INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 2016

4 NOVEMBER 2016

List of Cases:
No. 25

THE M/V "NORSTAR" CASE

(PANAMA *v.* ITALY)

PRELIMINARY OBJECTIONS

JUDGMENT

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Present: *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

In the *M/V "Norstar" Case*

between

Panama,

represented by

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

as Agent;

Mr Hartmut von Brevern, Attorney at Law, Hamburg,

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

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

as Counsel;

Ms Janna Smolkina, M.A./M.E.S., Ship Registration Officer, Consulate General of Panama in Hamburg, Germany,

Mr Arve Einar Mörch, owner of the ship "*Norstar*", Norway,

Mr Magnus Einar Mörch, son of Mr Arve Einar Mörch, Norway,

as Advisors,

and

Italy,

represented by

Ms Gabriella Palmieri, Deputy Attorney General,

as Agent;

Minister Plenipotentiary Stefania Rosini, Deputy Head, Service for Legal Affairs, Diplomatic Disputes and International Agreements, Ministry of Foreign Affairs and International Cooperation,

Commander Massimo di Marco, Italian Coast Guard Headquarters - International Affairs Office,

as Senior Advisors;

Dr Attila Tanzi, Professor of International Law, University of Bologna,

Dr Ida Caracciolo, Professor of International Law, University of Naples 2, Member of the Rome Bar,

Dr Francesca Graziani, Associate Professor of International Law, University of Naples 2,

Mr Paolo Busco, LL.M. (Cantab), Lawyer, Member of the Rome Bar,

as Counsel and Advocates;

Dr Gian Maria Farnelli, Research fellow of International Law, University of Bologna,

Dr Ryan Manton, University of Oxford, Member of the New Zealand Bar,

as Legal Assistants,

THE TRIBUNAL,

composed as above,

after deliberation,

delivers the following Judgment:

I. Introduction

1. By an Application dated 16 November 2015 and filed at the Registry of the Tribunal on 17 December 2015 (hereinafter “the Application”), the Republic of Panama (hereinafter “Panama”) instituted proceedings against the Italian Republic

(hereinafter “Italy”) in a dispute “between the two states concerning the interpretation and application of the United Nations Convention on the Law of the Sea … in connection with the arrest and detention by Italy of mv Norstar, an oil tanker registered under the flag of Panama.” On the same date, the Registrar of the Tribunal received a letter dated 2 December 2015 from the Vice-President and Minister of Foreign Relations of Panama, informing the Tribunal of the appointment of Mr Nelson Carreyó as Agent in “the case concerning the arrest of the m/n NORSTAR”.

2. By letter dated 17 December 2015, the Registrar transmitted a certified copy of the Application and the letter to the Minister of Foreign Affairs and International Cooperation of Italy and also to the Ambassador of Italy to Germany.

3. The originals of the Application and of the letter referred to in paragraph 1 were received by the Registry on 21 December 2015.

4. In its Application, Panama invoked, as the basis for the jurisdiction of the Tribunal, the declarations made by the Parties in accordance with article 287 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”).

5. In its Application, Panama requested that the dispute be referred to the Chamber of Summary Procedure of the Tribunal, pursuant to article 15, paragraph 3, of the Statute of the Tribunal (hereinafter “the Statute”). In his letter dated 17 December 2015, the Registrar invited the Government of Italy to communicate its position in this regard at its earliest convenience, but not later than 8 January 2016.

6. The case was entered in the List of cases as Case No. 25 on 17 December 2015.

7. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997 (hereinafter “the Relationship Agreement”), the Registrar, by letter dated

18 December 2015, notified the Secretary-General of the United Nations of the Application.

8. In accordance with article 24, paragraph 3, of the Statute, the Registrar, by note verbale dated 21 December 2015, notified the States Parties to the Convention of the Application.

9. By letter dated 29 December 2015 addressed to the Registrar, the Minister of Foreign Affairs and International Cooperation of Italy notified the Tribunal of the appointment of Ms Gabriella Palmieri, Deputy Attorney General, as Agent in the case.

10. By letter of the same date addressed to the Registrar, the Agent of Italy, referring to the proposal by Panama to refer the dispute to the Chamber of Summary Procedure, expressed Italy's "preference for the case to be heard before the Tribunal *in plenum*."

11. In accordance with article 45 of the Rules of the Tribunal (hereinafter "the Rules"), on 28 January 2016, the President of the Tribunal held consultations with the representatives of the Parties at the premises of the Tribunal to ascertain their views with regard to questions of procedure in respect of the case. During these consultations, the President indicated to the Parties that, in the light of article 108, paragraph 1, of the Rules, the case would be considered by the full Tribunal.

12. Having ascertained the views of the Parties, by Order dated 3 February 2016, the President of the Tribunal fixed, in accordance with articles 59 and 60 of the Rules, the following time-limits for the filing of pleadings in the case: 28 July 2016 for the Memorial of Panama, and 28 January 2017 for the Counter-Memorial of Italy. On 3 February 2016, the Registrar transmitted a copy of the Order to each Party.

13. Since the Tribunal did not include upon the bench a judge of the nationality of Panama, the Agent of Panama, pursuant to article 17, paragraph 3, of the Statute, informed the Registrar by letter dated 20 February 2016 that Panama had chosen

Mr Gudmundur Eiriksson to sit as judge *ad hoc* in the case. The Deputy Registrar transmitted a copy of the letter to Italy on 22 February 2016.

14. Since the Tribunal did not include upon the bench a judge of the nationality of Italy, the Agent of Italy, pursuant to article 17, paragraph 3, of the Statute, informed the Registrar by letter dated 23 February 2016 that Italy had chosen Mr Tullio Treves to sit as judge *ad hoc* in the case. The Registrar transmitted a copy of the letter to Panama on 24 February 2016.

15. By communication addressed to the Registrar and received on 11 March 2016, within the time-limit set by article 97, paragraph 1, of the Rules, Italy filed with the Tribunal "written preliminary objections under article 294, paragraph 3, of the United Nations Convention on the Law of the Sea" (hereinafter "the Preliminary Objections") in which Italy "challenges the jurisdiction of [the] Tribunal as well as the admissibility of Panama's claim". These Preliminary Objections were notified to Panama on the same date.

16. Upon receipt of the Preliminary Objections by the Registry, pursuant to article 97, paragraph 3, of the Rules, the proceedings on the merits were suspended, as stated in the Order of the Tribunal dated 15 March 2016.

17. By the same Order, the Tribunal fixed 10 May 2016 as the time-limit for the presentation by Panama of its written observations and submissions on the Preliminary Objections, and 9 July 2016 as the time-limit for Italy to submit its written observations and submissions in reply.

18. On 15 March 2016, the Registrar transmitted a copy of the Order to each Party. Panama filed "Observations and Submissions of the Republic of Panama to the Preliminary Objections of the Italian Republic" (hereinafter "the Observations") on 9 May 2016, and Italy filed "Written Observations and Submissions of the Republic of Italy in Reply to Observations and Submissions of the Republic of Panama" (hereinafter "the Reply") on 8 July 2016.

19. Pursuant to the Relationship Agreement, the Registrar, by letter dated 15 March 2016, notified the Secretary-General of the United Nations of the Preliminary Objections in the case.

20. By note verbale dated 16 March 2016, the Registrar notified the States Parties to the Convention of the Preliminary Objections filed by Italy in the case.

21. No objection to the choice of Mr Eiriksson as judge *ad hoc* was raised by Italy, and no objection to the choice of Mr Treves as judge *ad hoc* was raised by Panama. No objection to the choice of the judges *ad hoc* appeared to the Tribunal itself. Consequently, in accordance with article 19, paragraph 3, of the Rules, the Registrar informed the Parties by separate letters dated 16 March 2016 that Mr Eiriksson and Mr Treves would be admitted to participate in the proceedings as judges *ad hoc*, after having made the solemn declaration required under article 9 of the Rules.

22. In accordance with article 45 of the Rules, on 18 March 2016, the President of the Tribunal held consultations with the representatives of the Parties by way of a telephone conference to ascertain their views with regard to questions of procedure in respect of the Preliminary Objections.

23. By Order dated 4 August 2016, the President of the Tribunal, having ascertained the views of the Parties, fixed 20 September 2016 as the date for the opening of the oral proceedings. On 4 August 2016, the Registrar transmitted a copy of the Order to each Party.

24. By communication dated 19 August 2016 addressed to the Registrar and received on 22 August 2016, Panama submitted a request dated 16 August 2016 for “a ruling concerning the scope of the subject matter based on the preliminary objections filed by Italy”. The request was transmitted to the Agent of Italy on 22 August 2016.

25. By letter dated 23 August 2016 addressed to the Registrar and received on 24 August 2016, the Agent of Italy objected to the request made by Panama. The letter was transmitted on the same date to the Agent of Panama.

26. At the request of the President of the Tribunal, the Parties were informed by letter from the Registrar dated 29 August 2016 that the request of Panama for "a ruling concerning the scope of the subject matter based on the preliminary objections filed by Italy" would be examined by the Tribunal on 19 September 2016.

27. Prior to the opening of the oral proceedings, materials required under paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal were submitted to the Registry by the Agent of Italy on 15 and 19 September 2016, and by the Agent of Panama on 19 September 2016.

28. At a public sitting held on 19 September 2016, Mr Treves and Mr Eiriksson each made the solemn declaration required under article 9 of the Rules.

29. In accordance with article 68 of the Rules, prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 19 September 2016.

30. Pursuant to the initial deliberations held on 19 September 2016, after having considered the request of Panama for "a ruling concerning the scope of the subject matter based on the preliminary objections filed by Italy" dated 16 August 2016, and the response of Italy dated 23 August 2016, the Tribunal "decided to allocate each Party additional speaking time of 30 minutes during the hearing to comment on the matter."

31. On 19 September 2016, the President of the Tribunal held consultations with the Agent of Panama and the Agent of Italy at the premises of the Tribunal to ascertain the views of the Parties regarding the conduct of the case and the organization of the hearing. During these consultations, the Parties were informed of the Tribunal's decision referred to in paragraph 30 above.

32. From 20 to 22 September 2016, the Tribunal held six public sittings. At these sittings, the Tribunal was addressed by the following:

For Italy:

Ms Gabriella Palmieri,
as Agent;

Mr Attila Tanzi,
Ms Ida Caracciolo,
Ms Francesca Graziani,
Mr Paolo Busco,
as Counsel and Advocates;

For Panama:

Mr Nelson Carreyó,
as Agent;

Mr Olrik von der Wense,
Mr Hartmut von Brevern,
as Counsel;

Ms Janna Smolkina,
as Advisor.

33. During the hearing, the Parties displayed a number of exhibits on screen, including excerpts of documents.

34. The hearing was broadcast on the Internet as a webcast.

35. Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and documents annexed thereto were made accessible to the public on the opening of the oral proceedings.

36. In accordance with article 86, paragraph 1, of the Rules, the transcript of the verbatim records of each public sitting was prepared by the Registry in the official languages of the Tribunal used during the hearing. In accordance with article 86, paragraph 4, of the Rules, copies of the transcripts of the said records were

circulated to the judges sitting in the case, and to the Parties. The transcripts were also made available to the public in electronic format.

II. Submissions of the Parties

37. In paragraph 13 of its Application, Panama requested the Tribunal to adjudge and declare that:

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

38. In paragraph 36 of its Preliminary Objections, repeated in paragraph 178 of its Reply, Italy requested the Tribunal to adjudge and declare that:

> (a) it lacks jurisdiction with regard to the claim submitted by Panama in its Application filed with the Tribunal on 17 December 2015;
>
> and/or that
>
> (b) the claim brought by Panama against Italy in the instant case is inadmissible to the extent specified in the preliminary objections.

39. In paragraph 75 of its Observations, Panama requested that the Tribunal:

> FIRST, declare that
>
> 1. it has jurisdiction over this case;
>
> 2. the Application made by Panama is admissible; and
>
> 3. the Italian Republic has not complied with the rule of Due Process of Law;
>
> SECOND, that as a consequence of the above declarations the Written Preliminary Objections made by the Italian Republic under Article 294, paragraph 3 of the Convention, are rejected.

40. In accordance with article 75, paragraph 2, of the Rules, the following final submissions were presented by the Parties at the conclusion of the last statement made by each Party at the hearing:

On behalf of Italy:

> For the reasons given in its Written Preliminary Objections dated 10 March 2016, in its Written Observations and Submissions in Reply to Panama's Observations and Submissions of 8 July 2016, and in the course of the present hearing, Italy request[s] that the International Tribunal for the Law of the Sea adjudge and declare that:
>
> a. The Tribunal lacks jurisdiction with regard to the claim submitted by Panama in its Application filed with the Tribunal on 17 December 2015;
>
> And / or that
>
> b. The claim brought by Panama against Italy in the instant case is inadmissible.

