

# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2016

Public sitting

held on Tuesday, 20 September 2016, at 10 a.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,

President Vladimir Golitsyn presiding

## **THE M/V “NORSTAR” CASE**

Preliminary Objections

(Panama v. Italy)

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**Verbatim Record**

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<i>Present:</i>	President	Vladimir Golitsyn
	Vice-President	Boualem Bouguetaia
	Judges	P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Jin-Hyun Paik
		Elsa Kelly
		David Attard
		Markiyan Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
	Judges <i>ad hoc</i>	Tullio Treves
		Gudmundur Eiriksson
	Registrar	Philippe Gautier

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*Panama is represented by:*

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

*as Agent;*

*and*

Mr Hartmut von Brevern, Attorney at Law, Hamburg, Germany,  
Dr Olrik von der Wense, LL.M., ALP Rechtsanwälte (Partner), Attorney at Law,  
Hamburg, Germany,  
Ms Swantje Pilzecker, ALP Rechtsanwälte (Associate), Attorney at Law,  
Hamburg, Germany,

*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 *Norstar*, Norway,  
Mr Magnus Einar Mörch, Norway,

*as Advisers.*

*Italy is represented by:*

Ms Gabriella Palmieri, Deputy Attorney General,

*as Agent;*

*and*

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 Advisers;*

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, United Kingdom, Member of the New Zealand Bar,

*as Legal Assistants.*

1 **THE PRESIDENT:** Before we enter into today's hearing, I wish to note with deep  
2 regret the absence of Judge Antonio Cachapuz de Medeiros, Member of the Tribunal  
3 since 15 January 2016, who passed away last Friday. The Tribunal observed a  
4 minute of silence yesterday during the swearing-in ceremony of the Judges *ad hoc* in  
5 this case.

6  
7 Today's hearing is devoted to the examination of the Preliminary Objections raised  
8 by Italy in the context of the *M/V "Norstar" Case (Panama v. Italy)*.

9  
10 By an Application filed in the Registry of the Tribunal on 17 December 2015, the  
11 Republic of Panama instituted proceedings against the Italian Republic in a dispute  
12 concerning the arrest and detention of the *M/V "Norstar"*, a Panamanian-flagged  
13 vessel.

14  
15 On 11 March 2016, within the time-limit set by article 97, paragraph 1, of the Rules of  
16 the Tribunal, Italy raised Preliminary Objections to the jurisdiction of the Tribunal and  
17 to the admissibility of Panama's Application.

18  
19 I now call on the Registrar to summarize the procedure and to read out the  
20 submissions of the Parties.

21  
22 **THE REGISTRAR** (*Interpretation from French*): Thank you, Mr President. By Order  
23 of 15 March 2016, the Tribunal fixed 10 May 2016 as the time-limit for Panama to  
24 submit its written observations and submissions on the Preliminary Objections filed  
25 by Italy, and 9 July 2016 as the time-limit for Italy to submit its written observations  
26 and submissions in reply. The two Parties lodged their statements within the  
27 prescribed time-limits. By the same Order, the Tribunal suspended the proceedings  
28 on the merits pursuant to article 97, paragraph 3, of the Rules of the Tribunal.

29  
30 (*Continued in English*) I will now read out the submissions of the Parties in the phase  
31 of the case relating to the Preliminary Objections.

32  
33 Italy requests the Tribunal to adjudge and declare that:

34  
35 (a) it lacks jurisdiction with regard to the claim submitted by Panama in its  
36 Application filed with the Tribunal on 17 December 2015; and/or that

37  
38 (b) the claim brought by Panama against Italy in the instant case is inadmissible to the  
39 extent specified in the preliminary objections.

40  
41 Panama requests that the Tribunal

42  
43 FIRST, declare that

44  
45 1. it has jurisdiction over this case;

46  
47 2. the Application made by Panama is admissible; and

48  
49 3. the Italian Republic has not complied with the rule of Due Process of Law;

50

1 SECOND, that as a consequence of the above declarations the Written  
2 Preliminary Objections made by the Italian Republic under Article 294,  
3 paragraph 3 of the Convention are rejected.  
4

5 **THE PRESIDENT:** Thank you, Mr Registrar.  
6

7 By letter dated 16 August 2016, and received by the Registry on 22 August 2016,  
8 Panama submitted a request for  
9

10 A ruling concerning the scope of the subject matter based on the preliminary  
11 objections filed by Italy.

12 In this document, Panama requested that  
13 new Objections and issues brought up by Italy for the first time in its Reply be  
14 rejected  
15

16 and that  
17

18 [i]n the case that the Tribunal does not reject the new Objections made by  
19 Italy[,] ... the Tribunal set an appropriate deadline for Panama to reply to these  
20 Objections in writing after the hearing.  
21

22 By letter dated 23 August 2016, the Agent of Italy objected to the request made by  
23 Panama, stating that Italy finds Panama's document inadmissible, and reserving its  
24 right to reply on the merits of Panama's document, if found admissible, during the  
25 hearing.  
26

27 The Parties were informed, by letter from the Registrar dated 29 August 2016, that  
28 this matter would be examined by the Tribunal on 19 September 2016.  
29

30 On 19 September 2016, having considered the  
31

32 Request of the Republic of Panama for a ruling concerning the scope of the  
33 subject matter based on the preliminary objections filed by Italy

34 dated 16 August 2016, and the response of Italy dated 23 August 2016, the Tribunal  
35 decided to allocate each Party additional speaking time of 30 minutes during the  
36 hearing to comment on the matter. The Parties were informed of the Tribunal's  
37 decision during consultations with the President held on 19 September.  
38

39 Over the three days of oral proceedings, the Tribunal will hear the arguments of the  
40 Parties on the preliminary objections raised by Italy in the case. At today's hearing,  
41 Italy will present the first round of its oral argument. It will present its arguments this  
42 morning until approximately 1 p.m., with a break of 30 minutes at around 11.30 a.m.,  
43 and then from 3 p.m. to 5:30 p.m., with a break of 30 minutes at 4.30 p.m. Panama  
44 will speak tomorrow from 10 a.m. to 1 p.m., also with a break of 30 minutes at  
45 around 11.30 a.m., and then from 3 p.m. to 5.30 p.m., with a break of 30 minutes at  
46 4.30 p.m.  
47

48 The second round of oral argument will take place on Thursday 22 September, with  
49 Italy taking the floor from 10 a.m. to 11.30 a.m., followed by Panama from 3 p.m. to  
50 4.30 p.m.  
51

1 I note the presence at the hearing of Agents, Counsel and Advocates of Italy and  
2 Panama. Italy, which has raised the preliminary objections in this case, will be heard  
3 first today. I now call on the Agent of Italy, Ms Gabriella Palmieri, to introduce the  
4 delegation of Italy.

5  
6 **MS PALMIERI** (*Interpretation from French*): Thank you, Mr President.

7  
8 Mr President, Judges, it is an honour and a privilege for me to come before you for  
9 the first time as Agent for the Italian Republic in proceedings instituted against my  
10 country by the Republic of Panama.

11  
12 Allow me, first of all, to say that I hold the Members of this Tribunal in the highest  
13 esteem.

14  
15 I would also like to offer congratulations on my own behalf and on behalf of my  
16 Government to Judges Gudmundur Eiriksson and Tullio Treves on their appointment  
17 as Judges *ad hoc* in this case.

18  
19 With your permission, Mr President, I shall now introduce the members of the  
20 delegation representing Italy before your Tribunal: Professor Attila Tanzi, Counsel;  
21 Professors Ida Caracciolo and Francesca Graziani, also Counsel; and Paolo Busco,  
22 lawyer, also Counsel. The names and titles of the other members of the Italian  
23 delegation have already been duly communicated to the Tribunal.

24  
25 Mr President, after the presentation of the counsel representing the Republic of  
26 Panama, I shall, on your invitation, return to make a few preliminary remarks on  
27 behalf of Italy and to outline how our pleadings on this first day will be organized.  
28 Thank you very much, Mr President.

29  
30 **THE PRESIDENT**: Thank you, Ms Palmieri. I now call on the Agent of Panama,  
31 Mr Nelson Carreyó, to introduce the delegation of Panama.

32  
33 **MR CARREYÓ**: I request Ms Janna Smolkina to introduce our delegation.

34  
35 **MS SMOLKINA**: Mr President, distinguished Members of the Tribunal, I am Janna  
36 Smolkina and I am here today as a representative of Panama's diplomatic consular  
37 mission in Hamburg where I am responsible for vessel registration.

38  
39 It is indeed an honour for me to be representing Panama before this distinguished  
40 Tribunal.

41  
42 Panama is represented here today in the interests of its flag, its entities, the vessel  
43 *Norstar* and the persons associated with the vessel. The Panamanian flag and its  
44 protected entities are subject to circumstances that will be explained and appreciated  
45 during this week's hearings. We hope that these hearings will be conducive to a  
46 more detailed understanding of the case.

47  
48 I will now introduce the members of the Panamanian delegation. I present first  
49 Panama's Agent, Dr Nelson Carreyó, an international maritime and admiralty law  
50 litigation attorney who has a wealth of experience including as a First Judge of the

1 Maritime Court of Panama and Chairman of the Board of Labour Relations of the  
2 Panama Canal Authority.

3  
4 Dr Nelson Carreyó will address the Tribunal in detail regarding the factual and legal  
5 circumstances of this matter. He is accompanied by Counsel, Dr Olrik von der  
6 Wense, a German lawyer who also practises international law of the sea. Together  
7 with Dr Carreyó he will discuss the points on which the Parties are in dispute.  
8 Mr Hartmut von Brevern, a German attorney at law, who will provide arbitral  
9 experience in international maritime and trade law, including before this esteemed  
10 Tribunal, acts as a Counsel of the Panamanian delegation. He will also set out and  
11 discuss the points of the dispute together with our Agent Dr Carreyó and Dr von der  
12 Wense.

