessel looked like that, then my evaluation would have been different".[31] Yet opposing Counsel omitted the rest of the sentence; in that sentence Captain Matteini clarified: "but again we would need to consider the necessary technical update that it had to comply with".[32]

Opposing Counsel also referred to a series of photographs taken between 2010 and 2015 in which the status of the ship was defined as "active", which opposing Counsel considered "rather surprising unless you believe in the resurrection of ships".[33] However, there is nothing surprising in that statement, as the ship is defined as "active" because it is no longer under the effect of the seizure.

Panama claimed that *"Norstar"* did not need to conform to the new technical requisites imposed by the 73/78 MARPOL Convention because its deadweight was below 500 metric tonnes.

However, the threshold set by MARPOL is of 400 metric tonnes, and includes the *"Norstar"*. Moreover, it is necessary to keep in due regard, next to the weight, the category of cargo, which is to be combined with the relevance of the determinant of the weight of the ship, especially if it is gasoil, due to its inflammatory nature and its related flashpoint. This is why *"Norstar"* had to comply with double-hull legal requirements set by MARPOL.

At the time of the events we know for sure that at least opposing Counsel and witnesses claim the use of the *"Norstar"* was to transport gasoil, not fresh water. If it had intended to change its business, it had to incur major renovation works, costly works.

Captain Matteini's declarations are valid also in respect of the valuation of the ship. For example, the expert could not have realistically considered a different use for the vessel as this was not an available option at the time of the Decree of Seizure, as I just alluded to, Mr President.

For the transport of bio-products or fishing industry waste, the vessel would have to undergo a remodelling of its structure. Mr President, Members of the Tribunal, it would be unthinkable to load the tankers with waste flowing through tubes designed for gasoil.

Mr President, in my final remark I will be addressing an issue which is not meant to be procedural, and it has a highly substantive importance in nature.

In March 2016 Italy filed Preliminary Objections under article 294, paragraph 3, UNCLOS and article 97 of its Rules of Procedure, and it consciously did so to avoid starting preliminary proceedings under article 294, paragraph 1, UNCLOS and article 96 of its Rules

[29] ITLOS/PV.18/C25/9, p. 35, lines 5-9.
[30] *Memorial of Panama*, 11 April 2017, Annex 16.
[31] ITLOS/PV.18/C25/8, p. 22, lines 16-17.
[32] *Ibid.*, p. 22, lines 17-18.
[33] ITLOS/PV.18/C25/9, p. 33, lines 48-49.

of Procedure. Italy did so on the assumption that a State Party to the Convention would not file an unfounded claim. That assumption was also based on the fact that Panama had almost 17 years to prepare the case before filing it. However, by the end of the merits phase, including what we heard this week, Panama has remarkably failed to substantiate its claims, while handling issues of evidence and documentation in the most appalling way.

In particular, as illustrated on Wednesday by Professor Caracciolo, Mr Busco and myself, the evidence and arguments produced by Panama against the higher evidentiary and argumentative thresholds required at merits stage with respect to the prima facie ones show that nothing in the conduct complained of by Panama which is attributable to Italy can possibly constitute a breach of article 87 of the Convention and of article 300. Much more than that, Mr President, now, in the light of the full record, those provisions appear not to be even relevant to the present case.

Furthermore, Mr President, my considerations regarding Panama's repeated failures concerning the burden of proof that I illustrated on Wednesday, and that my colleagues have corroborated in their speeches, remain unaltered in the light of what we heard Panama say in its Second Round. Most importantly, I must emphasize the last-minute reliance shown yesterday by opposing Counsel on self-serving pieces of evidence coming from self-interested witnesses in an attempt to paper over the obvious gaps in its documentary evidence. Such poor evidentiary background, Mr President, Members of the Tribunal, together with the lack of substantiation of its legal arguments, renders Panama's claim manifestly unfounded.

Mr President, distinguished Members of the Tribunal, this concludes my presentation and I kindly ask you to call the Agent for Italy, Mr Aiello, to present Italy's submissions. I thank you very much for your attention.

THE PRESIDENT: Thank you, Mr Tanzi.

I understand that this was the last statement made by Italy during this hearing. Article 75, paragraph 2, of the Rules of the Tribunal provides that, at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read that Party's final submissions. A copy of the written text of these submissions, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other Party.

I now invite the Co-Agent of Italy to take the floor to present the final submissions of Italy.

STATEMENT OF MR AIELLO
CO-AGENT OF ITALY
[ITLOS/PV.18/C25/10/Rev.1, p. 21]

Mr President, distinguished Members of the Tribunal, with your permission and pursuant to article 75 of the Rules of Procedure of this Tribunal, I will now read the final submissions by Italy.

Italy requests the Tribunal to dismiss all of Panama's claims, either because they fall outside the jurisdiction of the Tribunal, or because they are not admissible, or because they fail on their merits, according to arguments that have been articulated during these proceedings.

Panama is also liable to pay the legal costs derived from this case.

Mr President, Members of the Tribunal, this concludes my presentation and Italy's statements.

Dear Mr President, at the very end of this hearing, let me thank you and the Members of the Tribunal, but also the Registrar, the staff and the interpreters for their kind cooperation for the success of this hearing.

THE PRESIDENT: Thank you, Mr Aiello.

Closure of the Oral Proceedings
[ITLOS/PV.18/C25/10/Rev.1, pp. 21-22]

THE PRESIDENT: This brings us to the end of this hearing. On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both Panama and Italy. I would also like to take this opportunity to thank both the Agent of Panama and the Co-Agent of Italy for their cooperation.

The Registrar will now address a few matters related to documentation.

THE REGISTRAR: Thank you, Mr President.

Pursuant to article 86, paragraph 4, of the Rules of the Tribunal, the Parties may, under the supervision of the Tribunal, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the meaning and scope thereof. These corrections relate to the transcripts in the official language used by the Party in question. In the case of statements made in the Italian language by experts, a correction could be marked in the English or French version of the transcript. The Parties are requested to use for their corrections the verified versions of the transcripts and not those marked as "unchecked". The corrections should be submitted to the Registry as soon as possible and by Tuesday, 25 September 2018 at 5.00 p.m. Hamburg time, at the latest.

The Parties will also receive today a letter concerning the certification of documents they have submitted as copies.

Finally, I wish to remind the Parties that the President has transmitted to them questions that the Tribunal would like them to answer. The Parties are requested to submit their answers, if any, to these questions at the latest by Friday, 21 September 2018 at 5.00 p.m. Hamburg time.

THE PRESIDENT: Thank you, Mr Registrar.

The Tribunal will now withdraw to deliberate. The Judgment will be read on a date to be notified to the Agents. The Tribunal currently plans to deliver the Judgment in spring 2019. The Agents of the Parties will be informed reasonably in advance of the precise date of the reading of the Judgment.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the Judgment.

The hearing is now closed.

(*The sitting closed at 5.45 p.m.*)

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in *The M/V "Norstar" Case (Panama* v. *Italy), Merits.*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire du navire « Norstar » (Panama c. Italie), fond*

Le 10 septembre 2019
10 September 2019

Le Président
Jin-Hyun Paik
President

La Greffière par intérim
Ximena Hinrichs Oyarce
Acting Registrar