On behalf of Panama:

> For the reasons explained in the Application and the Observations and during the oral hearings the Republic of Panama requests the International Tribunal for the Law of the Sea to adjudge and declare that:
>
> FIRST
>
> - the Tribunal has jurisdiction over this case;
>
> - the claim made by Panama is admissible; and
>
> SECOND, that as a consequence of the above declarations the Written Preliminary Objections made by the Italian Republic under Article 294, paragraph 3 of the Convention are rejected.

III. Factual background

41. From 1994 to 1998, the *M/V "Norstar"*, an oil tanker flying the flag of Panama, was engaged in supplying gasoil to mega yachts, in an area described by Panama as "international waters beyond the Territorial Sea of Italy, France and Spain" and by Italy as "off the coasts of France, Italy and Spain". According to Italy, the vessel was owned by *Inter Marine & Co AS*, managed by *Borgheim Shipping*, which are both

Norwegian-registered companies, and chartered out to *Nor Maritime Bunker*, a Maltese-registered company.

42. On 11 August 1998, the Public Prosecutor at the Court of Savona, Italy, issued a Decree of Seizure against the *M/V "Norstar"*, in the context of criminal proceedings against eight individuals for the alleged offences of criminal association aimed at smuggling mineral oils and tax fraud. The Decree ordered the seizure of the *M/V "Norstar"* "as *corpus delicti*" for the alleged criminal offences.

43. Following a request for judicial assistance by the Prosecutor at the Court of Savona pursuant to article 15 of the European Convention on Mutual Assistance in Criminal Matters done in Strasbourg on 20 April 1959 (hereinafter "the 1959 Strasbourg Convention") and article 53 of the "Schengen Agreement of 14 June 1985", the Spanish authorities seized the *M/V "Norstar"* when it was anchored in the Bay of Palma de Mallorca, Spain, in September 1998.

44. In January 1999, the owner of the *M/V "Norstar"* made an application for the release of the vessel, which was refused by the Public Prosecutor at the Court of Savona, who offered instead the release against a security of 250 million Lire. According to Panama, the owner was not able to provide such an amount.

45. On 13 March 2003, the Court of Savona (Criminal Division) delivered its judgment and "acquitted all accused of all charges." The judgment also ordered that "the seizure of motor vessel Norstar be revoked and the vessel returned to" its owner. On 18 March 2003, the Court of Savona transmitted a copy of its judgment to the Court of Palma de Mallorca, Spain, requesting the latter to execute the order for release.

46. On 18 August 2003, the Public Prosecutor at the Court of Savona appealed against the judgment of 13 March 2003. The appeal was not made in relation to the vessel and was limited to the conviction and sentencing of seven of the eight individuals referred to in paragraph 42. On 25 October 2005, the Court of Appeal of Genoa, Italy, upheld the judgment delivered by the Court of Savona.

47. On 6 September 2006, the Port Authority of the Balearic Islands, Spain, requested through the Court of Savona authorization to demolish the *M/V "Norstar"*. On 31 October 2006, the Court of Appeal of Genoa issued an order stating that the judgment of the Court of Savona of 13 March 2003 "has to be enforced" and that "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". On 13 November 2006, the Court of Appeal of Genoa transmitted a copy of its order of 31 October 2006 to the Port Authority of the Balearic Islands.

48. Prior to the submission of the Application in the present case, two notes verbales were sent to Italy by Panama. Several other communications were sent to Italy, stating that they were sent on behalf of Panama. Their status is analysed in subsequent parts of the Judgment.

IV. Panama's Request for ruling on the scope of Italy's Preliminary Objections and Italy's Objection thereto

49. As noted in paragraphs 24 and 25, Panama filed on 22 August 2016 a request for "a ruling concerning the scope of the subject matter based on the preliminary objections filed by Italy", and Italy objected to this request by letter of 23 August 2016.

50. In its request, Panama stated that Italy submitted, in its Reply of 8 July 2016, several new objections that were not mentioned previously and that were made beyond the time-limit prescribed in article 97, paragraph 1, of the Rules in an attempt "to broaden the scope" of Italy's Preliminary Objections. It further stated that the only opportunity it had had to make use of its right to contradict Italy's arguments was in the oral proceedings and that "this would affect the Principles of Due Process of Law, of Contradiction and of [*égalité des armes*]". Panama, therefore, requested that "these new Objections and issues brought up by Italy for the first time in its Reply be rejected", and, "[i]n the case that the Tribunal does not reject the new Objections

made by Italy … that the Tribunal set an appropriate deadline for Panama to reply to these Objections in writing after the hearing." In the course of the oral proceedings, Panama maintained that it had had no opportunity to respond "in writing".

51. Italy, in its letter dated 23 August 2016, contended that Panama's document was inadmissible, reserving "its right to reply on the merits of Panama's document, if found admissible, during the hearing." In the course of the oral proceedings, Italy further contended that Panama's request was "manifestly unfounded" and that "all of Italy's arguments made in its Reply of 8 July 2016, either developed and specified its objections first raised on 16 March or responded to arguments made by Panama in its observations of 5 May 2016". Italy stated that it had made all of its preliminary objections in a timely manner and that "the equality of arms principle has been fully respected" because Panama had had ample time to prepare its responses to those objections and the opportunity to present those responses during that hearing.

52. Having examined Italy's written pleadings, the Tribunal finds that Italy, in its Reply of 8 July 2016, did not raise any new objections but rather elaborated and developed the objections already contained in its Preliminary Objections filed on 11 March 2016.

53. The Tribunal notes that, in accordance with its decision of 19 September 2016 (see paragraph 30), each Party was allocated additional time during the hearing to comment on the matter and that each Party made use of this time. Therefore, the Tribunal is of the view that the principle of equality of arms was complied with.

V. Declarations made pursuant to article 287 of the Convention

54. Both Panama and Italy are States Parties to the Convention.

55. Article 287, paragraph 1, of the Convention reads:

> When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written

> declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
> (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
> (b) the International Court of Justice;
> (c) an arbitral tribunal constituted in accordance with Annex VII;
> (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Article 287, paragraph 4, of the Convention reads:

> If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

56. Italy ratified the Convention on 13 January 1995 and made a declaration under article 287 of the Convention on 26 February 1997. The declaration states:

> In implementation of article 287 of the United Nations Convention on the Law of the Sea, the Government of Italy has the honour to declare that, for the settlement of disputes concerning the application or interpretation of the Convention and of the Agreement adopted on 28 July 1994 relating to the Implementation of Part XI, it chooses the International Tribunal for the Law of the Sea and the International Court of Justice, without specifying that one has precedence over the other.
>
> In making this declaration under article 287 of the Convention on the Law of the Sea, the Government of Italy is reaffirming its confidence in the existing international judicial organs. In accordance with article 287, paragraph 4, Italy considers that it has chosen “the same procedure” as any other State Party that has chosen the International Tribunal for the Law of the Sea or the International Court of Justice.

57. Panama ratified the Convention on 1 July 1996 and made a declaration under article 287 of the Convention on 29 April 2015. The declaration states:

> In accordance with paragraph 1 of article 287 of the United Nations Convention on the Law of the Sea of December 10th, 1982, the Government of the Republic of Panama declares that it accepts the competence and jurisdiction of the International Tribunal of the Law of the Sea for the settlement of the dispute between the Government of the Republic of Panama and the Government of the Italian Republic concerning the interpretation or application of UNCLOS that arose from the detention of the Motor Tanker NORSTAR, flying the Panamanian flag.

58. The Tribunal notes that the declaration of Panama is more limited than that of Italy and is restricted to this particular case. Although the Parties did not raise the issue of the scope of their declarations, the Tribunal considers it appropriate to point

out that the Convention does not preclude a declaration limited to a particular dispute (see *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, at p. 30, para. 79). In this connection, the Tribunal observes that it recognized in the *M/V "Louisa" Case* that "in cases where States Parties have made declarations of differing scope under article 287 of the Convention, its jurisdiction exists only to the extent to which the substance of the declarations of the two parties to a dispute coincides" (*M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, at p. 30, para. 81). In this case, the jurisdiction of the Tribunal would therefore be confined to the terms of the narrower of the two declarations.

59. The Tribunal notes that the wording of the declaration of Panama refers to the dispute between Panama and Italy concerning the interpretation or application of the Convention "that arose from the detention" of the *M/V "Norstar"*, while the Application refers to the dispute between the two States concerning the interpretation and application of the Convention in connection "with the arrest and detention by Italy" of the *M/V "Norstar"*. The Tribunal observes that in the communications from Panama or on its behalf to Italy, issued prior to the submission of its declaration, references were made to the arrest and detention of the *M/V "Norstar"*. Therefore, in the view of the Tribunal, the Application is consistent with the terms of the declaration of Panama.

VI. Objections to jurisdiction

60. The Tribunal will now turn to Italy's objections to the jurisdiction of the Tribunal.

61. In paragraph 34 of its Preliminary Objections, Italy summarizes its preliminary objections to the jurisdiction of the Tribunal as follows:

> (a) the case falls outside the jurisdiction of the Tribunal since there is no dispute between Panama and Italy;

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

(c) the case falls outside the jurisdiction of the Tribunal since Panama has failed to appropriately pursue the settlement of the dispute by negotiation or other peaceful means under Article 283, paragraph 1, UNCLOS.

1. Existence of a dispute concerning the interpretation or application of the Convention

62. The Tribunal will now consider whether a dispute exists between Italy and Panama and, if the answer to this question is in the affirmative, whether the dispute concerns the interpretation or application of the Convention.

Existence of a dispute

63. The Tribunal will first examine the issue of the existence of a dispute between the Parties. The positions of the Parties on this issue are set out below.

64. While Italy maintains that "[t]here is no dispute between Panama and Italy pertaining to the facts complained of in the Application", Panama contends that "a dispute most certainly does exist in this case despite Italy's protestations to the contrary".

65. Italy argues that the "unilateral assertion of one's own claims does not, as such, fulfil the basic jurisdictional requirement of the existence of a dispute between the Parties". It emphasizes that "no complaint, or protest, bearing on the facts complained of in the Application, has been raised in any legally appropriate manner by the Government of Panama with the Government of Italy, which the latter would resist, or contest." While acknowledging that "communications [were] received by the Italian Government on the facts in issue", Italy states that these communications "had no relevance for the purposes of the fulfilment of the requirement of the existence of an international dispute between Italy and Panama."

66. With regard to communications received by Italy from Mr Carreyó, Italy maintains that these "could not be deemed as coming from a State representative entitled to invoke Italy's responsibility" and "were not legally capable of leading to an inter-State dispute with Italy." In Italy's view, it "has not failed to respond to diplomatic communications from Panama on the matter in issue, it simply did not respond to Mr Carreyó since he was not vested with powers to negotiate with Italy over the facts of the present case."

67. Italy maintains that, "[f]rom 15 August 2001 to 31 August 2004, Italy received written communications exclusively from Mr Carreyó, a private Panamanian lawyer who was acting in the interest of the owner of *M/V Norstar*." It also argues that Mr Carreyó "failed to provide any evidence of his representative powers" in any of his communications before 31 August 2004. Italy therefore contends that "until 31 August 2004 Mr Carreyó could not represent the wishes of the Panamanian Government in its diplomatic relations with Italy" and that "until that date any claims that Panama was entitled to a response from Italy are completely unfounded."

68. With regard to the letter of 15 August 2001 from Mr Carreyó, Italy states that the signatory of this letter was neither an official of the Panamanian Government nor the Ambassador of Panama to Rome and that this signature had been certified by a notary in Panama and supplied with an apostille in accordance with the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961 (hereinafter "the 1961 Hague Convention"). According to Italy, this corroborates the fact that Mr Carreyó worked in his private capacity because that convention does not apply to documents executed by diplomatic or consular agents.

69. Italy acknowledges that, by letter of 2 December 2000 from the Ministry of Foreign Affairs of Panama to the Registrar, Mr Carreyó "had been authorized by the Panamanian Government to start prompt release proceedings against Italy before [the] Tribunal". Italy emphasizes, however, that it became aware of this authorization only through Mr Carreyó's communication dated 31 August 2004.

70. With regard to the content of the letter of 2 December 2000, Italy maintains that "[t]he document simply restricts itself to authorizing [Mr Carreyó] to litigate on behalf of Panama, clearly within the exclusive limits of prompt release proceedings within the meaning of article 292 of the Convention." Italy emphasizes that "the power for an individual to act 'on behalf' of a State for the purpose of prompt release proceedings is a unique kind of power under article 292" and that this power "does not extend to the power to act on behalf of the State beyond those proceedings."

71. Italy further maintains that "the power to litigate" and "the power to represent a State in diplomatic relations" are not to be confused. Italy emphasizes that the "authorization to litigate" contained in the letter of 2 December 2000 "could not also give Mr Carreyó the authorization to represent Panama in diplomatic dealings with Italy, that is to say, the only level on which any dispute could arise between the two Parties."

72. Italy contends that its "considerations concerning the inexistence of a dispute between the Parties based on the communications coming from Mr Carreyó are not countered by the few isolated communications coming from Panama". With regard to Panama's note verbale A.J. No. 2227 of 31 August 2004, Italy emphasizes that "it simply reiterated that powers vested upon Mr Carreyó were specifically confined to triggering a prompt release procedure under Article 292 UNCLOS by explicitly referring to the communication to ITLOS of 2 December 2000". With regard to Panama's note verbale A.J. No. 97 of 7 January 2005, Italy points out that "it simply referred to Note Verbale A.J. No. 2227."