13 Ms Swantje Pilzecker, a German attorney at law, a specialist in European and  
14 international law is also a Counsel of the Panamanian delegation.

15  
16 Your Honours, that concludes my brief introduction. Mr President, Members of the  
17 Tribunal, I thank you very much for your attention.

18  
19 **THE PRESIDENT:** Thank you, Ms Smolkina. I now request the Agent of Italy,  
20 Ms Palmieri, to begin her statement.

21  
22 **MS PALMIERI** (*Interpretation from French*): Thank you, Mr President.

23  
24 Mr President, Judges, before outlining the way our statement will be organized, may  
25 I make a few general preliminary remarks on behalf of Italy.

26  
27 Even though on 17 December 2015 my Government, to its great surprise and with  
28 some regret, received the Application filed by Panama to this esteemed Tribunal,  
29 Italy does not consider itself to be a State that has a dispute with the Republic of  
30 Panama, with which we have enjoyed a longstanding friendship, which we hope will  
31 go into the future.

32  
33 This is not merely a kind of initial diplomatic statement that should govern the  
34 examination of Panama's Application. It also has a strictly legal basis, as will be  
35 shown in the pleadings by Italy's counsel subsequently.

36  
37 Without prejudice to the arguments which will be put forward by Italy's team in due  
38 course, I would like to underline that the heart of the matter before you is essentially  
39 a question of private interests which has no real connection with the Panamanian  
40 State. This question is not governed by the 1982 United Nations Convention on the  
41 Law of the Sea since the rights invoked by Panama under that Convention, and  
42 allegedly breached by Italy, are manifestly devoid of any real link with the facts of the  
43 instant case.

44  
45 Mr President, Judges, from this premise and on the basis of the arguments that we  
46 will put forward in further detail in due course, it is quite obvious that the only  
47 question arising in this case is whether this esteemed Tribunal may legitimately hear  
48 and determine the Application filed by Panama. Given that this issue has never been  
49 brought before your Tribunal before, you are called upon to take a fundamental

1 decision of the utmost importance in this regard. That decision, which will determine  
2 the limits of the rights and interests protected by the United Nations Convention on  
3 the Law of the Sea in preliminary proceedings, will also define the limits for recourse  
4 to judicial or arbitral methods of dispute settlement under Chapter XV of the  
5 Convention. Therefore, this decision will also determine the limits for preventing  
6 improper applications being made to international judicial bodies in future.  
7

8 Mr President, I would like to underline once again the predominantly, if not  
9 exclusively, private nature of the case before you. Accordingly, I would like to  
10 reiterate that Italy does not have any dispute with the Government of Panama.  
11 However, if this Tribunal were to decide that there was a dispute of the kind claimed  
12 by Panama when it filed its Application, the Italian Government will maintain, in the  
13 alternative, that the matter cannot be decided by this esteemed Tribunal in  
14 accordance with the provisions of the 1982 Convention because other fundamental  
15 requirements for establishing its jurisdiction are not met.  
16

17 As Italy's counsel will also show, the same holds, in the further alternative, for the  
18 requirements laid down by that Convention. It will regulate more clearly future  
19 applications to international judicial bodies in the forms provided for by the  
20 Convention.  
21

22 It is in the light of these considerations that on 8 March 2016 Italy filed its Preliminary  
23 Objections under article 294, paragraph 3, of the Convention and in accordance with  
24 article 97 of the Rules of the Tribunal, relying on the "jurisdiction on jurisdiction"  
25 which the Tribunal enjoys under article 288, paragraph 4.  
26

27 The reasons for this have been outlined in the Written Observations presented to the  
28 Tribunal by the Government of the Italian Republic, and the same reasons will now  
29 be developed in greater detail by the Italian counsel.  
30

31 Mr President, Judges, with your permission, I would now like to outline the order of  
32 our pleadings.  
33

34 First of all, Professor Attila Tanzi will briefly address the rather surprising claims put  
35 forward by Panama, which Italy received on 22 August 2016 and to which Italy  
36 responded on 23 August by a note verbale.  
37

38 Professor Tanzi will then present arguments to show that this Tribunal does not have  
39 jurisdiction to entertain Panama's Application, both because there is no dispute  
40 between Italy and Panama and because Panama has not properly met the condition  
41 laid down in article 283, paragraph 1, of the Convention of proceeding expeditiously  
42 to an exchange of views. Professor Tanzi will then address the question of the  
43 jurisdiction of the Tribunal in the light of the manifest absence of any real connection  
44 between the facts of the instant case and the rights under the Convention which  
45 Panama claims have been violated; particular attention will be paid to the principle of  
46 freedom of navigation. He will end his presentation with an explanation of the limits  
47 of the Tribunal's jurisdiction *ratione personae*.  
48

49 Professor Ida Caracciolo will explain the predominantly, if not exclusively, private  
50 nature of Panama's Application within the framework of the objections raised by Italy

1 in the alternative relating to the inadmissibility of that Application. To this end, she  
2 will return to the question of the manifest absence of any real link between the facts  
3 of the instant case and the rights under the Convention which Panama claims have  
4 been violated.

5  
6 Professor Graziani will then show how the condition of admissibility relating to  
7 exhaustion of local remedies under article 295 of the Convention has not been met in  
8 relation to the circumstances surrounding Panama's Application.

9  
10 She will be followed by Paolo Busco, who will examine other questions relating to the  
11 inadmissibility of Panama's Application, in particular acquiescence, extinctive  
12 prescription and time-bar or estoppel.

13  
14 Thank you, Mr President. I would now ask you to call Professor Tanzi. Thank you for  
15 your attention.

16  
17 **THE PRESIDENT:** Thank you, Ms Palmieri. I now give the floor to Mr Attila Tanzi.

18  
19 **MR TANZI** (*Interpretation from French*): Mr President, Members of the Tribunal, it is  
20 an honour and privilege to speak to your august Tribunal on behalf of Italy, in  
21 particular since this is happening on the occasion of the 20<sup>th</sup> anniversary of the  
22 establishment of the Tribunal.

23  
24 Mr President, before I start my initial plea, bearing in mind yesterday's consultations,  
25 I will first turn to the allegedly late submission of certain preliminary objections raised  
26 by Italy, claimed by Panama on 16 August 2016. With your approval, Mr President, I  
27 will run through the Italian arguments in English.

28  
29 (*Continued in English*) Mr President, Members of the Tribunal, I shall address the  
30 Request of the Republic of Panama for a ruling concerning the scope of the subject  
31 matter based on the preliminary objections filed by Italy, dated 16 August 2016 but  
32 received by the Tribunal and forwarded to Italy on 22 August. I will do so succinctly  
33 as most of the points that I am going to make will be complemented individually by  
34 the other members of the team.

35  
36 Mr President, in its Request Panama alleges that Italy made six new preliminary  
37 objections in its Reply that should be declared inadmissible as untimely and contrary  
38 to article 97, paragraph 1, of the ITLOS Rules.

39  
40 In its letter to the Tribunal dated 23 August, Italy reserved its right to reply on the  
41 merits of Panama's Request during the hearing, and I am very happy to do so now.

42  
43 As already anticipated in writing, Italy respectfully submits that Panama's Request is  
44 manifestly unfounded. In fact, all of Italy's arguments made in its Reply of 8 July  
45 2016, either developed and specified its objections first raised on 16 March or  
46 responded to arguments made by Panama in its observations of 5 May 2016; and  
47 I would stress the distinction between objections and arguments, for a specific  
48 argument substantiating a given objection is not the same thing as a new objection.  
49

1 The equality of arms principle on which Panama relies has therefore been respected;  
2 and, in any event, the Tribunal has wide and inherent powers to ascertain its  
3 jurisdiction and the admissibility of the claim.

4  
5 Mr President, Members of the Tribunal, as I anticipated, none of the six preliminary  
6 objections of which Panama complains was newly made in Italy's Reply. Italy raised  
7 all of these objections in its first written pleading in accordance with article 97,  
8 paragraph 1, of the ITLOS Rules. Panama in its observations acknowledged all of  
9 these objections, following which Italy simply elaborated upon them in its Reply. With  
10 your permission, Mr President, I will now address each of these objections  
11 individually.

12  
13 Mr President, Italy's submissions concerning the irrelevance of the communications  
14 from Panama for lack of representative powers are part of Italy's objection that there  
15 exists no dispute between Italy and Panama. This objection was clearly raised in  
16 Italy's Preliminary Objections at paragraphs 18–20, and Panama acknowledged this  
17 objection having been made at paragraphs 6–9 of its Observations. Italy had also  
18 more specifically raised the issue of Panama failing to raise any dispute in a legally  
19 appropriate manner when, at paragraph 18 of its Preliminary Objections, it objected  
20 that

21  
22 In fact, no complaint, or protest, bearing on the facts complained of in the  
23 Application, has been raised in any legally appropriate manner by the  
24 Government of Panama with the Government of Italy, which the latter would  
25 resist or contest.

26  
27 Mr President, allow me to turn to Italy's objection that the rights invoked by Panama  
28 are manifestly irrelevant to the instant case. Italy clearly raised this point in its  
29 Preliminary Objections. Paragraph 19 of that pleading precisely begins with the  
30 words "Apart from the manifest irrelevance of the UNCLOS provisions invoked by the  
31 Applicant to sustain its claim...". Panama acknowledged this when in its  
32 observations it recorded at paragraph 50 that "Nevertheless, Italy asserts that there  
33 is 'a manifest irrelevance of the UNCLOS provisions invoked by Panama'."

34  
35 Mr President, Members of the Tribunal, as to the objection that the order for seizure  
36 of the *M/V Norstar* does not *per se* amount to a breach of an international obligation,  
37 Italy clearly raised it in its Preliminary Objections.

38  
39 I draw your attention to paragraph 21 of the Preliminary Objections in question,  
40 where Italy submitted that "even though the order for seizure of the *M/V Norstar* has  
41 been issued by an Italian Public Prosecutor, the actual arrest and detention of the  
42 vessel has not been executed by Italian Enforcement Officials, but by the Spanish  
43 Authorities". Panama in turn acknowledged that Italy made this objection in  
44 paragraph 10 of its Observations.

45  
46 Mr President, the same applies to the objection that no allegedly wrongful act in the  
47 present case is attributable to Italy. Italy addressed this point with the same  
48 language that I have just quoted and Panama has likewise acknowledged.

1 As far as the espousal nature of the claim is concerned, Mr President, Italy clearly  
2 also raised this objection in its first written pleading. Italy stated in the title to  
3 Chapter 3.II.A of its Preliminary Objections that “[t]he claim is one of Diplomatic  
4 Protection” and the objection was raised more specifically in paragraphs 28 and 29.  
5 Panama acknowledged this in paragraph 52 of its Observations.  
6

7 Mr President, as to acquiescence, prescription and estoppel, there is again no doubt  
8 that Italy clearly raised the point in its first written pleading, and I may call your  
9 attention to Chapter 3.II.B of our first written pleading. Its title is “Time Bar and  
10 Estoppel”. Panama acknowledged that Italy made these objections in its Preliminary  
11 Objections at paragraph 52 of its Observations.  
12

13 In summary, Mr President, given that Italy has raised all of these objections in its first  
14 written pleading and Panama has acknowledged this in its Observations, it is clear  
15 that they have been timely made in accordance with article 97, paragraph 1, of the  
16 ITLOS Rules.  
17

18 Mr President, Members of the Tribunal, in light of the submissions that I have just  
19 made, there can be no basis for Panama to claim that any breach of the principle of  
20 equality of arms may have occurred.  
21

22 Panama has had ample opportunity to respond to these objections and it has the  
23 further ability to respond to these objections during this hearing. Indeed, one of the  
24 very purposes of this hearing is to allow Panama the opportunity to respond further  
25 to the preliminary objections that Italy has made.  
26

27 In addition to this, the Tribunal has already afforded the Parties the opportunity to  
28 present their cases as fully as possible by extending the allotted time. In these  
29 circumstances we respectfully submit that permitting any post-hearing pleadings, as  
30 Panama has requested, would unnecessarily prolong these proceedings.  
31

32 Finally, Mr President, Italy acknowledges that the Tribunal in any event has wide and  
33 inherent powers to consider its jurisdiction and the admissibility of the claim. These  
34 wide and inherent powers extend to empowering a tribunal to consider jurisdiction  
35 and admissibility where objections have not been timely made – and even if they  
36 have not been made at all – is part and parcel of general international law.  
37

38 Allow me to recall that the ICJ made this clear in *Appeal relating to the Jurisdiction of*  
39 *the ICAO Council* when it considered whether a jurisdictional objection raised at the  
40 merits stage of proceedings could still be considered. The Court explained that  
41

42 It is certainly to be desired that objections to the jurisdiction of the Court should  
43 be put forward as preliminary objections for separate decisions in advance of  
44 the proceedings on the merits. The Court must, however, always be satisfied  
45 that it has jurisdiction and must if necessary go into that matter *proprio motu*.<sup>1</sup>  
46

47 That reasoning applies *a fortiori* where, as here, proceedings remain at the stage of  
48 preliminary objections.

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<sup>1</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, p. 46, at p. 52, para. 13.

1  
2 Any concerns that Panama has with its opportunity to respond on issues of  
3 jurisdiction and admissibility can be accommodated during this hearing – such as  
4 they already have been accommodated through the extension of time that the  
5 Tribunal has permitted.

6  
7 Mr President, Members of the Tribunal, for these reasons Italy respectfully submits  
8 that its preliminary objections are all admissible. The preliminary objections have  
9 been made in a timely manner in accordance with article 97, paragraph 1, of the  
10 ITLOS Rules, the equality of arms principle has been respected and, in any event,  
11 the Tribunal has wide and inherent powers to determine its jurisdiction and the  
12 admissibility of the claim.

13  
14 I thank you, Mr President. With your permission, I will now turn to my first pleading.

15  
16 Today my main task is to demonstrate that the Tribunal does not have jurisdiction to  
17 decide on Panama's Request of 17 December 2015.

18  
19 Mr President, Italy disputes the jurisdiction of this Tribunal in the present case on the  
20 basis of three preliminary objections as follows: first, there is no dispute between the  
21 Parties; secondly, the fact that Panama has not met its obligation to proceed to an  
22 exchange of views within the meaning of article 283 of the Convention; and the third  
23 objection is the lack of jurisdiction *ratione personae*. I will go into this in greater detail  
24 in my second statement.

25  
26 Before I come back to my reasoning, Mr President, I would just like to emphasize, as  
27 the Agent of the Italian Government mentioned a moment ago, that we are putting  
28 these arguments forward with the utmost respect. We are fully convinced that the  
29 Tribunal will bear in mind that a well-founded objection to its jurisdiction serves to  
30 strengthen its authority because it confirms its "jurisdiction on jurisdiction".

31  
32 Mr President, I now come back to the first legal point raised by Italy, that is to say,  
33 that there is no dispute between the Parties. As the ICJ stated in the *Nuclear Tests*  
34 case:

35  
36 ... the existence of a dispute is the primary condition for the Court to exercise  
37 its judicial function.<sup>2</sup>

38  
39 In the *Fisheries Jurisdiction* case, the ICJ underlined that

40  
41 "[i]t is for the Court ...itself to determine on an objective basis the dispute  
42 dividing the parties, by examining the position of both parties."<sup>3</sup>

43  
44 It is therefore very clear from international case law that it is not for the applicant  
45 alone to determine unilaterally that a dispute exists. It has to be verified objectively,  
46 and this is the exclusive domain of the court or tribunal that has been seized.

47  

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<sup>2</sup> *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, at p. 476, para. 58.

<sup>3</sup> *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432, at p. 448, para. 30.

1 The written submissions of the Parties in today's case show that they agree on what  
2 is meant by the term "dispute", in accordance with the pronouncement in the  
3 *Mavrommatis* case<sup>4</sup>, with which we are familiar.

4  
5 As this Tribunal asserted in the *Southern Bluefin Tuna* cases,<sup>5</sup> this definition was  
6 adopted by the International Court of Justice in the *South West Africa* case, when it  
7 underlined

8  
9 [i]t must be shown that the claim of one party is positively opposed by the  
10 other.<sup>6</sup>

11  
12 Mr President, if I may, I would now like to set out two preliminary considerations on  
13 the basis of the case law I have quoted.

14  
15 First, one of the conditions for ensuring that the claim in question is established  
16 objectively is for opposition to exist between the Parties at the moment when an  
17 application is filed. Otherwise, any State could submit a request and unilaterally  
18 assert that there is a dispute simply as a result of having submitted an application,  
19 which the defendant would then oppose before a court or tribunal.

20  
21 Secondly, the interests being opposed must be interests of States and protected by  
22 the rules of international law. It follows that objectively determining whether or not  
23 there is a dispute is a matter for this august Tribunal to carry out by checking (a) that  
24 it is an inter-State question and (b) that it is relevant to the rules of the Convention.

25  
26 Mr President, Italy is fully aware that, in this process of objective determination, the  
27 Tribunal must take account of the behaviour of the two Parties.

28  
29 In this respect Italy fully agrees with the ICJ statement in the case of *Georgia v.*  
30 *Russian Federation*, when it said that:

31  
32 the existence of a dispute may be inferred from the failure of a State to respond  
33 to a claim in circumstances where a response is called for.<sup>7</sup>

34  
35 We are fully convinced that all the arguments which I will run through in a moment  
36 serve to show clearly that, in the case before us today, we find ourselves precisely in  
37 a situation in which such a response is not required.

38  
39 Mr President, I will set out Italy's objection by showing firstly that, until the date of its  
40 Application, Panama had not communicated to the Italian Government in a  
41 diplomatic and proper way, nor in a legally valid way, the expression of any claim  
42 that Italy could have opposed or at all events disagreed with.

---

<sup>4</sup> *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, *Jurisdiction*, *P.C.I.J. Reports*, Series A, No. 2, p. 11.

<sup>5</sup> *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, *Provisional Measures, Order of 27 August 1999*, *ITLOS Reports 1999*, p. 280, para. 44.

<sup>6</sup> *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, *Preliminary Objections, Judgment*; *I.C.J. Reports 1962*, p. 319, at p. 328.

<sup>7</sup> *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.

1  
2 Secondly, if the Tribunal were to take the view that Mr Carreyó's communications  
3 should be attributed to the Panamanian Government, I will explain that these  
4 communications did not in any way refer to any of the rights deriving from the  
5 provisions of the Convention which Panama then invoked in its Application.  
6

7 Even if we could deduce that the allegedly Panamanian correspondence was  
8 claiming to invoke rights which were somehow connected with the Convention, I will  
9 explain that none of these rights is in any way relevant to the case before us today,  
10 and indeed, are very obviously not relevant.