73. Italy maintains that,

> [i]n the event that, contrary to Italy's contentions, [the] Tribunal were to consider Mr Carreyó's communications as attributable to Panama, neither those communications nor the two above mentioned Notes Verbale could be deemed, with regards to their contents, as elements of negotiations, or attempted negotiations, capable of creating an international dispute.

It emphasizes that "none of these communications invoked any right possessed by Panama under UNCLOS and which Italy therefore could have allegedly breached and could, accordingly, object to or agree upon."

74. Panama argues that "the detention of the M/V Norstar, its acquittal, and the subsequent failure of Italy to pay damages constitute a dispute". It also argues that the fact "[t]hat Panama has made a claim which Italy has not acknowledged, much less attempted to resolve, clearly indicates the existence of a dispute."

75. Panama maintains that, in its written communications to Italy, it "explained the facts and requested compensation for the unlawful detention of the M/V Norstar". It also maintains that the facts that were explained in Panama's letters "clearly indicated" that the claim related to "the rights of Panama in terms of freedom of commerce and freedom of navigation."

76. Panama states that "Italy has not responded to any of the written communications sent by Panama" and argues that, "[b]y refusing to answer Panama's communications, Italy has, in fact, implicitly taken a very different position from Panama by rejecting Panama's formal requests, thereby confirming the existence of a serious disagreement." Panama is of the view that "[t]he Tribunal should … take into account the silence of Italy as unambiguous evidence of its refusal of Panama's claim."

77. Referring to the jurisprudence of the International Court of Justice (hereinafter "the ICJ") in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections), and the case concerning *Application of the International Convention on the Elimination of all Forms of Racial Discrimination*, Panama argues that it is not necessary that a "difference be expressed in words", that "[i]ts existence may be inferred simply from the behaviour of the Parties" and that "a dispute may be deduced even from a failure of one State to answer when a reply is expected from another".

78. As regards Mr Carreyó's authority to represent Panama, Panama contends that the letter from its Ministry of Foreign Affairs of 2 December 2000 to the Registrar was "authorizing Mr Carreyó to act on behalf of Panama and the *M/V Norstar*". Panama states that this letter "covered all acts referring to the seizure of the ship,

particularly the negotiation of claims for damages" and, "cannot be interpreted as relating to the execution of prompt release proceedings only." Panama also emphasizes that "the Rules of the Tribunal do not prohibit a party being represented by a 'private lawyer'."

79. Panama states that,

> with note verbale 2227 of 31 August 2004, Panama expressly confirmed to Italy that its Ministry of Foreign Affairs had certified that lawyer Nelson Carreyó was empowered to act as the representative of the Republic of Panama before the International Tribunal for the Law of the Sea.

It further states that, "[w]ith note verbale 97 of 7 January 2005, Panama again confirmed the representative power of Mr Carreyó". Panama maintains that the note verbale of 7 January 2005 "does not contain any reference to prompt release proceedings" and "[t]hus, the authorization could not have been misunderstood as being restricted to prompt release proceedings."

80. Panama maintains that Italy "confirmed in note verbale 332 dated 25 January 2009 the receipt of Panama's note verbale 97 dated 7 January 2005 in which Mr Carreyó was expressly named representative of the Republic of Panama." It is of the view that "this confirmation refutes the Italian argumentation of the alleged missing representative power".

81. Panama further maintains that "a correspondence does not need to include a written representative power for representation to be effective" but that "[a]n indication of the person or state who is represented is sufficient." It emphasizes that, "the relevant authorization can [also] be given with retroactive effect by the state represented."

82. Panama argues that "Italy no longer has any reason to deny the attempts that Panama made to communicate before 2004, and certainly has no justification for failing to respond after that date." It also emphasizes that "Italy did not object to the alleged lack of representative power until its Reply of 8 July 2016" and that, "[w]ith this behaviour, Italy has violated the principle of good faith."

83. Panama rejects the argument that the power of attorney was granted to a "private lawyer who was acting in the interest of the owner of the *Norstar"* rather than of Panama. It argues that Mr Carreyó used his "personal headed paper" merely to display the fact that he was the correspondent. Panama also considers of no significance the fact that the letters of Mr Carreyó were certified under the 1961 Hague Convention since the certification provided to Italy proved the authenticity of the signature and thus the identity of the correspondent and Italy had not previously objected to the signature of Mr Carreyó.

* * *

84. The Tribunal recalls that, for it to have jurisdiction *ratione materiae* to entertain a case, a dispute concerning the interpretation or application of the Convention between the Parties must have existed at the time of the filing of the Application (see *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013,* p. 4, at p. 46, para. 151).

85. The Tribunal notes that in the *Southern Bluefin Tuna Cases* it stated that:

> [A] dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11), and "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328) (*Southern Bluefin Tuna* (*New Zealand* v. *Japan; Australia* v. *Japan) Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 293, para. 44).

86. The Tribunal further notes that, as from 2001, a number of communications were sent to Italy concerning the detention of the *M/V "Norstar"* and the question of compensation arising in this regard. The communications that need to be examined are set out below.

87. On 15 August 2001 a letter was sent by Mr Carreyó to the Minister of Foreign Affairs of Italy, which stated that Mr Carreyó

> has obtained a legal authorization from the Ministry of Foreign Affairs of Panama … to start a legal action against the Republic of Italy, at the International Tribunal for the Law of the Sea in Hamburg, in order to obtain … compensation for damages caused by the arrest of MC Norstar in Palma de Majorca.

88. The letter noted that the vessel "[had] been seized through ordinance dated 11/8/1998" of the Public Prosecutor at the Court of Savona and claimed that the arrest was "illegal" both under international and Italian law. It also referred to the "principle of Freedom of Commerce outside territorial waters and Contiguous Zone". The letter further called upon Italy to "release the vessel and pay the damages caused by the illegal procedure" and provided a rough calculation of the amount of damages claimed in this respect. The letter also noted that "[t]he arrest [was] proposed according to [article] 297" of the Convention.

89. By letter addressed to the Minister of Foreign Affairs of Italy received on 3 August 2004 (hereinafter the "letter of 3 August 2004"), Mr Carreyó reiterated statements made in his letter of 15 August 2001, including those relating to the authorization given to him by Panama and the alleged illegality of the arrest of the vessel. It was pointed out in the letter that it was "a letter from the Panamanian Government to the Italian Government in accordance with Article 283 of the United Nations Convention on the Law of the Sea." The letter further referred to the possibility, under the Convention, of submitting the "dispute between the two Governments" to the Tribunal or to arbitration.

90. On 31 August 2004, the Ministry of Foreign Affairs of Panama sent a note verbale to the Embassy of Italy in Panama, confirming that Mr Carreyó "acts as representative of the Republic of Panama and of the interests of the m/v **NORSTAR** … before the … International Tribunal for the Law of the Sea". The note verbale also referred to the "detention" of the vessel "at the request of the Court of Savona, Italy and enforced in the Port of Palma de Mallorca, Balearic Islands, Spain on 11 August 1998."

91. On 7 January 2005, the Ministry of Foreign Affairs of Panama sent another note verbale to the Embassy of Italy in Panama, referring once again to the "case of

the Panamanian flagged motor vessel NORSTAR, detained by the Court of Savona, Italy, on 11 August 1998". The note verbale reaffirmed that Mr Carreyó was the "Legal Representative of the Republic of Panama and of the interests of the owners of the motor vessel NORSTAR".

92. By letter dated 17 April 2010 addressed to the Minister of Foreign Affairs of Italy, Mr Carreyó reaffirmed that he acted with the authorization of the Ministry of Foreign Affairs of Panama and reiterated the statements made in his letters dated 15 August 2001 and 3 August 2004. The letter stressed that if "damages caused by the illegal procedure adopted by [Italy's] competent authorities" are not paid, "the Republic of Panama will apply to the Hamburg Tribunal."

93. The Tribunal notes that, under international law, it is for each State to determine the persons, including private persons, who represent the State or are authorized to act on its behalf in its relations with other States, international organizations and international institutions, including international courts and tribunals. This is without prejudice to the specific treaty regimes or other rules on State representation that may be applicable.

94. The Tribunal is, however, of the view that, for communications sent by a lawyer in private practice on behalf of a State to be opposable to another State, the latter needs to be duly informed of the authority conferred on the lawyer to represent the former State. Therefore, the mere reference in a letter by a private person to the authorization given to that person by the State may not be sufficient.

95. The Tribunal finds that it was for Panama to decide whether to authorize Mr Carreyó to communicate on its behalf with Italy concerning issues that arose from the detention of the *M/V "Norstar"*. In the view of the Tribunal, the fact that Mr Carreyó is a lawyer in private practice, acting as a legal representative of the owner of the *M/V "Norstar"*, does not imply that Panama is prevented from entrusting him with the powers to represent Panama.

96. The Tribunal notes that Panama, in its notes verbales dated 31 August 2004 and 7 January 2005, confirmed to Italy in clear and unequivocal terms that Mr Carreyó acted as representative of Panama in connection with the detention of the *M/V "Norstar"*. The Tribunal, therefore, finds that, from the receipt by Italy of the first of those notes verbales, Italy had sufficient knowledge of the representative powers conferred upon Mr Carreyó by Panama. The Tribunal is of the view that the note verbale of 31 August 2004 refers to Mr Carreyó's powers as representative of Panama in general terms and that these powers are not limited to the procedures under article 292 of the Convention nor do they prevent him from representing Panama during the prelitigation phase.

97. The Tribunal concludes that, since 31 August 2004, when Italy received the first note verbale of Panama, it cannot validly question that Mr Carreyó was duly authorized to represent Panama in all exchanges relating to the detention of the *M/V "Norstar".* Italy cannot, therefore, claim ignorance of the fact that Panama, as the flag State of the *M/V "Norstar",* contests the legality of the detention under the Convention.

98. The Tribunal notes that the only response of Italy to the aforementioned communications was a note verbale dated 25 January 2005 from the Embassy of Italy in Panama to the Ministry of Foreign Affairs of Panama, wherein the Embassy confirmed receipt of the note verbale of 7 January 2005 and stated that it " [had] been conveyed to the Italian Foreign Ministry and that as soon [as] a response is received, this [would] be duly sent" to the Ministry of Foreign Affairs of Panama. All other communications sent to Italy remained unanswered.

99. The Tribunal observes that the ICJ has held that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports* 2011, p. 70, at p. 84, para. 30; see also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Preliminary*

Objections, Judgment of 5 October 2016, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Preliminary Objections, Judgment of 5 October 2016*, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment of 5 October 2016*, para. 40).

100. The ICJ also stated that

> a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party
> *(Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 315, para. 89; see also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Preliminary Objections, Judgment of 5 October 2016*, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *Pakistan), Preliminary Objections, Judgment of 5 October 2016*, para. 37; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment of 5 October 2016*, para. 40).

101. The Tribunal concludes that Italy cannot rely on its silence to cast doubt on the existence of a dispute between the Parties. In the view of the Tribunal, the existence of such a dispute can be inferred from Italy's failure to respond to the questions raised by Panama regarding the detention of the *M/V "Norstar"*.

102. The Tribunal is of the view that the notes verbales and other communications sent to Italy and the silence of Italy indicate that in the present case there is a disagreement between the Parties on points of law and fact.

103. The Tribunal, therefore, concludes that in the present case a dispute existed between the Parties at the time of the filing of the Application.

Dispute concerning the interpretation or application of the Convention

104. The Parties disagree not only on the existence of a dispute between them but also on the question as to whether a dispute, if it exists, concerns the interpretation or application of the Convention.

105. While Italy maintains that "there is no dispute between Panama and Italy concerning the interpretation or application of UNCLOS", Panama contends that "this dispute falls under the scope of the Convention and how its rules are interpreted and applied."

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

107. Italy further contends that "all the provisions referred to by Panama in its Application manifestly concern maritime zones different from internal waters" and that, "[c]onsequently, articles 33, 87 and 111 UNCLOS clearly do not apply to the facts of the instant case."

108. Panama in its Application states that "[t]he claim of the Republic of Panama is based on Respondent's violations of Articles 33, 73 (3) and (4), 87, 111, 226 and 300 and others of the Convention." During the oral proceedings, Panama conceded that "article 73 … and article 226 … do not apply to this case" while it maintained that "articles 33, 58, 87, 111 and 300 among others are applicable".

* * *

109. With reference to Panama's statement that its claim relates to the aforementioned articles "and others of the Convention" and that, in addition to these

articles “others are applicable”, the Tribunal points out that it is not sufficient for an applicant to make a general statement without invoking particular provisions of the Convention that allegedly have been violated.

110. In line with its Judgment in the *M/V “Louisa” Case*, in order for the Tribunal to determine whether a dispute between the two Parties in the present case concerns the interpretation or application of the Convention, the Tribunal must establish a link between the facts advanced by Panama and the provisions of the Convention referred to by it and show that such provisions can sustain the claims submitted by Panama (see *M/V “Louisa” (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, at p. 32, para. 99).

111. The Tribunal will now proceed to examine whether a link exists between the Decree of Seizure against the *M/V “Norstar”* for its activities on the high seas and the request for its execution by the Prosecutor at the Court of Savona, and any rights enjoyed by Panama under the articles of the Convention invoked by it.

112. With reference to article 33 of the Convention, Italy maintains that “Panama’s Claim based on Article 33 of UNCLOS is plainly unfounded *ratione loci.*” It emphasizes in this context that the arrest of the *M/V “Norstar”* and therefore “the event from which the present case results occurred in Spanish internal waters, not in the Italian contiguous zone.”

113. Panama alleges that Italy violated article 33 of the Convention “because none of the activities of the *Norstar* which led to its arrest fell within the Italian territorial sea as this provision requires.”

114. The Tribunal observes that article 33 of the Convention concerns the contiguous zone. As the Decree of Seizure was not issued to exercise the control envisaged in article 33, that article cannot be invoked in the present case.

115. Panama states that the dispute concerns “inter alia, the contravention by Italy of the provisions of the Convention in regard to the freedoms of navigation and/or in

regard to other international lawful uses of the sea specified in Article 58 of the Convention." The Tribunal notes that Italy did not comment on the applicability of this article.

116. Article 58 of the Convention relates to the rights and duties of all States in the exclusive economic zone. As Italy has not declared an exclusive economic zone, the Tribunal is of the view that this article cannot be invoked in the present case.

117. As to article 73, paragraphs 3 and 4, Italy maintains that, "[i]n the light of the contents of article 73" of the Convention, it "does not see any relation between this provision and the present case *ratione loci* and *ratione materiae*." It emphasizes in this respect that article 73, paragraphs 3 and 4, "only refers to the arrest and the detention of vessels by coastal States in the course of ensuring compliance with the laws and regulations concerning the conservation and management of fish stocks in the exclusive economic zone."

118. Panama conceded during the oral proceedings that article 73 is not applicable in this case. The Tribunal takes note of this statement by Panama.

119. As regards article 87 of the Convention, Italy maintains that "[t]his provision is also irrelevant *ratione loci* with respect to the instant case since the *M/V "Norstar"* was seized while it 'was anchored at the Palma de Mallorca Bay', *i.e.* within Spanish territorial waters." In this context, Italy argues that the Tribunal's finding in the *M/V "Louisa" Case*, namely that "[a]rticle 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", also applies to the present case.

120. Panama alleges that "[t]he right of peaceful navigation of the Republic of Panama through the [M/V] Norstar was violated by the Italian Republic" whose "agents … [were] hindering the movements and activities of foreign vessels in the High Seas without complying with essential norms of the Convention". It states that "[t]he activities carried out by the *Norstar* were held to be in accordance with the law

by the Italian judiciary itself" and that "the order for its arrest breached UNCLOS article 87 and constituted a serious violation of the freedom of navigation."

121. Referring to the *M/V "Louisa" Case*, Panama maintains that "[t]he reasons for the arrest of the *Norstar* were different from the reasons for the arrest of the *Louisa*" as "the *Norstar* was arrested due to its activities on the high seas" while "the *Louisa* was arrested for its activities within Spanish territorial waters."

122. The Tribunal observes that article 87 of the Convention, which concerns the freedom of the high seas, provides that the high seas are open to all States and that the freedom of the high seas comprises, inter alia, the freedom of navigation. The Decree of Seizure by the Public Prosecutor at the Court of Savona against the *M/V "Norstar"* with regard to activities conducted by that vessel on the high seas 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. Consequently, the Tribunal concludes that article 87 is relevant to the present case.

123. With regard to article 111 of the Convention, Italy argues that the reference to this article "is completely unfounded" as "no hot pursuit was carried on by the Italian authorities with respect to *M/V Norstar.*" It emphasizes that "any reference to article 111 made by the Public Prosecutor at the Tribunal of Savona is totally irrelevant for the present international law case."

124. Panama alleges that Italy "used article 111 of UNCLOS … to justify its unlawful order of seizure" and that "[t]herefore the Italian contention that this provision has no link to the facts laid down in the Application is false."

125. The Tribunal notes that Italy did not claim that it has exercised the right of hot pursuit in relation to the *M/V "Norstar"* and, therefore, concludes that article 111 on the right of hot pursuit is not relevant to the present case.

126. Italy states that "the claim grounded in article 226 of UNCLOS is again obviously irrelevant *ratione materiae* in the present case." It emphasizes in this context that

> this provision is very specific in scope, not only because it is confined to the protection of the marine environment but also because its purpose is to set out some conditions to those investigative activities within the competence of port States established in articles 216, 218 and 220.

127. Panama conceded during the oral proceedings that article 226 of the Convention, which is mentioned in its Application, as noted in paragraph 108, does not apply in the present case. The Tribunal takes note of this statement by Panama.

128. With reference to article 300 of the Convention, Italy argues that "[t]he plain terms of Article 300 make it clear that it cannot be applied independently of the rights, jurisdiction and freedoms provided for under UNCLOS" and that "[o]nly the exercise of a right, jurisdiction and freedom accrued under UNCLOS may be challenged as being abusive." It further argues that, "since all the provisions identified by Panama in the Application are manifestly irrelevant to the present case, its claim based on article 300 of the Convention is altogether unfounded as well."

129. Panama maintains that article 300, concerning "good faith and abuse of rights, also deals with the rights of the *Norstar* which were violated by the Italian order of arrest."

130. Article 300 of the Convention reads:

> 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.

131. The Tribunal noted in the *M/V "Louisa" Case* that "it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own" (*M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, at p. 41, para. 137).

132. The Tribunal concluded in paragraph 122 that article 87 of the Convention concerning the freedom of the high seas is relevant to the present case. The Tribunal considers that the question arises as to whether Italy has fulfilled in good faith the obligations assumed by it under article 87 of the Convention. Therefore, the Tribunal is of the view that article 300 of the Convention is relevant to the present case.

133. In the light of the foregoing, the Tribunal rejects the objection raised by Italy based on non-existence of a dispute concerning the interpretation or application of the Convention.

2. Jurisdiction *ratione personae*

134. Italy submits that the Tribunal lacks jurisdiction *ratione personae* in the present case on the basis of the following three arguments.

135. First, Italy argues that it is not the proper respondent in this case because the Decree of Seizure of the *M/V "Norstar"* issued by the Italian judicial authorities does not amount *per se* to an internationally wrongful conduct. Second, Italy argues that it is not the proper respondent because the conduct of the authorities of Spain could not be attributable to Italy. Third, Italy argues that, in any event, the Tribunal may not exercise jurisdiction because such exercise over the merits of the case would imply adjudicating on rights and duties of a State absent from the present proceedings, without its consent.

136. Italy emphasizes that each of these three grounds alone is sufficient to establish the lack of jurisdiction of the Tribunal.

137. For its first argument, Italy states that in order to assess whether it is the proper respondent in the present case, it is essential to determine whether the Decree of Seizure of the *M/V "Norstar"* can engage the international responsibility of Italy. In this regard, Italy points out that, even though the Decree of Seizure of the *M/V "Norstar"* was issued by an Italian public prosecutor, the actual arrest and

detention of the vessel was not executed by Italian enforcement officials but by the Spanish authorities. Italy further points out that the actual conduct complained of by Panama is not the Decree of Seizure, but the material arrest and detention of the *M/V "Norstar"*. Italy adds that "Panama claimed to be seeking redress for the arrest and detention rather than the order for seizure."

138. Italy contends that "the order for seizure issued by the Italian judicial authorities, together with a request for its enforcement addressed to the Spanish authorities, did not amount *per se* to a breach of the Convention." According to Italy, "assuming that the arrest of the *M/V Norstar* was to be considered as internationally unlawful, the order for seizure of the Italian judiciary could only be deemed as conduct 'preparatory' to an internationally wrongful act". In this regard, Italy refers to the case concerning the *Gabčíkovo-Nagymaros Project* in which the ICJ stated that:

> A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997,* p. 7, at p. 54, para. 79).

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

139. Italy contends that "the order for seizure of the *M/V Norstar* was not the actual conduct making up the international wrong alleged in the present proceedings and, no less importantly, it is not even the conduct actually complained of by the claimant." For these reasons alone, in the view of Italy, the Tribunal lacks jurisdiction *ratione personae* to entertain the present dispute.

140. For its second argument, Italy refers to the international rules on the attribution of an internationally wrongful act and, in particular, to the independent

responsibility principle that “each State is responsible for its own internationally wrongful conduct, i.e., for conduct attributable to it.” Italy recalls that the only conduct attributed to the State at the international level is that of its organs of government or of agents of the State. Italy recognizes that the independent responsibility principle is subject to exceptional cases where one State is responsible for the internationally wrongful acts of another.

141. In this regard, Italy examines, in particular, the applicability of article 6 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter “Draft Articles on State Responsibility”) to the present case. Article 6 reads:

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed
> (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 26).

After examining the conditions for the application of article 6 and the facts of the present case, Italy maintains that “it cannot possibly be contended that the Spanish authorities, when carrying out the arrest of the *M/V Norstar*, were acting as organs placed at the disposal of Italy.” Italy further points out that the fact that the arrest was carried out by Spain at the request of Italy in accordance with the 1959 Strasbourg Convention does not change this assessment. According to Italy, the 1959 Strasbourg Convention gives to the Spanish authorities “ample margin to refuse the Italian letter rogatory.” In Italy’s view, as long as Spain is empowered to lawfully refuse to enforce a letter rogatory from Italy, it cannot be correct to say that Spain acted under the exclusive direction and control of Italy.

142. To support its argument, Italy refers to the commentary of the International Law Commission (hereinafter “the ILC”), which points out that article 6 “is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.” Italy also refers to the *Xhavara* case, in which the European Court of Human Rights decided that the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to

Albania (see *Xhavara and Others* v. *Italy and Albania*, Decision of 11 January 2001, Appl. No. 39473/98).

143. On the basis of these considerations, Italy maintains that the arrest and detention of the *M/V "Norstar"* cannot in any way be attributed to Italy. Therefore, in Italy's view, the Panamanian claim is addressed to the wrong Respondent and the Tribunal should reject it owing to the lack of jurisdiction.

144. The third argument of Italy is concerned with the application of the indispensable party principle. According to Italy, this principle emerges from the case law of the ICJ as an established principle of general international law. Italy refers to the *Monetary Gold* case, in which the ICJ stated that:

> [w]here […] the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it
> (*Monetary Gold Removed from Rome in 1943, Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 19, at p. 33).

Italy further refers to the ICJ Judgment in the *East Timor* case:

> Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act
> (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29).

145. In the view of Italy, the circumstances of the present case fall perfectly within the framework of the indispensable party principle. Italy contends that although it made the Decree of Seizure of the *M/V "Norstar"*, it is Spain, and Spain alone, that arrested and detained it. Italy further contends that it is this arrest and detention that is the focus of Panama's claim and thus constitutes the very subject matter of the judgment that Panama asked the Tribunal to render. Accordingly, if the Tribunal did entertain its jurisdiction over the Application, this would necessarily involve the ascertainment of the legality of the conduct of another State which is not a party to the proceedings. However, this would be at variance with the indispensable party principle.

146. Italy concludes that the indispensable party principle prevents the Tribunal from exercising its jurisdiction in the present case because "the assessment of the legality of the order for seizure issued by Italy could not be made irrespective of the assessment of the legality of the arrest of the vessel in question by Spain". In the light of these considerations, Italy submits that the Tribunal should dismiss the claim advanced by Panama in its Application owing to the lack of jurisdiction.

147. Panama rejects the objections made by Italy to the Tribunal's jurisdiction *ratione personae* to entertain the present dispute.

148. With respect to the first ground of the objection that the Decree of Seizure of the *M/V "Norstar"* does not amount *per se* to an internationally wrongful conduct, Panama points out that, without the order of Italy, Spain would never have carried out the seizure of the *M/V "Norstar"*. Panama emphasizes that "it was not Spain as the executing State but Italy who decided and ordered the seizure of the *M/V Norstar*, Spain merely provided judicial assistance." In Panama's view, Italy is therefore responsible for the consequence of its wrongful order.

149. Panama contended during the oral hearing that "the conduct complained of was the order for the seizure, the physical detention being the natural consequence of the wrongful conduct of Italy's order". According to Panama, "[t]he order of arrest was an internationally wrongful act because it was issued in contravention of several provisions of UNCLOS." Panama rejects Italy's argument distinguishing conduct that completes a wrongful act from conduct that precedes it by stressing that "[e]ven its own judiciary has held that the order of arrest was unlawful without differentiating between conduct that completes a wrongful act from conduct that precedes it."