11  
12 Mr President, one last preliminary point, if I may.  
13

14 All Italy's objections arising from the same facts are inextricably linked to the  
15 objection that there is no dispute between the Parties. It will be clear that the  
16 arguments underlying each of the objections to the jurisdiction of this Tribunal go to  
17 show that there was no need for Italy to provide any response to Mr Carreyó's or  
18 Panama's claims.  
19

20 Mr President, the lack of a situation which could lead to a dispute between the  
21 Parties is due principally to Mr Carreyó's role not being a representative one.  
22 Mr President, Members of the Tribunal, Mr Carreyó appeared to the Italian officials in  
23 his first letter of 15 August 2001<sup>8</sup> to be acting as a private individual, without any  
24 authorization to represent or negotiate on behalf of the Government of Panama.  
25

26 You can see this letter in your folders (tab 3, page 1). I would like to draw your  
27 attention to the last lines of this, which you will now see on the screen:  
28

29           The undersigned therefore respectfully requests that the Italian State, within  
30           reasonable time decides if it wants to release the vessel and pay the damages  
31           caused by the illegal procedure.<sup>9</sup>  
32

33 The signatory of this letter was not an official of the Panamanian Government,  
34 neither was he the Ambassador of Panama in Rome. His signature had been  
35 certified by a notary in Panama and supplied with an apostille in accordance with the  
36 Hague Convention of 1961.<sup>10</sup>  
37

38 As regards the private nature of this signature and apostille, I would refer you to  
39 paragraph 11 of Italy's Reply dated 8 July 2016. The same applies, Mr President, to  
40 the letters Mr Carreyó sent subsequently, in particular to those of 7 January 2002,  
41 6 June 2002 and 3 and 31 August 2004.<sup>11</sup> You will find them under tab 3 on pages 3,  
42 5, 7 and 11, of your folders.

---

<sup>8</sup> Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs, 15 August 2001 (Preliminary Objections, Annex F).

<sup>9</sup> *Ibid.*

<sup>10</sup> Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents (The Hague, 5 October 1961; entry into force: 24 January 1965).

<sup>11</sup> Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs, 7 January 2002 (Preliminary Objections, Annex G); Letter sent by Mr Carreyó to the Italian Embassy in Panama, 6 June 2002 (Preliminary Objections, Annex H); Letter sent by Mr Carreyó to the Italian Embassy in Panama,

1  
2 Mr President, I am saying all this with the utmost respect for Mr Carreyó's role today  
3 as Agent before this august Tribunal. That being said, even if I have said how things  
4 appeared to the Italian officials, it is not just a question of appearances; it is also a  
5 question of reality. In fact, it is a question of law because, Mr President, we cannot  
6 confuse the power to litigate with the power to represent a State in diplomatic  
7 relations. In its commentary on the international responsibility of States, the  
8 International Law Commission stated the following, which you will find in your folders  
9 under tab 5, and is also on the screen:

10  
11 Thus, the general rule is that the only conduct attributed to the State at the  
12 international level is that of its organs of government, or of others who have  
13 acted under the direction, instigation or control of those organs, i.e. as agents  
14 of the State.<sup>12</sup>

15  
16 Mr President, an authorization to litigate is something entirely different.

17  
18 It is precisely these two separate roles which Mr Carreyó confused over the years,  
19 starting from 2001. Clearly, Panama made the same confusion when it authorized  
20 the current litigation; however, it also made this confusion at an earlier stage.

21  
22 The confusion is very clearly visible in Mr Carreyó's communication of 31 August  
23 2004. You will find this in annex H (tab 3, page 11) of your folders.

24  
25 This is a covering fax. The language is very lavish language and sets out a very  
26 broad interpretation of the document being faxed:

27  
28 Please find enclosed a document authorizing Nelson Carreyó to act on behalf  
29 of the Government of Panama in the case of *M/V Norstar*.<sup>13</sup>

30  
31 Mr President, this language is not at all in line with the text of the document  
32 accompanying it. The document accompanying it simply is a letter from the  
33 Panamanian Ministry of Foreign Affairs, sent to the Registrar of this Tribunal four  
34 years previously, that is to say, on 2 December 2000. You will find it in annex I, tab  
35 4, page 1, of your folders.

36  
37 I would like to draw your attention to the following words:

38  
39 ...was authorized to represent the Panamanian Government before this  
40 Honorable Tribunal as laid down in article 292 of the United Nations  
41 Convention on the Law of the Sea.<sup>14</sup>

---

3/6 August 2004 (Reply, Annex G); Fax sent by Mr Carreyó to the Italian Embassy in Panama,  
31 August 2004 (Reply, Annex H).

<sup>12</sup> Draft articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the  
International Law Commission, 2001, Volume II (Part Two), p. 20, at p. 38, para. 2, commentary on  
Chapter II.

<sup>13</sup> Fax sent by Mr Carreyó (footnote 11).

<sup>14</sup> Document of full powers issued by the Republic of Panama in favour of Mr Carreyó with regard to a  
prompt release procedure before ITLOS, 2 December 2000 (Preliminary Objections, Annex L).

1 As you see, Mr President, this document most certainly does not authorize  
2 Mr Carreyó to intervene in the name of the Panamanian Government in the case of  
3 *M/V Norstar* as such, as the fax which Mr Carreyó sent to Italy says. Coming back to  
4 the words of the ILC, the document does not show that Mr Carreyó in any way acted  
5 under the direction, instigation or control of Panama.<sup>15</sup>  
6

7 The document simply restricts itself to authorizing him to litigate on behalf of  
8 Panama, clearly within the exclusive limits of prompt release proceedings within the  
9 meaning of article 292 of the Convention.

10  
11 Mr President, as I have just shown, this authorization to litigate could not also give  
12 Mr Carreyó the authorization to represent Panama in diplomatic dealings with Italy,  
13 that is to say, the only level on which any dispute could arise between the two  
14 Parties.

15  
16 In the light of this correspondence, there are two subsequent and even more  
17 astonishing points which arise and serve further to justify the non-response of any  
18 kind on the part of the representatives of the Italian Government.

19  
20 First, the intention to instigate prompt release proceedings was sent to a State which  
21 had not seized the vessel and which therefore had no authority to detain the vessel  
22 in any way at all.

23  
24 Secondly, and in addition, at the moment when this communication was sent, on  
25 31 August 2004, this authorization, given four years previously, had already become  
26 moot – regarding Italy, at any rate. Indeed, despite Mr Carreyó's repeated assertions  
27 that prompt release proceedings were about to be instigated, no such proceedings  
28 were ever initiated in fact. In the meantime, on 14 March 2003, the Savona Criminal  
29 Court issued a ruling ordering the *Norstar* to be released from detention<sup>16</sup> since the  
30 vessel was not in Italian waters, neither internal nor territorial; four days later, on  
31 18 March 2003, the Italian judge communicated this ruling to the Spanish  
32 authorities.<sup>17</sup>  
33

34 Mr President, it was thus not until summer 2004 that Italy became aware that in  
35 December 2000, that is to say four years earlier, Mr Carreyó had been authorized by  
36 the Panamanian Government to start prompt release proceedings against Italy  
37 before this Tribunal<sup>18</sup> – four years down the road! In addition, it seemed completely  
38 obvious to the Italian officials that there was no justification for any such procedure  
39 against Italy because Italy did not have any restrictive power over the vessel in  
40 question.

41  
42 In addition, it has to be borne in mind that the Panamanian Government did not  
43 trouble to inform the Italian Government of the authorization in question until almost  
44 four years later. In any case, by that time the power to litigate through a prompt  
45 release procedure had become entirely moot.

---

<sup>15</sup> See above (footnote 12).

<sup>16</sup> Judgment by the Tribunal of Savona, 13 March 2003 (Preliminary Objections, Annex B).

<sup>17</sup> Communication to the Spanish Authorities of the judgment of 13 March 2003, 18 March 2003 (Preliminary Objections, Annex I).

<sup>18</sup> Fax sent by Mr Carreyó (footnote 11); Document of full powers (footnote 14).

1  
2 Mr President, it is very difficult indeed to imagine that there could be any  
3 international obligation of due diligence obliging Italian officials to recognize for four  
4 whole years information which had not been communicated to them and was also  
5 not in the public domain.  
6

7 Far from it, Mr President; one may in fact wonder whether it was not incumbent on  
8 the Government of Panama to give prompt information to Italy regarding any power  
9 to litigate which it had granted Mr Carreyó and which could have any impact on Italy.  
10 This at least would serve to validate his claimed status of State official, and allow  
11 Italy to be able to contest its non-recognition in the proper manner. Be that as it may,  
12 Mr President, if Panama had adopted a different attitude it would not have actually  
13 changed anything since it was exclusively a matter of having the power to litigate in  
14 prompt release proceedings which were never initiated anyway.  
15

16 Mr President, Members of the Tribunal, it is thus very clear that until 31 August 2004  
17 Mr Carreyó could not represent the wishes of the Panamanian Government in its  
18 diplomatic relations with Italy. It is even more evident that until that date any claims  
19 that Panama was entitled to a response from Italy are completely unfounded.  
20

21 Mr President, I would now like to move on to show how we reached the same  
22 conclusions regarding the communications sent in the following years until the date  
23 of Panama's Application on 17 December 2015.  
24

25 First of all, I would point out that on this date, 31 August 2004, which is the date on  
26 which Mr Carreyó sent the fax which I mentioned a moment ago, Italy received for  
27 the first time a communication from the Government of Panama with similar content  
28 to the one Mr Carreyó had sent.<sup>19</sup> This is note verbale AJ 2227, which you can find in  
29 your folders under tab 4, page 3. The same considerations which I have just put  
30 forward regarding Mr Carreyó's fax of the same date and its attachment apply  
31 broadly speaking to this note verbale.  
32

33 As you will find in the second paragraph of this letter, once again there is a reference  
34 to an authorization to litigate in prompt release proceedings which had become out  
35 of date anyway. In the third and fourth paragraphs, this letter indicates that it is  
36 sending to the Italian Government a letter from Mr Carreyó, dated 3 August 2004  
37 and duly certified and apostilled. This is a curious way of proceeding and you might  
38 wonder who is representing whom in this case: public or private? Which way round is  
39 it?  
40

41 This puzzlement is caused all the more by the condition set out by the International  
42 Law Commission, according to which the action of an individual is attributed to a  
43 particular government only if the individual is acting, in the words of the Commission,  
44

45 under the direction, instigation or control of the organs of government.<sup>20</sup>  
46

47 You will find the letter in question at tab 3, page 7, of your folders.

---

<sup>19</sup> Note Verbale A.J. No. 2227 sent by the Ministry of Foreign Affairs of Panama to Italy, 31 August 2004 (Preliminary Objections, Annex M).