150. Regarding the relationship between Italy and Spain under the 1959 Strasbourg Convention, Panama recalls that "Spain, as the State providing judicial assistance, was neither obligated nor expected to investigate whether an offence existed or whether the seizure was justified." Panama points out that "Spain was merely responsible for the manner and methods of the seizure". Therefore, if a

criminal charge for which judicial assistance had been granted "were not ratified, the State seeking judicial assistance would be liable for paying damages, not the State providing judicial assistance."

151. Panama contends that Italy's responsibility is also proven by the communication between Italy and Spain. In this regard, Panama refers to the letter of Italy dated 18 March 2003, in which Italy submitted the judgment of the Court of Savona to Spain and requested it to execute the release. Reference is also made to the letter dated 6 September 2006, in which Spain asked Italy to authorize the demolition of the vessel. According to Panama, this communication reveals not only that Italy was fully responsible for the seizure but also that both States, Italy and Spain, assessed the responsibility of Italy accordingly.

152. Panama alternatively argues that "even if Spain would have conducted a wrongful act itself, the responsibility of Italy's actions were not affected." In such case, Panama observes that "Italy and Spain would be independently liable to Panama for the damage incurred, and Panama was entitled to make a claim to Spain as well as to Italy." In Panama's view, Italy therefore would be the proper respondent even in the case of a wrongful act of Spain, and the question as to whether Spain conducted a wrongful act is of no relevance to the present case.

153. With respect to the second ground of Italy's objection, Panama disagrees with Italy on the applicability of article 6 of the Draft Articles on State Responsibility. According to Panama, by accepting Italy's request for the execution of its arrest order, the Spanish authorities were indeed put at the disposal of Italy. Panama maintains that this is evidenced by the communications between Italy and Spain, including "the *Statement of Detention* of the *Norstar*", in which the Spanish authorities stated that the *M/V "Norstar"* will "remain at the disposal of the Office of the Public Prosecutor attached to the Court of Savona". In Panama's view, this evidence is sufficient to show that "Spain did not act independently but rather under the exclusive direction and control of Italy as the receiving or beneficiary party."

154. Panama contends that the *Xhavara* case referred to by Italy is not comparable to the present case. Panama observes that in the *Xhavara* case Italy did not act in the context of mutual assistance but rather on the basis of a bilateral agreement authorizing the Italian Navy to board and search Albanian boats. Thus, "Italy's action was made in execution of its own decision and not a mere execution of mutual assistance." In the view of Panama, the *Xhavara* case is also different from the present case since the sinking of the Albanian ship was directly caused by the Italian warship. Panama further observes that if, in the present case, "Spain had used excessive force and had damaged the *Norstar* when putting its organ at the disposal of Italy, Panama would have considered Spain as the respondent for the wrongful act of the sending State."

155. Panama agrees with Italy that the independent responsibility principle entails that "each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it which is in breach of an international obligation of that State". Panama further agrees with Italy that "this principle is particularly germane to the circumstances of the present case", because the arrest of the vessel was ordered by the respondent State. Panama argues that in the present case, "as in most cases of collaborative conduct, any State's culpability for any wrongful act will be determined according to the principle of independent responsibility." Panama concludes that, if the Decree of Seizure issued by Italy is considered unlawful because it breached the obligation under the Convention, there should be no doubt that this act entails the international responsibility of Italy according to the independent responsibility principle.

156. As regards the third ground of Italy's objection, Panama contends that the present case is fundamentally different from the case where the indispensable third party principle established by the *Monetary Gold* case is applicable. Panama observes that "this case does not involve the actions of a third State, only those of Italy", since the arrest and detention of the *M/V "Norstar"* was based on an order given by Italy, not by Spain. Panama asserts that its claim is, therefore, not about the rights or obligations of Spain, but only about the obligations of Italy. Therefore, the

Monetary Gold case, referred to by Italy to support its argument, is not relevant to the present case.

157. In order to support its assertion that Italy's liability can be determined regardless of Spain's involvement, Panama refers to the *Certain Phosphate Lands in Nauru* case, in which the ICJ stated that

> the absence of such a request in no way precludes the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for
> (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 240, at p. 261, para. 54).

Panama points out that, in the present case, "the only legal interests which may be affected are those of Italy, not those of Spain, and the very subject matter of a decision on its merits would concern only Italy as Respondent."

158. Panama further argues that this would be the case even "under hypothetical consideration of Spain and Italy being jointly and severally liable for the damage incurred." According to Panama, "[i]n that case also the present case would not affect the interests of Spain." In Panama's view, under the "hypothetical event of a claim of Panama against Spain, the present case would in no way prejudice the legal situation of Spain in that case."

159. In the light of these considerations, Panama submits that the Tribunal can determine Italy's international responsibility without examining the conduct of Spain and thus should reject Italy's objection on the basis of the indispensable third party principle.

* * *

160. The Tribunal will now consider whether it has jurisdiction *ratione personae* to entertain the present dispute. The questions the Tribunal has to examine in this regard are twofold, namely whether Italy is the proper respondent in these

proceedings and whether any third party is indispensable to the present proceedings.

161. The Tribunal notes that the Parties disagree on the first question.

162. The Tribunal wishes to point out at the outset that it 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. The question for the Tribunal to address at this stage is whether Italy is the proper respondent to the Application submitted by Panama, or, to put it differently, whether the dispute before the Tribunal is essentially one between Panama as the applicant and Italy as the respondent.

163. The Tribunal notes that the arrest of the *M/V "Norstar"* was made by the Spanish judicial authorities upon the Decree of Seizure issued in connection with the criminal proceedings in progress in Italy. The Tribunal further notes that the arrest was carried out to execute the letter rogatory sent by Italy to the Spanish judicial authorities in accordance with the 1959 Strasbourg Convention, to which both States are Contracting Parties. Italy's request for assistance was sent to Spain because the *M/V "Norstar"* was anchored at the Palma de Mallorca Bay, outside the territorial jurisdiction of Italy.

164. The Tribunal recalls that the Contracting Parties to the 1959 Strasbourg Convention undertake to afford each other, in accordance with its provisions, the widest measure of mutual assistance in proceedings in respect of offences, the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State (article 1). The requested Party may refuse assistance on certain grounds (article 2) and make the execution of letters rogatory for search or seizure of property dependent on certain conditions (article 5). In the present case, Spain, the requested Party, executed the letter rogatory of Italy, the requesting Party, asking for the immediate enforcement of the Decree of Seizure in accordance with the provisions of the 1959 Strasbourg Convention. The Tribunal notes that Italy, referring to Spain's execution of its

request, stated that “this is an example of the most satisfactory treaty cooperation with Spain, of which Italy is most appreciative”.

165. 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.

166. The Tribunal 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 *Gabčíkovo-Nagymaros Project* case and the preparatory work of the ILC. 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.

167. 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.

168. In the light of these considerations, the Tribunal is of the view that Italy is the proper respondent to the claim made by Panama in these proceedings.

169. Having made the above findings, the Tribunal considers it unnecessary to determine the validity of Italy's second ground of objection, namely, that the conduct of Spain could not be attributable to Italy. The Tribunal recalls that Italy made this argument as "complementary submissions" to its first argument that the Decree of Seizure of the *M/V "Norstar"* does not *per se* amount to a breach of an international obligation. As the Tribunal has rejected the first argument of Italy and found that Italy is the proper respondent, the question whether the conduct of Spain is attributable to Italy is irrelevant for the purpose of determining the proper respondent.

170. For the above reasons, the Tribunal cannot accept the argument of Italy that it is not the proper respondent in the present case.

171. The next question the Tribunal will examine is whether any third party is indispensable to the present case.

172. The Tribunal acknowledges that the notion of indispensable party is a well-established procedural rule in international judicial proceedings developed mainly through the decisions of the ICJ. Pursuant to this notion, where "the vital issue to be settled concerns the international responsibility of a third State" or where the legal interests of a third State would form "the very subject-matter" of the dispute, a court or tribunal cannot, without the consent of that third State, exercise jurisdiction over the dispute (*Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Judgment, I.C.J. Reports 1954*, p. 19, at pp. 32-33; *East Timor (Portugal/Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 92, para. 29; *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, at p. 431, para. 88; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 259-262, paras. 50-55; *Armed Activities on the Territory of the Congo*

(Democratic Republic of the Congo v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at pp. 237-238, paras. 203-204).

173. The Tribunal does not consider that Spain is an indispensable party in the present case. As noted in paragraph 167, the dispute before the Tribunal concerns the rights and obligations of Italy. The involvement of Spain in this dispute is limited to the execution of Italy's request for the seizure of the *M/V "Norstar"* in accordance with the 1959 Strasbourg Convention. Accordingly, it is the legal interests of Italy, not those of Spain, that form the subject matter of the decision to be rendered by the Tribunal on the merits of Panama's Application. The decision of the Tribunal on jurisdiction and admissibility does not require the prior determination of Spain's rights and obligations. Thus, it is not necessary, let alone indispensable, for Spain to be a party to the present proceedings for the Tribunal to determine whether Italy violated the provisions of the Convention.

174. The Tribunal, therefore, cannot accept the argument of Italy that Spain is an indispensable party to the proceedings.

175. In the light of the foregoing, the Tribunal rejects the objection raised by Italy based on lack of jurisdiction *ratione personae*.

3. Exchange of views under article 283 of the Convention

176. Italy objects to the jurisdiction of the Tribunal on the ground that Panama has failed to appropriately pursue the settlement of the dispute by negotiations or other peaceful means under article 283, paragraph 1, of the Convention.

177. Italy submits that the obligation in question applies in the first instance to the Applicant, who must take the initiative.

178. Italy argues that the requirement under article 283 of the Convention "consist[s] of the 'obligation upon the Parties […] to seek to settle their disputes by recourse to negotiations', as it was put by the Annex VII Tribunal in *Barbados v.*

Trinidad and Tobago." It states that article 283 requires the parties to indicate a view on the most appropriate means of settlement in the circumstances existing at the time, which is not the same as announcing the intention to have recourse to litigation.

179. Although Italy does not claim that it is necessary for the parties to engage in negotiations on the substance of their disagreement and recognizes that the wording of article 283 of the Convention indicates that the subject matter of the exchange of views must concern only the means of settlement of the dispute, it asserts that, before instituting proceedings, the applicant State must present the subject matter of its claims sufficiently to determine the outlines of its dispute and its relevance to the Convention. Italy maintains that "it is only once this common-sense condition, which is based on good faith and on law, has been met that a reaction must be given by the respondent."

180. Italy contends that the communications received from Mr Carreyó and the Government of Panama concerning the seizure of the *M/V "Norstar"* fall short of the requirement under article 283, paragraph 1, of the Convention.

181. In the view of Italy, these communications lack consistency and continuity; they either concerned requests for release of the vessel in combination with the anticipation that a prompt release procedure would be triggered, or advanced isolated requests for damages in a not legally appropriate manner, without pursuing a genuine attempt at negotiated settlement of the dispute. Italy points out that "Panama, next to anticipating that it would start a prompt release procedure, also announced few times its intention to have recourse to litigation".

182. Italy notes that the only communication in which reference is made to article 283 of the Convention is the letter of 3 August 2004 sent by Mr Carreyó on paper bearing his letterhead and before Italy was informed that the sender was vested with any governmental capacity. Italy argues that, although there is an express reference in this letter to article 283, there is no real proposal for consultation. Italy maintains that none of the communications received since that

letter, either from Mr Carreyó or from Panama, proposed an exchange of views, consultations or negotiations.

183. While asserting that the contents of the communications it received do not qualify for the purposes of an exchange of views, Italy further argues that for the communication to be relevant it should be made by a State representative, which is not the case in the present proceedings. In this regard, Italy maintains that the communications from Mr Carreyó cannot be attributed to Panama for lack of representative power and his inability to proceed to an intergovernmental exchange of views with Italy on behalf of Panama.

184. The arguments of Italy on the lack of proper authorization of Mr Carreyó to represent Panama are also referred to in paragraphs 66 to 72.

185. In this regard, Italy does not consider the letter dated 2 December 2000 from the Ministry of Foreign Affairs of Panama to the Registrar a document authorizing Mr Carreyó to act on behalf of the Government of Panama in the case of the *M/V "Norstar"*. Italy points out that "[t]he document simply restricts itself to authorizing him to litigate on behalf of Panama, clearly within the exclusive limits of prompt release proceedings within the meaning of article 292 of the Convention."

186. Italy asserts that it "was never notified by Panama that Mr Carreyó had ever been mandated by that Government to negotiate, or exchange views under Article 283" of the Convention.

187. Italy claims that no exchange of views has been pursued by Panama in any meaningful and legally appropriate manner with a view to reaching the settlement of the putative dispute by negotiations, or through other means of dispute resolution, under article 283, paragraph 1, of the Convention.

188. According to Panama, it has always maintained that one of the vessels registered by the Panama Merchant Marine of the Panama Maritime Authority had been wrongfully detained upon a judicial order from Italy and it notified Italy in writing

of its claim. Panama points out that it commenced communication with Italy in order to resolve the matter by mutually determining the appropriate amount of damages resulting from the unlawful arrest of the *M/V "Norstar"*.

189. Panama contends that it has fulfilled its part of the obligation to exchange views with Italy. Panama submits that, in its communications with Italy, it notified Italy that a dispute existed, delimited the scope of the subject matter, and placed it in the context of negotiations, thereby fulfilling the requirements of article 283 of the Convention.

190. In support of its claim, Panama refers to a number of written communications that have been addressed to Italy, starting with the first letter of 15 August 2001. Panama emphasizes that this communication reflected all the important facts that had occurred concerning the seizure of the *M/V "Norstar"*, noted that the detention was improper, asked Italy within reasonable time if it wanted to release the vessel and pay damages, and stated that otherwise Panama would apply to the "Hamburg Tribunal".

191. Panama attaches particular importance to Mr Carreyó's letter of 3 August 2004 to the Ministry of Foreign Affairs of Italy, which declared "[t]his is a letter from the Panamanian Government to the Italian Government in accordance with Article 283 of the United Nations Convention on the Law of the Sea." Panama notes that this communication was written in Spanish and translated into English, French, and Italian; the Italian Embassy in Panama certified the receipt of all four versions. Panama claims that in this communication it confirmed its desire to reach a settlement with the Italian Government and stated that if the Italian Government wished to have the dispute with Panama decided by the Tribunal in accordance with article 287 of the Convention, the Government of Panama would be ready to proceed accordingly, but if Italy did not give its consent, the Panamanian Government would be forced to invoke proceedings for arbitration as described in Annex VII of the Convention.

192. Panama argues that, in its note verbale of 31 August 2004 from the Ministry of Foreign Affairs of Panama to the Embassy of Italy, it reiterated the mandate of Mr Carreyó and offered to work with Italy to come to an agreement. According to Panama, the note verbale of 7 January 2005, addressed to the Embassy of Italy, was sent in order "to determine the result of its attempts to communicate with Italy."

193. Panama stresses that the facts mentioned in the letter of 15 August 2001 were repeated in Mr Carreyó's letter dated 17 April 2010 addressed to the Ministry of Foreign Affairs of Italy.

194. Panama submits that it had made several attempts "to obtain feedback from Italy about the Panamanian position on the subject matter, and, therefore, the feasibility of a negotiation or settlement".

195. Panama also maintains that the time that elapsed between the first communication sent to Italy and the submission of the Application shows that Panama did not submit the case precipitously to the Tribunal.

196. Panama's arguments in support of its claim that Mr Carreyó was properly authorized to act as legal representative of Panama are also referred to in paragraphs 78 to 83.

197. Panama submits that the authorization of Mr Carreyó could not have been misunderstood as being restricted to prompt release proceedings. In this regard, Panama states that if an agent is empowered for incidental proceedings, such as a prompt release procedure, the agent should also be considered qualified to exchange views and it is not necessary for the power of attorney to contain an express authorization to this end or to apply for compensation.

198. In the view of Panama, if Italy had a real intention to negotiate in good faith according to article 283 of the Convention, "it would have communicated any concerns it had about the power of attorney at the time it received the initial messages".

199. At the same time, Panama draws the attention of the Tribunal to the fact that, apart from acknowledging the above-mentioned note verbale of 25 January 2005, it has not received any response from Italy to its communications. Panama submits that Italy has tacitly rejected all of Panama's efforts to engage in formal negotiation and kept Panama unaware of whether it had received the written communications, thus impeding compliance with the requirement to exchange views.

200. According to Panama, it has gone to great lengths to satisfy the requirements of article 283 of the Convention, while Italy has shown a complete lack of willingness to comply with this provision of the Convention by disregarding Panama's petitions.

201. Panama maintains that the exchange of views referred to in article 283 of the Convention has been undermined by Italy's silence, which has hindered Panama's attempts to settle this dispute with Italy by mutual agreement. Panama therefore claims that by failing to answer any of its communications, Italy has been the Party which has precluded this exchange and thus, according to the principle of *venire contra factum proprium*, Italy, having prevented Panama from fulfilling the obligation under article 283, cannot now argue that Panama is remiss for not having done so. Panama further claims that the Italian silence represented bad faith, because there is no excuse for not returning communications within a reasonable time save to avoid the matter being brought up and discussed.

202. Panama contends in this regard that Italy has essentially blocked any productive exchange of views and Panama's attempts to settle the issue, thereby justifying Panama's conclusion that the chances of reaching a resolution through bilateral communication have been exhausted.

203. Panama submits that in any case Italy's lack of responsiveness does not negate the fact that Panama has made a sincere effort to consult with Italy, thereby fulfilling the requirements under article 283 of the Convention.

* * *

204. Article 283, paragraph 1, of the Convention reads:

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

205. The Tribunal notes that the Parties express divergent views on the interpretation of article 283 of the Convention and disagree as to whether the requirement to exchange views pursuant to this article has been fulfilled as well as whether Mr Carreyó had been properly authorized to represent Panama in this regard.

206. The Tribunal has already concluded in paragraphs 96 and 97 that Mr Carreyó had powers as representative of Panama in general terms, that these powers were not limited to the procedures under article 292 of the Convention, and that he was duly authorized to represent Panama in all exchanges relating to the arrest and detention of the *M/V "Norstar"*.

207. The Tribunal now turns to the consideration of the question as to whether the requirement to exchange views pursuant to article 283 of the Convention has been fulfilled in the present case.

208. When a dispute arises, article 283 of the Convention requires the parties to "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means" (see *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional Measures, Order of 23 September 2010, ITLOS Reports 2008-2010*, p. 58, at p. 67, para. 57). The Tribunal shares the view expressed by the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* that "[a]rticle 283 cannot be understood as an obligation to negotiate the substance of the dispute" (*Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*, Award of 15 March 2015, para. 378).

209. The Tribunal notes that, in his letter of 3 August 2004, Mr Carreyó refers to the possibility "to have the dispute between the two Governments decided in accordance with the means for the settlement of disputes concerning the interpretation or application of the United Nations Convention on the Law of the Sea as mentioned in Article 287 of the Convention". The Tribunal notes in this regard that, as pointed out in paragraph 92, in his letter dated 17 April 2010, addressed to the Minister of Foreign Affairs of Italy as representative of Panama, Mr Carreyó reiterated the statements made in his letter dated 3 August 2004.

210. The Tribunal points out that it was already noted in paragraph 86 that, as from 2001, a number of communications have been sent to Italy concerning the detention of the *M/V "Norstar"* and the question of compensation arising in this regard. In the view of the Tribunal, these communications as a whole show that Panama has made a genuine effort to engage Italy in discussions on the detention of the *M/V "Norstar"* and compensation for damages resulting therefrom.

211. The Tribunal also notes that, in the letter of 3 August 2004, Mr Carreyó not only clearly declared that "[t]his is a letter from the Panamanian Government to the Italian Government in accordance with Article 283 of the United Nations Convention on the Law of the Sea", but also expressed readiness "to meet representatives of the Italian Government to explain the amount of damages".

212. The Tribunal concludes that after the note verbale of 31 August 2004 Italy should have been fully aware of Panama's attempts to exchange views concerning issues arising from the detention of the *M/V "Norstar"*.

213. The Tribunal notes that, with the exception of the note verbale of 7 January 2005, Italy did not respond to any of the communications from Panama. In this regard, the Tribunal recalls that the obligation to proceed expeditiously to an exchange of views applies equally to both parties to the dispute (see *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 19, para. 38; *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Provisional*

Measures, Order of 23 September 2010, ITLOS Reports 2008-2010, p. 58, at p. 67, para. 58).

214. The Tribunal observes that, in spite of several attempts by Panama to initiate discussion on the detention of the *M/V "Norstar"* and seek compensation for related damages, Italy maintained silence by not responding to the communications from Panama.

215. The Tribunal considers that the absence of a response from one State Party to an attempt by another State Party to exchange views on the means of settlement of a dispute arising between them does not prevent the Tribunal from finding that the requirements of article 283 have been fulfilled.

216. The Tribunal has held that "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted" (*MOX Plant (Ireland* v*. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95, at p. 107, para. 60; see also *Land Reclamation in and around the Straits of Johor (Malaysia* v*. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003,* p. 10, at pp. 19-20, para. 47; *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012,* p. 332, at p. 345, para. 71; *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013,* p. 230, at p. 247, para. 76; *M/V "Louisa" (Saint Vincent and the Grenadines* v*. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 68, para. 63).

217. The Tribunal is of the opinion that by disregarding correspondence from Panama concerning the detention of the *M/V "Norstar",* Italy in effect precluded possibilities for an exchange of views between the Parties. The Tribunal is therefore of the view that Panama was justified in assuming that to continue attempts to exchange views could not have yielded a positive result and that it had thus fulfilled its obligation under article 283 of the Convention.

218. The Tribunal finds that, in the circumstances of the present case, the requirements of article 283 of the Convention are satisfied.

219. Accordingly, the Tribunal rejects the objection raised by Italy based on the failure by Panama to fulfil its obligations regarding an exchange of views under article 283 of the Convention.

* * *

220. For the above reasons, the Tribunal finds that it has jurisdiction to adjudicate upon the dispute.

VII. Objections to admissibility

221. The Tribunal will now turn to Italy's objections to the admissibility of Panama's Application.

222. In paragraph 35 of its Preliminary Objections, Italy summarizes its preliminary objections to the admissibility of Panama's claim as follows:

> (a) the Application is preponderantly, if not exclusively, one of a diplomatic protection character, while the alleged victims of the seizure are not Panamanian nationals, and, anyhow, have failed to exhaust the local remedies available in Italy with regard to the claim for damages for the allegedly unlawful arrest of the M/V Norstar;
>
> (b) Panama is time-barred and estopped from validly bringing this case before this Tribunal due to the lapse of eighteen years since the seizure of the Vessel and Panama's contradictory attitude throughout that time.

1. Nationality of claims

223. Italy contends that the facts in the present case demonstrate that this case is manifestly one of diplomatic protection and that, accordingly, under the well-established rules of international law on diplomatic protection, Panama could validly

bring the present claim only if the alleged internationally wrongful act complained of in the Application had affected its own nationals.

224. In this regard, Italy maintains that, considering that the *M/V "Norstar"* was neither owned, fitted out, or rented, by a natural or legal person of Panamanian nationality, nor were the accused in the Italian criminal proceedings Panamanian nationals, the Tribunal should declare the claim by Panama inadmissible.

225. Panama argues that "this case is admissible … because it has the right to protect its national subjects by diplomatic action or through the institution of international judicial proceedings".

226. Panama maintains that, according to the Convention, it has the right and duty to protect its registered vessels and use peaceful means to assure that other members of the international community respect its rights. According to Panama, "[t]he fact that the victims of the wrongful conduct of Italy are not nationals of Panama does not disqualify this claim because it is based on the deprivation of the property of a juridical person having a vessel registered in Panama".

227. Panama contends that "[i]f Italy had taken into account the nationality of the M/V Norstar, the essence of what this claim is about, it would unconditionally have to accept that she holds Panamanian nationality" and "[e]ven its own competent authorities have granted this". Panama argues that "[t]he fact that the M/V Norstar is a national subject of Panama is precisely the reason that [it] has brought this case to [the] Tribunal".

228. In support of its position, Panama refers to the Judgment of the Tribunal in the *M/V "SAIGA" (No. 2) Case*, and notes that "a flag State is entitled to present claims for damages on behalf of natural and juridical persons who are not its own nationals".

* * *

229. The Tribunal recalls its observation in the *M/V "Virginia G" Case* that:

> in accordance with international law, the exercise of diplomatic protection by a State in respect of its nationals is to be distinguished from claims made by a flag State for damage in respect of natural and juridical persons involved in the operation of a ship who are not nationals of that State (*M/V "Virginia G" Case (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 48, para. 128).

As stated by the Tribunal in the *M/V "SAIGA" (No. 2) Case* and the *M/V "Virginia G" Case*, "[a]ny of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue" *(M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 48, para. 107; *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 48, para. 128).

230. The Tribunal recalls its finding in the *M/V "SAIGA" (No. 2) Case*, which was also referred to in its Judgment in the *M/V "Virginia G" Case*, that, under the Convention, a ship is to be considered a unit "as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States", that "[t]hus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State" and that "[t]he nationalities of these persons are not relevant" *(M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 48, para. 106; *M/V "Virginia G" Case (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 48, para. 126).

231. The Tribunal finds that the *M/V "Norstar"*, flying the flag of Panama, is to be considered a unit and therefore the *M/V "Norstar"*, its crew and cargo on board as well as its owner and every person involved or interested in its operations are to be treated as an entity linked to the flag State, irrespective of their nationalities.

232. In the light of the foregoing, the Tribunal rejects the objection raised by Italy based on the nationality of claims.

2. Exhaustion of local remedies

233. The Parties differ on the applicability of article 295 of the Convention on the exhaustion of local remedies.

234. Italy contends that "against the background of the factual circumstances of the present case, Panama's Claim predominantly, if not exclusively, pertains to alleged 'indirect' violations" relating to the rights of the owner of the *M/V "Norstar"*, that, "therefore, Panama's Claim is of an espousal nature" and that "[c]onsequently, ... the local remedies rule applies and it has not been met." In the view of Italy, the rule applies irrespective of the nationality requirement and, therefore, Panama's claim is inadmissible.