<sup>20</sup> See above (footnote 12).

1  
2 In this letter you will see, for the first and last time in the correspondence in question,  
3 a reference to article 283 of the Convention. I will come on to that in a moment.

4  
5 Aside from this formal reference to the provision in question, there is no mention of  
6 the Convention's provisions which would give rise to the material rights which Italy  
7 claims have been violated and which are mentioned in Panama's Application.

8  
9 Before coming back to the other alleged Panamanian communications, Mr President,  
10 I would like to draw your attention to the closing words of the letter dated 3 August  
11 2004.

12  
13 The Government of Italy will understand that failing to respond to the demand  
14 of the Government of Panama by August 30th 2004 Panama will have no other  
15 choice than to submit the dispute to arbitration in accordance with Annex VII  
16 of the United Nations Convention on the Law of the Sea.<sup>21</sup>

17  
18 Mr President, Members of the Tribunal, it is difficult to assess the legal effects of a  
19 communication which sets a deadline which had already expired at the date on  
20 which it was sent. Italy received this communication on 31 August and the deadline it  
21 sets out is 30 August, two days before Italy was informed of the deadline.

22  
23 It is quite possible that my honourable opponents believe that Panama was moved  
24 by a desire to frankly and fully exchange views, as they have said in their written  
25 submissions.

26  
27 It would seem, however, that this desire was not very strong or that the exchange of  
28 views they envisaged was not necessarily to be frank or full.<sup>22</sup>

29  
30 Panama's approach has rather been one of repeatedly and peremptorily demanding  
31 the payment of damages for which it is difficult to discern any legal justification in  
32 international law, and threatening at the same time to initiate litigation. You can see a  
33 number of quotes to that effect on the screen now.

34  
35 Mr President, this view is confirmed by the wording of the only communication from  
36 Panama before it filed its Application on 17 December 2015. I am referring to the  
37 note verbale dated 7 January 2005 from the Panamanian Ministry of Foreign  
38 Affairs.<sup>23</sup>

39  
40 In this communication, which you will find in your folders under tab 4, page 5, you  
41 can see a fairly terse mention of the fact that Mr Carreyó,

42  
43 *(Continued in English)*

44  
45 requested that procedural impulsion be given to the request submitted for  
46 consideration to the Government of the Republic of Italy.

---

<sup>21</sup> Letter of 3/6 August 2004 (footnote 11), pp. 1-2.

<sup>22</sup> Written Observations, para. 36.

<sup>23</sup> Note Verbale A.J. No. 97 sent by the Ministry of Foreign Affairs of Panama to Italy, 7 January 2005 (Reply, Annex M).

1  
2 *(Interpretation from French)* If we wish to attribute to Panama Mr Carreyó's letter of  
3 five years later – that is 17 April 2010, which you will find in your folders under tab 3,  
4 page 13 – aside from the problems of representation that I ran through a moment  
5 ago, you will note the wording at the beginning and end of the letter.

6  
7 This is how it starts:

8  
9 *(Continued in English)*

10  
11 The undersigned is honoured to inform that we have obtained the authorization  
12 from the Ministry from Foreign Affairs of the Republic of Panama, to start a  
13 legal action against the Republic of Italy, at the International Tribunal of the  
14 Sea [sic] in Hamburg, in order to obtain compensation for damages caused by  
15 the wrongful arrest of the *Norstar* in Palma de Majorca Port (Baleari, Spain).<sup>24</sup>

16  
17 *(Interpretation from French)* The letter in question ends in similar vein as follows:

18  
19 *(Continued in English)*

20  
21 The undersigned therefore respectfully requests that the Italian State, within a  
22 reasonable time decides [sic] if it will pay the damages caused by the illegal  
23 procedure adopted by its competent authorities. Were the above-mentioned  
24 not happen, the Republic of Panama will apply to the Hamburg Tribunal.<sup>25</sup>

25  
26 *(Interpretation from French)* Mr President, Honourable Members of the Tribunal, to  
27 summarize: over a 14-year time period from the first letter of 15 August 2001 until  
28 the date of the Application on 17 December 2015, Mr Carreyó and/or Panama sent  
29 communications, including those prior to 31 August 2004, that evidently concerned  
30 an issue in respect of which the allegedly representative nature of Panama was non-  
31 existent and was unknown to Italy.

32  
33 After this date, this allegedly representative nature remained highly controversial. In  
34 the first instance, in terms of power to litigate in prompt release proceedings that had  
35 no legal basis from the outset because Italy exercised no measures of restraint over  
36 the vessel and, in any case, it had become moot since March 2003, whereas the  
37 Italian judge had ruled that the vessel should be released.

38  
39 In the second instance all the communications regarding the alleged power of  
40 Mr Carreyó to litigate in the name of Panama as of 31 August 2004 either continued  
41 manifestly to refer to these fictitious proceedings, whether we speak of authorization  
42 to litigate in general or in respect of these proceedings.

43  
44 At all events, the perspective is still fictitious, since, as regards the facts, if we refer  
45 to authorization to litigate, this authorization can only refer to a release procedure  
46 because it is only that procedure in the Convention that can be initiated, either by the  
47 flag State or in its name.

48  

---

<sup>24</sup> Letter of Mr Carreyó to the Italian Minister of Foreign Affairs, 17 April 2010 (Reply, Annex K), p. 1.

<sup>25</sup> *Ibid.*, p. 2.

1 Mr President, I would like to return briefly to the document annexed to the  
2 observations of Panama, Annex 6, entitled “Petition by Dr Nelson Carreyó”, dated  
3 23 August 2004.<sup>26</sup> It can be found under tab 7 of your folders.

4  
5 Aside from the fact that in this document no mention is made of any declaration of  
6 acceptance of the jurisdiction of this Tribunal, as announced, one is bound to note  
7 that it is a request for the transmission of documents made by Mr Carreyó

8  
9 *(Continued in English)*

10  
11 In his own name and on behalf of Intermarine & Co. ACE, a Norwegian  
12 Corporation.<sup>27</sup>

13  
14 *(Interpretation from French)* It is clear from this document, and in the two diplomatic  
15 communications of Panama, that there is confusion regarding the role of the  
16 Panamanian Government in this case, notably as to the question, if, up until the date  
17 of the Application, it acted (a) as a subject with the authority to initiate prompt  
18 release proceedings in its name; (b) as an instrument for transmitting to Italy a  
19 private communication; or (c) a State acting in order to obtain reparation of the  
20 damage caused through an internationally wrongful act allegedly ascribed to Italy.

21  
22 Mr President, allow me to repeat my refrain once again. We cannot confuse the  
23 power to litigate on behalf of a State with that of representing it in its diplomatic  
24 relations.

25  
26 Finally, it has to be pointed out once again that, aside from the aspects regarding the  
27 representative powers of Mr Carreyó, all these communications announced the  
28 triggering of international judicial proceedings, having as their subject behaviour  
29 attributable to a State that was manifestly not Italy.

30  
31 For all these reasons, Mr President, no reaction to these communications was  
32 required from Italy. Even if we follow the same rationale of the dictum in the  
33 abovementioned *Georgia v. Russian Federation* case,<sup>28</sup> the absence of a reply from  
34 Italy cannot be considered a factor constituting a dispute between the Parties in the  
35 present case.

36  
37 In accordance with article 286 of the Convention, it is necessary that there be a  
38 “dispute on the interpretation or application of the Convention”. It is true that, in the  
39 written Application, Panama referred to a plethora of provisions of the Convention.

40  
41 However, as the ICJ recalled,

42  
43 according to its settled jurisprudence, its jurisdiction must be determined at the  
44 time that the act instituting proceedings was filed.<sup>29</sup>

45  

---

<sup>26</sup> Written Observations, Annex 6.

<sup>27</sup> *Ibid.*, p. 1.

<sup>28</sup> See above, para. 15.

<sup>29</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 12, para. 26.

1 Panama, before filing its Application, had not submitted to Italy the claims with which  
2 this Tribunal has just been invested.

3  
4 This also stems, first, from the same arguments that I have just illustrated, according  
5 to which the letters of Mr Carreyó could not be ascribed to the Panamanian  
6 Government.

7  
8 Secondly, it has to be pointed out that in the same letters no reference is made to  
9 the provisions of the Convention invoked by Panama in its Application. If we were to  
10 find implicitly reference to the rights protected by the Convention, these rights have  
11 no veritable link with the present facts.

12  
13 It is not enough, Mr President, for the Applicant to refer to a certain number of the  
14 provisions of the Convention when he files his application to obtain the jurisdiction  
15 *ratione materiae* of the Tribunal. This would run counter to established jurisprudence  
16 concerning the condition of the objectivity of determining the jurisdiction of the  
17 international judicial body that I mentioned at the beginning of my pleading.<sup>30</sup>

18  
19 In its written application, Italy has already addressed the non-relevance of the rights  
20 invoked by Panama in its Application supporting its challenge to the jurisdiction of  
21 the Tribunal.<sup>31</sup> My colleague, Professor Ida Caracciolo, will return to this in due  
22 course, also as part of the argument concerning the lack of admissibility of the  
23 Panamanian Application.

24  
25 Mr President, in the *M/V "Louisa" Case* this Tribunal claimed:

26  
27 To enable the Tribunal to determine whether it has jurisdiction, it must  
28 establish a link between the facts advanced by Saint Vincent and the  
29 Grenadines and the provisions of the Convention referred to by it and show  
30 that such provisions can sustain the ... claims submitted by Saint Vincent and  
31 the Grenadines.<sup>32</sup>

32  
33 For the purposes of the present case, I would like to draw your attention to the fact  
34 that in the so-called "Panamanian communications" we find on several occasions  
35 only a claim for the payment of damages that is completely unfounded in law in  
36 respect of the Convention.

37  
38 Mr President, I will immediately illustrate the manifest nature of this circumstance  
39 whose obviousness will easily lead the Tribunal to the conclusion that it cannot rule  
40 on the substance of this case as part of these preliminary proceedings.

41  
42 In fact the only allusion to a rule or principle of international substantive law that we  
43 find in the correspondence of Mr Carreyó is that it has as its principle freedom to  
44 trade.<sup>33</sup>

---

<sup>30</sup> See above, paras. 11-15.

<sup>31</sup> Preliminary Objections, para. 19; Reply, paras. 28-49.

<sup>32</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, at p. 32, para. 99.

<sup>33</sup> Letter of 7 January 2002 (footnote 11), p. 2; Letter of 3/6 August 2004 (footnote 11), p. 2; Letter of 17 April 2010 (footnote 24), p. 2.

1  
2 Mr President, none of the provisions invoked by Mr Carreyó or Panama explicitly  
3 refers to such a freedom. All the same, one might consider that by invoking this  
4 freedom, Mr Carreyó planned to refer to the freedom of navigation mentioned in  
5 article 87 of the Convention.  
6

7 But in that case, once again, your jurisprudence comes to our aid in order to indicate  
8 in a manifest manner the non-relevance *ratione loci* of the principle of the freedom of  
9 navigation in the present case. Notably, in the *M/V "Louisa" Case* this Tribunal  
10 formed a clear and precise determination on the non-application of the principle of  
11 freedom of navigation regarding the situation of detention of a vessel. The passage  
12 in question is projected on the screen and is to be found in tab 6 of your folder.  
13

14 It is not disputed that the M/V "Louisa" was detained when it was docked in a  
15 Spanish port. Article 87 cannot be interpreted in such a way as to grant the  
16 M/V "Louisa" a right to leave the port and gain access to the high seas  
17 notwithstanding its detention in the context of legal proceedings against it.<sup>34</sup>  
18

19 Mr President, it is difficult to consider a case to which this passage would better  
20 apply than the case that you have before you today.  
21

22 All the considerations that I have just illustrated would lead us to conclude that there  
23 is only one claim in the Application of Panama that we can find in the so-called  
24 Panamanian correspondence, and this is the claim for payment of damages for the  
25 detention of the *Norstar* vessel.  
26

27 There emerges from the general nature of the internal legal orders, including those  
28 of Italy and Panama,<sup>35</sup> a well-established legal principle according to which the  
29 obligation to compensate as part of reparation depends on a causal link between the  
30 damage which is the subject of a claim for reparation and the commission of the  
31 wrongful act that triggers such an obligation.<sup>36</sup>  
32

33 In international law this principle finds jurisprudential recognition in one of the most  
34 widely cited passages in the case of the PCIJ in the *Factory at Chorzów* case:  
35

36 The essential principle contained in the actual notion of an illegal act [...] is that  
37 reparation must, as far as possible, wipe out all the consequences of the illegal  
38 act.<sup>37</sup>  
39

40 Although this passage is usually quoted in relation to the content of the reparation, it  
41 is of interest here in that it requires the existence of a wrongful act as a condition that  
42 generates a right to reparation.  
43

---

<sup>34</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, at pp. 35-36, para. 109.

<sup>35</sup> See Italian Civil Code, article 2043; Panamanian Civil Code, article 1644.

<sup>36</sup> See Italian Civil Code, article 2043; Panamanian Civil Code, article 1644-A.

<sup>37</sup> *Factory at Chorzów (Germany v. Poland)*, Merits, Judgment, P.C.I.J. Reports, Series A, No. 17, p. 47.

1 The same principle was codified by the International Law Commission in article 31  
2 on the responsibility of States:

3  
4 The responsible State is under an obligation to make full reparation for the  
5 injury caused by the internationally wrongful act.<sup>38</sup>  
6

7 Mr President, it stems from the considerations that I have just illustrated on the  
8 non-relevance of the rights invoked by Panama regarding the present case that there  
9 is absolutely no causal link between the damage of which Panama is complaining  
10 and an internationally wrongful act of the type invoked in its Application.  
11

12 For all these reasons, Mr President, Italy respectfully submits that the Tribunal does  
13 not have jurisdiction to address the Application filed by Panama on 17 December  
14 2015 because on that date there was no dispute regarding the issues that are raised  
15 therein.  
16

17 Mr President, I would now like to illustrate the second reason why Italy claims that  
18 this Tribunal cannot validly address the Application submitted to it, notably the fact  
19 that Panama did not acquit itself of the duty provided for in article 283 of the  
20 Convention, and therefore cannot seize the Tribunal.  
21

22 Mr President, with your agreement I will not cite its content, which is reproduced in  
23 my written submission. I will just highlight, as article 283 did, that first it requires that  
24 the obligation in question, that of proceeding to an exchange of views, arises after  
25 the occurrence of a dispute. Consequently, this preliminary objection is raised by  
26 Italy as a secondary measure, on condition that this Tribunal, contrary to the Italian  
27 arguments, concludes that a dispute in fact occurred between Panama and Italy.  
28

29 Secondly, it emerges from the same provision that the obligation in question applies  
30 in the first instance to the Applicant, who must take the initiative.  
31

32 We are fully cognisant that there cannot be an exchange if there are not two parties  
33 between whom such an exchange can take place. It takes two to tango. In this  
34 regard we duly considered the grievance put forward by Panama in its observations,  
35 according to which Italy (*Continued in English*)  
36

37 has used silence to prevent Panama from fulfilling its desire to frankly and fully  
38 exchange views.<sup>39</sup>  
39

40 (*Interpretation from French*) Mr President, we will demonstrate that Panama in no  
41 way pursued a desire to have either a full or a genuine exchange of views with Italy.  
42

43 At the same time, because the precondition in question is inextricably linked to the  
44 requirement relating to the non-existence of a dispute, I will address this complaint  
45 by Panama by referring, once again, to the dictum of the International Court of  
46 Justice in *Georgia v. Russian Federation*, according to which  
47

---

<sup>38</sup> Draft Articles (footnote 15), p. 97.

<sup>39</sup> Written Observations, para. 36.

1 the existence of a dispute may be inferred from the failure of a State to respond  
2 [...] where a response is called for.<sup>40</sup>

3  
4 Mr President, once again I will show that such a reaction from Italy was not called  
5 for.

6  
7 Our first argument is linked to the argument already expounded relating to the non-  
8 attribution to Panama of the communications from Mr Carreyó. Just as he was not  
9 entitled to act on behalf of the Panamanian State in order to create a disagreement  
10 between the two States, he was also unable himself to proceed to an  
11 intergovernmental exchange of views with Italy on behalf of Panama.

12  
13 Mr President, with your permission, I will simply refer you to our arguments on the  
14 lack of representativeness which I have just demonstrated and which you will also  
15 find in our written statement.

16  
17 Our second argument relates, once again, to the fact that the communications in  
18 question, even if they were attributed to Panama, do not give rise to any of the rights  
19 invoked in the Application. Above all, and manifestly, none of those rights is really  
20 connected to the present case. Even though this argument is also linked to our  
21 earlier statements demonstrating the non-existence of a dispute, I will show its  
22 relevance regarding the objection in relation to article 283.

23  
24 As was stated in the *Mavrommatis* case:

25  
26 before a dispute can be made the subject of an action at law, its subject matter  
27 should have been clearly defined by means of diplomatic negotiations.<sup>41</sup>

28  
29 Although the wording of article 283 indicates that the subject matter of the exchange  
30 of views required must concern only the means of settlement of the dispute, very  
31 recently the arbitral tribunal in the case of *Philippines v. China* affirmed that

32  
33 [p]roposals on the mode of settlement will necessarily involve some discussion  
34 of substance. The Convention must be applied with this reality in mind.<sup>42</sup>

35  
36 In fact, as was stressed by the tribunal in the *Chagos* case

37  
38 Article 283 requires that a dispute have arisen with sufficient clarity that the  
39 Parties were aware of the issues in respect of which they disagreed.<sup>43</sup>

40  
41 Mr President, we are certainly not claiming that it is necessary for the Parties to  
42 engage in negotiations on the substance of their disagreement. In fact, as the  
43 Tribunal stated in the "*Arctic Sunrise*" case:

44  

---

<sup>40</sup> See above (footnote 7).

<sup>41</sup> *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, *Jurisdiction*, *P.C.I.J. Reports*,  
*Series A*, No. 2, p. 15.

<sup>42</sup> *The Republic of Philippines v. The People's Republic of China*, *PCA Case No. 2013-19, Preliminary  
Objections, Judgment*, p. 115, para. 332.

<sup>43</sup> *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, *Judgment*, *PCA Case  
No. 2011-03*, p. 149, para. 382.