235. Relying upon the commentary to article 18 of the Draft Articles on Diplomatic Protection, adopted in 2006 by the ILC, Italy states that "[o]ne of the elements associating the two situations pertaining to the State of nationality in the field of diplomatic protection, on the one hand, and to the flag State of a ship when seeking redress for the injury suffered by 'the ship, everything on it and every person involved or interested in its operations', on the other, is their espousal nature". Italy argues that "[t]he claims put forward by the State of nationality or by the flag State under such circumstances are equally 'indirect' in nature" and that

> [a]ccordingly, when a claim is lodged by the flag State, preponderantly, if not exclusively, to seek redress for the individuals involved in the operation of the ship, the local remedies rule applies on the same grounds as in a diplomatic protection case.

236. Referring to the *M/V "Virginia G" Case*, Italy states that in order to establish whether a given claim is "direct" or "indirect", the case law of the Tribunal shows a consistent application of the "preponderance test" in line with the ILC Draft Articles on Diplomatic Protection and the jurisprudence of the ICJ. In this regard, Italy refers to the commentary to article 14 of the ILC Draft Articles on Diplomatic Protection, which states:

> In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. … The principal factors to be considered

> in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official, diplomatic official or State property the claim will normally be direct, and where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect (*Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, pp. 77-78).

237. Italy maintains, in this regard, that not only does the subject of the dispute concern the seizure of a private vessel occurring in the internal waters of Spain but also the monetary relief sought by Panama is preponderantly on behalf of the owner of the *M/V "Norstar"*.

238. Italy further states that the nature of the claim and the remedy sought by Panama concern preponderantly, if not exclusively, the monetary interests of the owner of the *M/V "Norstar*". In this regard, Italy argues that "[i]n fact, Mr Carreyó was defending the financial interests of the *M/V Norstar's* owner, acting in his capacity as a private lawyer", and that "the only reason triggering … [his] efforts … was the aim of obtaining economic redress in favour of the owner of the *M/V Norstar".*

239. In the view of Italy,

> [t]he preponderance of the indirect character of the injury invoked by Panama, not only emerges from the claims for damages in question, but is also corroborated by the manifest irrelevance of the random UNCLOS provisions relied upon in the *Application* as the basis for the putative direct violation of Panama's rights.

According to Italy, "[c]onsequently there has been no breach of the UN Convention that could be attributed to the Italian Republic" and "[t]hus the claim cannot but be predominantly one of an espousal nature, pertaining to alleged indirect violations and seeking redress for the owner of the *M/V Norstar.*"

240. With reference to the *M/V "SAIGA" (No. 2) Case* and the *M/V "Virginia G" Case*, Italy contends that the factual circumstances of those cases "are so different from the instant case that the Tribunal would reach a different conclusion concerning the applicability of the 'preponderance test', if it ever came to that stage."

241. In the view of Italy, "the *Virginia* case also presents important differences from the instant case", the most important one being "that in *Virginia* the Tribunal recognized that some UNCLOS provisions were pertinent and were effectively infringed by the respondent State." Italy argues that "[c]onsequently, the manifest violation of UNCLOS cannot but influence the application of the preponderance test in order to ascertain the direct or indirect nature of the injuries invoked by the Claimant State" and that "[c]onversely, in the *M/V "Norstar" Case* the Panamanian Application relies upon UNCLOS provisions which are manifestly incoherent with respect to the facts of the present case, and therefore manifestly unfounded."

242. Italy contends that

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

243. Responding to Panamanian arguments concerning the relevant "*locus*" in relation to jurisdictional connection, Italy argues that "'*locus'* does not refer to the place where the bunkering activities causing the Decree of Seizure were conducted", but that it "refers precisely to the place where the alleged internationally wrongful conduct, namely the seizure itself, took place", that is "the Spanish internal waters."

244. Italy maintains that

> [t]he customary law character of the local remedies rule is generally accepted as reflected in Article 44 [of the Draft *Articles on State Responsibility*] and Article 14 of the 2006 ILC *Draft Articles on Diplomatic Protection*

and that, "[a]s acknowledged by the ICJ, '[t]he local remedies rule represents an important principle of customary international law'."

245. Italy states that "[m]ost importantly, for the purposes of the application of the rule in question in the present case, Article 295 UNCLOS upholds its relevance and application to disputes arising out of the Convention."

246. With reference to the exceptions to the local remedies rule as set out in article 15 of the ILC Draft Articles on Diplomatic Protection, Italy argues that none of these exceptions applies in the present case.

247. As far as the seizure of the *M/V "Norstar"* is concerned, Italy points out that the ship-owner had available to him a number of remedies to challenge the seizure, but he did not exhaust all the remedies that were open to him.

248. Italy further contends that "[t]he companies involved in the use of the *M/V Norstar* should have brought civil proceedings and sought compensation for damages under Article 2043 of the Italian Civil Code", that "[t]hose companies had a five-year time limit to file a claim for the damages allegedly caused by the order of seizure before Italian domestic courts" and that "[t]his time limit expired on 9 December 2010, no action on the part of the ship-owner having been instigated."

249. In the light of the above, Italy requests the Tribunal to adjudge and declare that the Applicant's claim, being predominantly of an espousal nature, is inadmissible owing to the non-exhaustion of local remedies.

250. Panama maintains that this case is admissible, "not only because it has the right to protect its national subjects by diplomatic action or through the institution of international judicial proceedings, but also because it is not prevented from doing so by … the requirement to exhaust local remedies".

251. According to Panama, "this claim is not one of diplomatic protection, nor is it espousal or based on indirect violations", but rather "the present case is one involving a direct violation of its rights accorded by the Convention and, as a consequence of those violations, damages inflicted must be compensated."

252. In the view of Panama, the exhaustion of local remedies rule does not apply in the present case since the actions of Italy against the *M/V "Norstar"*, a ship flying the Panamanian flag, violated the right of Panama, as a flag State under the Convention,

"to have its vessels enjoy the freedom of navigation and other internationally lawful uses of the sea related to that freedom, as set out in Articles 33, 58, … 87, 111, and 300 among others".

253. Referring to Italy's argument regarding the exceptions to the local remedies rule as set out in article 15 of the ILC Draft Articles on Diplomatic Protection, Panama states that

> [t]he exhaustion of local remedies rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.

254. Panama also challenges the Italian invocation of article 18 of the ILC Draft Articles on Diplomatic Protection because "this provision deals exclusively with the protection of ship's crews and not with the protection of ships themselves." According to Panama, article 18 "is thus inapplicable to this case, not only because the instant case is not one of diplomatic protection but also because article [18] deals only with the protection of ships' crews."

255. Panama contends that there are clear parallels between the *M/V "SAIGA" (No. 2) Case* and the present case. In this regard, Panama points out that in the *M/V "SAIGA" (No. 2) Case*

> the Tribunal affirmed that … the rule of exhaustion of local remedies is applicable when "the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens …"

and went on to add that "none of the violations of rights claimed by Saint Vincent and the Grenadines … could be described as breaches of obligations concerning the treatment to be accorded to aliens". Rather, "[t]hey all are direct violations of the rights of Saint Vincent and the Grenadines", "[d]amage to the persons involved in the operation of the ship arises from those violations", and, "[a]ccordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted."

256. In the view of Panama, the same situation exists with regard to the *M/V "Norstar".* Panama adds that the rights claimed by Panama are not based on obligations concerning the treatment of aliens, but rather on the treatment of a Panamanian vessel, the rights of which were violated. Therefore, according to Panama, the rule of exhaustion of local remedies does not apply in this case.

257. Panama refers to the *M/V* "*Virginia G" Case* and states that in that case "the Tribunal declared that the exhaustion of local remedies rule does not apply where the claimant State is directly injured by the wrongful act of another State". Panama further states that in that case, "the claimant had challenged the violation of its freedom of navigation and other internationally lawful uses of the seas in the exclusive economic zone of a coastal State". Panama notes that "[i]n response, the Tribunal reiterated the rights that belonged to the claimant State under the Convention and that their violation thus amounted to direct injury to the claimant State", and that, "[g]iven the nature of the rights which were claimed to be violated, the Tribunal found that the claim as a whole was brought by the claimant on the basis of an injury to itself."

258. Panama argues that "the circumstances of the *Virginia G* case are largely similar to the instant one because Panama is once again defending its basic rights concerning the freedom of navigation within the economic zone and on the high seas." In the view of Panama, the decision in the *M/V "Virginia G" Case* applies to the present case, in which Panama is, inter alia, claiming the violation of its freedom of navigation and "[t]he claim as a whole is therefore brought on the basis of an injury to Panama itself."

259. Panama notes that in the *M/V* "*Virginia G" Case*, "[t]he Tribunal found that the preponderance test in that case fell on the side of an injury to a State, thereby precluding the need to exhaust local remedies", and contends that "this is also the case here."

260. Panama further argues, with reference to the *M/V "SAIGA" (No. 2) Case*, that "the exhaustion of local remedies rule does not apply in the absence of a

'jurisdictional connection' between the arresting [S]tate … and the 'natural or juridical persons' represented by the Flag State bringing the action".

261. According to Panama, whether the local remedies rule applies depends on the *locus* where the alleged activity of the *M/V "Norstar"* took place, and not on the *locus* where the seizure was executed. In this regard, Panama states that the arrest of the *M/V "Norstar"* "was based upon activities that the vessel carried out in international waters beyond the territorial sea of Italy".

262. In this regard, Panama contends that

> [s]ince the facts of the case show that the M/V Norstar was outside its territorial waters, Italy was not entitled to apply its customs rules to its operation because there was no jurisdictional connection between Italy and the M/V Norstar nor with the juridical and natural persons that Italy identified as its shipowner, charterer, captain, and crew.

263. Finally, Panama argues that "[i]n any event, the conclusion of the court case in Italy has exhausted the local remedies" and "[t]hus, the 'exhaustion of local remedies' argument is moot."

* * *

264. The Tribunal will now consider whether the rule that local remedies must be exhausted applies in the present case.

265. Article 295 of the Convention reads:

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

266. In the *M/V "Virginia G" Case*, the Tribunal held:

> It is a well-established principle of customary international law that the exhaustion of local remedies is a prerequisite for the exercise of diplomatic protection. This principle is reflected in article 14, paragraph 1, of the Draft Articles on Diplomatic Protection adopted by the International Law Commission in 2006, which provides that "[a] State may not present an

> international claim in respect of an injury to a national … before the injured person has … exhausted all local remedies". It is also established in international law that the exhaustion of local remedies rule does not apply where the claimant State is directly injured by the wrongful act of another State
> (*M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at pp. 53-54, para. 153).

267. It should be recalled that the Tribunal in the *M/V "SAIGA" (No. 2) Case* and *M/V "Virginia G" Case* examined the nature of the rights which Saint Vincent and the Grenadines claimed had been violated by Guinea, and the rights which Panama claimed had been violated by Guinea-Bissau, respectively (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 45, para. 97, and *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 54, para. 156).

268. In this regard, the Tribunal will follow the same approach as in the *M/V "SAIGA" (No. 2) Case* and the *M/V "Virginia G" Case*.

269. Having examined Panama's rights under the Convention that Panama claims had been violated by Italy, the Tribunal came to the conclusion in paragraphs 122 and 132 that articles 87 and 300 of the Convention are relevant to the present case.

270. The Tribunal is of the view that the right of Panama to enjoy freedom of navigation on the high seas is a right that belongs to Panama under article 87 of the Convention, and that a violation of that right would amount to direct injury to Panama (see *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 54, para. 157).

271. The Tribunal considers that the claim for damage to the persons and entities with an interest in the ship or its cargo arises from the alleged injury to Panama. Accordingly, the Tribunal concludes that the claims in respect of such damage are not subject to the rule of exhaustion of local remedies.

272. For the above reasons, the Tribunal does not consider it necessary to address the arguments of the Parties on the question of a jurisdictional connection.

273. In the light of the foregoing, the Tribunal rejects the objection raised by Italy based on the non-exhaustion of local remedies.

3. Acquiescence, estoppel and extinctive prescription

274. Italy argues that the Application of Panama is inadmissible owing to the operation of the principles of acquiescence, estoppel and extinctive prescription, all of which, according to it, are general principles of law within the meaning of Article 38 of the Statute of the ICJ.

275. Italy maintains that all the conditions for the operation of acquiescence are present in the present case. It adds that Panama has never validly asserted its claim before filing its Application more than 18 years from the date when the event complained of by Panama occurred.

276. Italy contends that, even if it were to be held that Panama had made its claim at some point prior to its Application, it is still evident that Panama has failed to pursue its claim over a number of years. In this connection, Italy refers to the last communication sent by Panama by note verbale dated 7 January 2005 and Mr Carreyó's last communication, dated 17 April 2010.