1 article 238(1) does not require the Parties to engage in negotiations regarding  
2 the subject matter of the dispute.<sup>44</sup>  
3

4 What we are asserting here, Mr President, is that, before presenting its application  
5 instituting proceedings, the applicant State must present the subject matter of its  
6 claims sufficiently to determine the outlines of its dispute and its relevance to the  
7 Convention.  
8

9 Mr President, Italy maintains that it is only once this common-sense condition, which  
10 is based on good faith and on law, has been met that a reaction must be given by  
11 the respondent.  
12

13 Even though there is an express reference in the so-called Panamanian  
14 communications<sup>45</sup> to article 283 – as we have just shown a moment ago – in that  
15 correspondence there is no real proposal for consultation providing a sufficient  
16 indication of the outlines of the alleged dispute having a genuine link with the  
17 Convention. Nothing in that correspondence could give Italy the sense that it could  
18 be a genuine dispute between States Parties regarding the interpretation and  
19 application of the Convention.  
20

21 It should also be noted, Mr President, how the communications in question simply  
22 peremptorily reiterate and restate a claim for damages, together with a threat to  
23 initiate legal proceedings. Mr President, with your permission, I will once again refer  
24 you to the collection of relevant passages shown here on the screen.  
25

26 The letter from Mr Carreyó is to be found at tab 3 of your folder, while the  
27 communications from Panama are at tab 4 in your folder.  
28

29 Such an attitude runs counter to the logic of article 238, as was certainly noted by  
30 Judge Anderson. This logic is not that of “announcing an intention to have recourse  
31 to litigation”.<sup>46</sup>  
32

33 Finally, Mr President, our third argument demonstrating that Panama has not met the  
34 condition in question concerns the framework and the temporal links between the  
35 correspondence of allegedly Panamanian provenance. This argument is without  
36 prejudice to the conditions on extinctive prescription that will be presented in due  
37 course by my colleague Paolo Busco.  
38

39 In its observations Panama presented a list of communications numbered 1–7 in a  
40 narrative of about two pages, from paragraph 19 to 32. It is a narrative that could be  
41 presented in seven minutes but in actual fact the seven communications are spread  
42 over a 15-year time period. What is more, it should be noted that the last of these  
43 communications, that of 7 January 2005, dates back ten years before the filing of the  
44 Application. If we were to attribute the communications from Mr Carreyó to Panama,

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<sup>44</sup> *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, *Merits, Judgment*, p. 34, para. 151.

<sup>45</sup> Letter of 3/6 August (footnote 11).

<sup>46</sup> David Anderson, “Article 283 of the United Nations Convention on the Law of the Sea”, in Ndiaye, Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff 2007), p. 848, at p. 858.

1 its last communication would still date back to 17 April 2010, five years prior to the  
2 filing of the Application.

3  
4 It is obvious that the fragmented nature of the correspondence in question, spread  
5 over such a long time period, runs counter to the logic of another aspect of  
6 article 238. It is an aspect well expressed by Professor Nordquist, who considers this  
7 rule a source of “a continuing obligation applicable at every stage of the dispute”.<sup>47</sup>  
8

9 If Panama really thought that when it filed its Application there existed a dispute with  
10 Italy, it really does seem very strange to us, Mr President, that over the ten previous  
11 years, or even five, Panama did not seek to proceed to hold consultations with Italy  
12 in an appropriate manner through its diplomatic representatives.  
13

14 For all these reasons, Mr President, Italy respectfully submits that the Tribunal does  
15 not have jurisdiction to determine Panama’s Application because Panama has not  
16 fulfilled its duty to proceed to an exchange of views with Italy regarding the alleged  
17 dispute in the present case.  
18

19 Mr President, honourable Judges, I come now to the end of my statement, which  
20 seeks to demonstrate that this august Tribunal cannot exercise its jurisdiction in the  
21 present case due to the non-existence of a dispute between the Parties and because  
22 Panama has not fulfilled the condition set out in article 283 of the Convention.  
23

24 Thank you for your attention. With your permission, I will deliver the final part of my  
25 presentation after the break. Thank you.  
26

27 **THE PRESIDENT:** Thank you, Mr Tanzi. We have now reached the time when the  
28 Tribunal will withdraw for a break of 30 minutes. We will resume at 12 o’clock.  
29

30 (Break)  
31

32 **THE PRESIDENT:** Mr Tanzi, I invite you to continue your presentation.  
33

34 **MR TANZI:** Mr President, thank you for giving me the floor.  
35

36 Mr President, Members of the Tribunal, my submissions on the lack of jurisdiction  
37 *ratione personae* of this Tribunal will be divided into three parts. I wish to emphasize  
38 from the outset that each of these three objections is alone sufficient to establish the  
39 lack of jurisdiction of this Tribunal.  
40

41 In the first part, I will contend that the order for seizure of the *M/V Norstar* issued by  
42 the Tribunal of Savona on 11 August 1998 does not amount *per se* to an  
43 internationally wrongful conduct. In that respect, I will also stress and elaborate on  
44 the fact that Panama, in order to ground its claim for damages, is actually targeting  
45 conduct that is different from the order for seizure, namely the actual arrest and  
46 detention of the *M/V Norstar*. For these reasons alone, the Tribunal lacks jurisdiction  
47 *ratione personae*.

---

<sup>47</sup> Nordquist, Rosenne, Sohn (eds.), *United Nations Convention on the Law of the Sea. A Commentary*, Vol. V (Martinus Nijhoff 1989), p. 29, para. 283.3.

1  
2 In the second part, I will concentrate on the attribution of the arrest and detention of  
3 the *M/V Norstar* under international law, and I will demonstrate that such conduct is  
4 exclusively attributable to a State other than Italy.  
5

6 Lastly, in the third part of my presentation I will address the role of Spain in the  
7 present dispute. I will demonstrate that the “indispensable party” principle applies to  
8 the present case and that, accordingly, this Tribunal may not exercise its jurisdiction  
9 over Panama’s Application without Spain being a party to these proceedings.  
10

11 Before I come to my legal arguments, Mr President, allow me briefly to highlight two  
12 circumstances that are of essential importance in setting out the factual background  
13 to the case before you.  
14

15 First, on 24 September 1998, the Panamanian-flagged vessel *M/V Norstar* was  
16 arrested by Spanish authorities while it was anchored in the Palma de Mallorca Bay.  
17 The Palma de Mallorca Bay is part of Spanish internal waters, i.e. within the Spanish  
18 exclusive jurisdiction, not the Italian one. This matter of fact is uncontroversial as it  
19 was plainly recognized by Panama in its Application.<sup>48</sup> It is also not in dispute that  
20 the *M/V Norstar* has been “detained” in Spanish internal waters, without ever  
21 entering Italian waters since its arrest.  
22

23 Second, while Italy has never exercised any enforcement over the *M/V Norstar*, it is  
24 also to be recalled that on 13 March 2003 the Tribunal of Savona revoked the  
25 seizure of the *M/V Norstar*. Such a decision was communicated to the Spanish  
26 authorities on 18 March 2003.<sup>49</sup> In line with this, on 13 November 2006 the Court of  
27 Appeal of Genoa answered a request by the Spanish authorities, dated 6 September  
28 2006, concerning instructions with regard to the possibility of demolishing the  
29 *M/V Norstar*,<sup>50</sup> stating that it was not entitled to decide on the matter.<sup>51</sup> The relevant  
30 documents were attached to Italy’s Preliminary Objections and their Reply.  
31

32 Mr President, Members of the Tribunal, let me now turn to the first part of this  
33 presentation, where our main argument is that the order for seizure in question does  
34 not amount *per se* to conduct in breach of an international obligation.  
35

36 Even assuming that the Italian judicial decision in question may have been  
37 inconsistent with international law, Italy maintains that such conduct alone is not  
38 sufficient to actualize an internationally wrongful act. As stated by the International  
39 Court of Justice in its *dictum* in the *Gabčíkovo-Nagymaros* case,  
40

41 [a] wrongful act or offence is frequently preceded by preparatory actions which  
42 are not to be confused with the act or offence itself. It is as well to distinguish  
43 between the actual commission of a wrongful act ... and the conduct prior to

---

<sup>48</sup> Application, para. 5.

<sup>49</sup> Communication to the Spanish Authorities of the judgment of 13 March 2003, 18 March 2003 (Reply, Annex J).

<sup>50</sup> Response by the Court of Appeal of Genoa to the request of the Spanish Authorities to demolish the *M/V Norstar*, 13 November 2006 (Preliminary Objections, Annex O).

<sup>51</sup> *Ibid.*

1 that act which is of a preparatory character and which “does not qualify as a  
2 wrongful act”.<sup>52</sup>  
3

4 Mr President, this is precisely the legal situation which applies to the order for  
5 seizure in question.  
6

7 Now, even considering *in arguendo* that the arrest of the *M/V Norstar* was in breach  
8 of an international obligation, the Italian court’s order could only be deemed as  
9 “preparatory”, if at all, with respect to such putative wrongful conduct. Consequently,  
10 the order for seizure cannot ground Panama’s claim for it involves no internationally  
11 wrongful conduct.  
12

13 Mr President, Panama itself seems to be aware of the fact that the order for seizure  
14 alone cannot constitute an internationally wrongful act, insofar as its claim targets  
15 only the arrest and detention of the *M/V Norstar*.  
16

17 It is well to recall that in paragraphs 1 and 3 of its Application, and in paragraphs 7,  
18 9, 47, 48 and 51 of its Observations, Panama claimed that the dispute concerns “the  
19 arrest and detention of the *M/V Norstar*”. In the clearest terms, Panama claimed to  
20 be seeking redress for the arrest and detention rather than the order for seizure. For  
21 ease of reference, relevant excerpts of the Applicant’s pleadings are reproduced in  
22 tab 11 of your folder.  
23

24 Mr President, in light of the above considerations, it appears that the order for  
25 seizure of the *M/V Norstar* was not the actual conduct making up the international  
26 wrong alleged in the present proceedings and, no less importantly, it is not even the  
27 conduct actually complained of by the claimant.  
28

29 Mr President, I shall now come to the second part of my presentation. Having just  
30 showed that the object of the claim by Panama is the arrest and detention of the  
31 *M/V Norstar*, I will now demonstrate that such conduct is not attributable to Italy and  
32 that, therefore, Italy is the improper respondent in the present proceedings.  
33

34 The international rules on the attribution of an internationally wrongful act are based  
35 on the *independent responsibility principle*. As put by the International Law  
36 Commission in its codification work on the subject, “each State is responsible for its  
37 own internationally wrongful conduct, i.e. for conduct attributable to it”.<sup>53</sup>  
38

39 Under the relevant part of article 4, paragraph 1, of the 2001 International Law  
40 Commission’s Articles on State Responsibility it is stated that:  
41

42 The conduct of any State organ shall be considered an act of that State under  
43 international law, whether the organ exercises legislative, executive, judicial or  
44 any other functions, whatever position it holds in the organization of the State,

---

<sup>52</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports* 1997, p. 7, at p. 54, para. 79; emphasis added.