277. Italy argues that Mr Carreyó's communications have not validly made Panama's claim; even if it were to be held that the claim had been validly asserted in the note verbale dated 7 January 2005, then 7 January 2005 would be the date from which the inactivity of Panama as regards the pursuit of its claim starts. It adds that, in this scenario, Panama should be held to have remained silent for 10 years and 11 months before bringing its claim before the Tribunal.

278. Italy further argues that, even if the Tribunal were to hold that Mr Carreyó's communication of 17 April 2010 validly made Panama's claim, it would still be a fact that Panama remained silent for five years and eight months before filing its Application.

279. Italy points out that a State should not be surprised by the resurrection of a claim that, after being originally asserted, has not been pursued for some time.

280. Italy underlines that the Application of Panama involves a claim for damages and that a short period of passivity is sufficient to bar the claim.

281. Italy points out that Mr Carreyó's letter dated 17 April 2010 and addressed to the Italian Minister of Foreign Affairs (assuming, *in arguendo* only, that it is capable of asserting the claim of Panama vis-à-vis Italy) states that Panama would commence legal proceedings before the Tribunal within a reasonable period of time if Italy failed to pay damages. Italy adds that, though it failed to acknowledge the claim for damages, for five years and eight months Panama did nothing when action had been required, that this non-response by Panama amounts to acquiescence on the part of Panama and that, consequently, the Panamanian claim is inadmissible.

282. Italy contends that the principle of estoppel requires a State to be consistent in its attitude to a given factual or legal situation, that Panama should not be allowed to defend before the Tribunal a situation contrary to a clear and unequivocal representation previously made by it to Italy on which Italy has relied, and that Italy would be prejudiced if Panama were now authorized to depart from that representation against Italy.

283. In this connection, Italy draws attention to the communication by Panama dated 31 August 2004, together with Mr Carreyó's communications dated 7 January 2002 and 15 August 2004, in which Italy was informed that Panama would commence international proceedings against Italy, if Italy failed to release the *M/V "Norstar"* and pay damages to Panama within a reasonable time. Italy adds that, in the communication dated 7 January 2002, Mr Carreyó called upon Italy to respond to his communication dated 15 August 2001, or else Panama would institute proceedings within 21 days, and that such proceedings were never brought.

284. Italy points out that, had Panama pursued its claim diligently, including by means of the domestic mechanisms of redress available to Panama in Italy, the prejudice that falls upon Italy from the pursuit of the claim by Panama would have been significantly less. It adds that Italy cannot bear the consequences of the late pursuit of the claim by Panama.

285. Italy states that, for the above reasons, Panama is estopped from submitting the claim contained in the Application.

286. Italy states that extinctive prescription is "strictly connected" with acquiescence and that the purpose of extinctive prescription is to ensure the "certainty of legal relationships in the face of the passage of time."

287. Italy argues that the right of Panama to claim damages is extinct not just as a matter of the laws of Panama and Italy, but also as a matter of the laws of the vast majority of other jurisdictions. It further maintains that a claim that cannot be pursued domestically owing to prescription is also automatically barred at international level.

288. Italy adds that "it is not asking [the Tribunal] to declare generally what the period of time for the prescription of international claims should be. It is simply asking [the Tribunal] to declare that … [the] specific claim [of Panama] for damages, in the circumstances of this … case, is extinct due to prescription."

289. Panama argues that the examination of the arguments of Italy regarding acquiescence, estoppel and extinctive prescription pertain to the merits of the case. Nevertheless, Panama proceeded to examine the objections *in extenso*. Panama, however, states "the fact that we are discussing these objections must not be deemed as prejudicial to the question of whether the principles are a matter of admissibility or of the merits."

290. Panama maintains that, unlike national law, international law does not provide deadlines for a claimant to assert its claim but leaves the matter to be determined by international courts on the basis of the specific circumstances of a case. It does not,

therefore, agree with Italy's argument that the statutes of limitation of Italy and Panama should serve as a guideline in an international case before the Tribunal.

291. Referring to Italy's argument based on acquiescence, Panama maintains that to state that its Application in 2015 could not have been anticipated is misleading, particularly since Panama announced several times that, if Italy did not compensate the damages, it would initiate proceedings before the Tribunal. It adds that Italy has been aware that the matter was in no way closed, that Italy delayed settling the dispute by either failing to respond or by promising a response which never came and that the Italian courts took a total of seven years since the vessel was seized in 1998 to effectively conclude the case. Panama refers specifically to the Italian note verbale dated 25 January 2005 saying that the Italian Embassy would forward the response to the Ministry of Foreign Affairs of Panama after receiving it from the Italian Foreign Ministry, but this response never came.

292. Panama maintains that it has repeatedly pointed out to Italy that the damages were increasing and referred in this connection to its letters dated 15 August 2001, 3 August 2004 and 17 April 2010, in which Panama states, inter alia, that the damages, roughly calculated, amounted to no less than US$ 6 million and were increasing day by day owing to inactivity of the ship and its continuous degradation.

293. Panama adds that since Italy has been aware of the fact that the damages have been continually increasing, and since Italy has preferred not to respond to the compensation claims of Panama, Italy can no longer maintain that it is now suffering from unjust prejudice.

294. Refuting the argument of Italy concerning estoppel, Panama argues that it has made no statement that compensation for damages would not be claimed from Italy and that, on the contrary, Panama has clearly stated in its letters dated 3 August 2004 and 17 April 2010 that it would claim compensation before the Tribunal if Italy did not agree to pay damages beforehand. Panama adds that the conditions of the principle of estoppel are not met.

295. Referring to the Italian argument based on extinctive prescription, Panama maintains that international law does not lay down any specific time-limit within which a claim is to be asserted and that it is for an international court to determine, in the light of the circumstances of each case, whether the passage of time renders an application inadmissible.

296. Panama argues that it presented its claim to Italy within proper time and this has the effect of interrupting the running of any prescription period or time-bar lapse running or any other delay that could affect its claim. It adds that full notice of its claim having been given to Italy, no danger of injustice or disadvantage to Italy exists and, accordingly, the principle of prescription does not hold.

297. Explaining some of the facts that contributed to delay, Panama points out that the decision of the Court of Savona was given in 2003 and the Appeal Court of Genova did not confirm this decision until 2005. Panama adds that the reasons for the verdict were not given before 2009.

298. Panama contends that, contrary to the allegations of Italy, the conduct and activities of Panama cannot be considered to involve a waiver of its rights or to permit an inference that Panama would not pursue its claim anymore.

299. Panama further argues that Italy does not deserve protection by means of "the principle of legitimate expectations, which are a core of extinctive prescription, acquiescence and estoppel."

* * *

300. At the outset, the Tribunal wishes to refer to the argument of Panama that the contentions of Italy based on acquiescence, estoppel and extinctive prescription should be dealt with as part of the merits phase. Panama has made this argument in passing without substantiating it within the framework of article 97, paragraph 6, of the Rules. The Tribunal notes that there has been no response from Italy in this matter. The Tribunal finds that Panama has dealt with the arguments of Italy in

adequate measure and that the Tribunal is fully informed in this regard. In the light of all the relevant circumstances of this case, the Tribunal finds no reason why it should not proceed to an examination of the arguments of Italy referred to above for the purposes of ascertaining whether the Application is admissible.

301. The Tribunal notes that the question of the admissibility of an application may be assessed in the light of the well-established principles of international law governing acquiescence, estoppel and extinctive prescription. Such principles may be invoked by virtue of article 293 of the Convention to the extent they are not incompatible with the Convention.

302. The Tribunal notes that the Parties do not dispute these principles. Their differences relate to the application of such principles in the circumstances of the present proceedings; while Italy invokes them, Panama denies their applicability.

303. Explaining the rationale behind the principles of acquiescence and estoppel, the Chamber of the ICJ in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* held:

> The Chamber observes that in any case the concepts of acquiescence and estoppel … both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion
> (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 246, at p. 305, para. 130).

As to extinctive prescription, it has been recognized that lapse of time may have the effect of rendering an application inadmissible (see *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports,* p. 240, at pp. 253-254, para. 32; see also *Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland), Award of the Commission of Arbitration of 6 March 1956, Reports of International Arbitral Awards, Vol. XII*, pp. 83-153, at p. 103).

304. Referring to the argument based on acquiescence, the Tribunal notes that the claim of Panama was made known to Italy from the first note verbale of 31 August

2004 and through subsequent communications. The argument of Italy that Panama remained silent over a number of years in prosecuting its claims that arose from the detention of the *M/V "Norstar"*, and that this silence amounts to acquiescence, is not substantiated in the circumstances of this case, taking into account Italy's conduct of not responding to Panama's communications. The Tribunal holds that at no stage has the conduct of Panama given scope to infer that it has abandoned its claim or acquiesced in the lapse of its claim.

305. In view of the above, the Tribunal rejects the objection raised by Italy based on acquiescence.

306. The Tribunal will now deal with the reliance placed by Italy on estoppel. In the *Case concerning the Delimitation of the Maritime Boundary in the Bay of Bengal* (*(Bangladesh/Myanmar), Judgment, ITLOS Reports 2012,* p. 4, at p. 45, para. 124), the principle of estoppel has been set out by this Tribunal as follows:

> [T]he Tribunal observes that, in international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation. The Tribunal notes in this respect the observations in the *North Sea Continental Shelf* cases (*Judgment, I.C.J. Reports 1969*, p. 3, at p. 26, para. 30) and in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Judgment, I.C.J. Reports 1984*, p. 246, at p. 309, para. 145).

307. The Tribunal considers that the main elements of estoppel have not been fulfilled in this case. First, Panama has never made a representation, by word, conduct or silence, that it would abandon its claim if Italy failed to act on its claim within a specific time-limit. It is true that there was a representation that Panama would commence legal proceedings if Italy failed to release the vessel and pay damages by a specified time and that no such proceedings were brought in spite of Italy's failure to respond to such representation. However, this cannot be taken as amounting to a clear and unequivocal representation that Panama would abandon its claim because of the non-response of Italy. Second, Italy has not submitted any evidence to prove that it was induced by such representation to act to its detriment.

308. For these reasons, the Tribunal rejects the objection raised by Italy based on estoppel.

309. The Tribunal will now address the question as to whether the claim of Panama is barred because of the operation of the principle of extinctive prescription, that is, lapse of claim on account of passage of time.

310. The Tribunal notes that the ILC, in its commentary to article 45 of the Draft Articles on State Responsibility, observed that "[o]nce a claim has been notified to the respondent State, delay in its prosecution (e.g. before an international tribunal) will not usually be regarded as rendering it inadmissible" (*Yearbook of the International Law Commission*, 2001, Vol. II, p. 123, para. 10).

311. The Tribunal further notes that neither the Convention nor general international law provides a time-limit regarding the institution of proceedings before it. As stated by the ICJ:

> [T]he Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible
> (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at p. 253, para. 32).

312. In the *Nauru* case, Nauru made its claim more than 20 years after it became independent. Nevertheless, the ICJ held that in the circumstances of that case the Application of Nauru was not rendered inadmissible by passage of time.

313. The Tribunal notes that, starting with the note verbale of 31 August 2004, there have been communications from time to time questioning the detention of the vessel and requesting compensation. The Tribunal finds that Panama has not failed to pursue its claim since the time when it first made it, so as to render the Application inadmissible.

314. In the light of the foregoing, the Tribunal rejects the objection raised by Italy based on extinctive prescription.

* * *

315. For the above reasons, the Tribunal finds that the Application filed by Panama is admissible.

VIII. Operative provisions

316. For the above reasons, the Tribunal

(1) By 21 votes to 1,

Rejects the objections raised by Italy to the jurisdiction of the Tribunal and finds that it has jurisdiction to adjudicate upon the dispute.

IN FAVOUR: *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judge* ad hoc EIRIKSSON;

AGAINST: *Judge* ad hoc TREVES.

(2) By 20 votes to 2,

Rejects the objections raised by Italy to the admissibility of Panama's Application and finds that the Application is admissible.

IN FAVOUR: *President* GOLITSYN; *Vice-President* BOUGUETAIA; *Judges* CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, PAIK, KELLY, ATTARD, KULYK, GÓMEZ-ROBLEDO, HEIDAR; *Judge* ad hoc EIRIKSSON;

AGAINST: *Judge* COT; *Judge* ad hoc TREVES.

Done in English and in French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this fourth day of November, two thousand and sixteen, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Republic of Panama and the Government of the Italian Republic, respectively.

(signed)
VLADIMIR GOLITSYN
President

(signed)
PHILIPPE GAUTIER
Registrar

Judge COT, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(initialled) J.-P.C.

Judge HEIDAR, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(initialled) T.H.

Judges WOLFRUM and ATTARD, availing themselves of the right conferred on them by article 30, paragraph 3, of the Statute of the Tribunal, append their joint separate opinion to the Judgment of the Tribunal.

(initialled) R.W.
(initialled) D.A.

Judge NDIAYE, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(initialled) T.M.N.

Judge LUCKY, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(initialled) A.A.L.

Judge ad hoc TREVES, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(initialled) T.T.