<sup>53</sup> Articles on Responsibility of States for Internationally Wrongful Acts, in Yearbook of the International Law Commission, 2001, Volume II (Part Two), pp. 31 *et seq.*, at p. 64, para. 1 (“ASR”).

1 and whatever its character as an organ of the central Government or of a  
2 territorial unit of the State".<sup>54</sup>

3  
4 As emphasized by the Commission itself in a passage already quoted in my previous  
5 intervention for different purposes

6  
7 [T]he general rule is that the only conduct attributed to the State at the  
8 international level is that of its organs of government, or of others who have  
9 acted under the direction, instigation or control of those organs, i.e. as agents  
10 of the State.<sup>55</sup>

11  
12 Mr President, in the light of what I have just quoted, it is clear that the conduct of the  
13 Spanish authorities in arresting and detaining the *M/V Norstar* cannot be considered  
14 as performing acts that may be attributed to Italy under article 4 of the Articles on  
15 State Responsibility.

16  
17 As put by the ILC, the independent responsibility principle is subject to

18  
19 exceptional cases where one State is responsible for the internationally  
20 wrongful acts of another.<sup>56</sup>

21 Such exceptions have been codified in articles 5, 6 and 8 of the Articles on State  
22 Responsibility. Mr President, none of such exceptions applies to the instant case.

23  
24 Article 5, on conduct of persons or entities exercising elements of governmental  
25 authority, addresses the conduct of individuals or entities other than State organs.<sup>57</sup>  
26 Likewise, article 8, on conduct directed or controlled by a State, governs the  
27 attribution to a State of conduct carried out by private persons or entities.<sup>58</sup> Since the  
28 Spanish judiciary and enforcement officials are organs of a State, even though not  
29 Italy, it is manifest that those two provisions are immaterial to the instant case.

30  
31 Article 6 on conduct of organs placed at the disposal of a State by another State may  
32 seem more germane to the present case, but I will show that rather than grounding  
33 the attribution to Italy of the arrest and detention of the *M/V Norstar*, article 6  
34 substantiates precisely the contrary.

35  
36 Article 6 reads as follows:

37  
38 The conduct of an organ placed at the disposal of a State by another State  
39 shall be considered an act of the former State under international law if the  
40 organ is acting in the exercise of elements of the governmental authority of the  
41 State at whose disposal it is placed.<sup>59</sup>

42  
43 For the conduct of the organ of a State to be attributed to another State two  
44 conditions apply. As stated by the ILC in its commentary:

---

54 *Ibid.*, p. 40.

55 *Ibid.*, p. 38, para. 2.

56 *Ibid.*, p. 65, para. 8.

57 *Ibid.*, p. 42, para. 1.

58 *Ibid.*, p. 47, para. 1.

59 *Ibid.*, pp. 43-44.

1 [n]ot only must the organ be appointed to perform functions appertaining to  
2 the State at whose disposal it is placed, but in performing the functions  
3 entrusted to it by the beneficiary State, the organ must also act in conjunction  
4 with the machinery of that State and *under its exclusive direction and control,*  
5 *rather than on instructions from the sending State.*<sup>60</sup>  
6

7 Mr President, neither conditions are met in the present case.  
8

9 In light of the rule in question, it cannot possibly be contended that the Spanish  
10 authorities, when carrying out the arrest of the *M/V Norstar*, were acting as organs  
11 placed at the disposal of Italy.  
12

13 The fact that the arrest was carried out by Spain at the request of Italy within the  
14 framework of judicial cooperation under the 1959 Strasbourg Convention on Mutual  
15 Assistance in Criminal Matters does not change this assessment. Indeed, the rule  
16 under consideration on the attribution of conduct of organs placed at the disposal of  
17 a State by another State, as explicitly pointed out by the International Law  
18 Commission  
19

20 is not concerned with ordinary situations of inter-State cooperation or  
21 collaboration, pursuant to treaty or otherwise.<sup>61</sup>  
22

23 International case law illustrates the application of this rule precisely to the point in  
24 question. I may recall the *Xhavara* case.<sup>62</sup> There, as put by the ILC, the European  
25 Court of Human Rights decided that  
26

27 the conduct of Italy in policing illegal immigration at sea pursuant to an  
28 agreement with Albania was not attributable to Albania.<sup>63</sup>  
29

30 The *X and Y v. Switzerland* case before the European Commission of Human Rights  
31 adds to the authorities in the same direction.<sup>64</sup> In that case, the European  
32 Commission had been seised of a claim where the conduct complained of had been  
33 performed by Swiss organs on Liechtenstein's territory on the basis of a bilateral  
34 treaty on police cooperation between the two countries. The determination of the  
35 attribution to either country was key to the assessment of the jurisdiction over the  
36 case because Liechtenstein was not a party to the European Convention. Eventually,  
37 the Commission found that it should entertain the case attributing the conduct to  
38 Switzerland. In order to do so, the Commission found that, while the Swiss  
39 authorities were exercising  
40

41 their function on the basis of the treaty relationship between the two  
42 countries,<sup>65</sup>  
43

---

<sup>60</sup> *Ibid.*, p. 44, para. 2; emphasis added.

<sup>61</sup> ASR (footnote 53), p. 44, para. 2.

<sup>62</sup> *Xhavara and Others v. Italy and Albania*, Application No. 39473/98, 11 January 2001.

<sup>63</sup> ASR (footnote 53), p. 44, footnote 130.

<sup>64</sup> European Commission of Human Rights, *X and Y v. Switzerland*, Application Nos. 7289/75 and 7349/76, Decision, 14 July 1977, in *Yearbook of the European Commission of Human Rights*, 1978, p. 372.

<sup>65</sup> *Ibid.*, p. 402.

1 they were

2

3 not act[ing] in distinction from their national competence [... but] exclusively in  
4 conformity with Swiss law.<sup>66</sup>

5

6 Mr President, Members of the Tribunal, it appears from the authorities just referred to  
7 that a State organ may not be considered as having been placed at the disposal of  
8 another State when it has acted (a) in compliance with a treaty relationship; and (b)  
9 under the authority and laws of the State of which it is an organ. Both these  
10 circumstances apply to the instant case.

11

12 This is clear when one looks at the international framework under which the Italian  
13 judge requested the Spanish authorities to enforce the order for seizure that we are  
14 discussing today. As already alluded to, such legal framework is provided by the  
15 1959 Strasbourg Convention on Mutual Assistance in Criminal Matters<sup>67</sup>, which is  
16 binding upon Italy and Spain.

17

18 Mr President, I would like to draw your attention to some of its provisions that are of  
19 special interest in relation to the present case. You may find them in excerpt at  
20 tab 12 of your folder and they will also be displayed on the screen. They are,  
21 respectively, articles 2, 3 and 5.

22

23 Article 2 clearly provides that a Contracting Party is allowed to refuse to enforce a  
24 letter rogatory from another State Party when the request concerns a political or  
25 fiscal offence.<sup>68</sup>

26

27 Clearly, under the provision in question, Spain was free to enforce or refuse  
28 enforcement of the Italian request, as it concerned a fiscal offence.

29

30 Under article 5, a Contracting Party may reserve its ability to refuse the enforcement  
31 of a letter rogatory on a number of other grounds, which you can see on the screen  
32 and find in your folder at tab 12, page 5.<sup>69</sup> Indeed, Spain has availed itself of this  
33 opportunity to the fullest extent by making the following declaration, which can also  
34 be found on the screen, and at tab 12, page 7 of your folder. It reads as follows:

35

36 Spain reserves the right to make the execution of letters rogatory for search  
37 or seizure of property dependent on the following conditions: (a) that the  
38 offence motivating the letters rogatory is punishable under Spanish law; (b)  
39 that the offence motivating the letters rogatory is an extraditable offence under  
40 Spanish law; (c) that execution of the letters rogatory is consistent with  
41 Spanish law.<sup>70</sup>

42

43 Article 3 of the Convention in point is even more germane to the instant case:

---

<sup>66</sup> *Ibid.*, p. 406.

<sup>67</sup> European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959; entry into force: 12 June 1962).

<sup>68</sup> *Ibid.*, article 2(a).

<sup>69</sup> *Ibid.*, article 5.

<sup>70</sup> Spain's reservation is contained in the instrument of ratification deposited on 18 August 1982. The text of the reservation is available at [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030/declarations?p\\_auth=9PjGzN0s](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030/declarations?p_auth=9PjGzN0s) (visited on 19 August 2016).

1  
2 [t]he requested Party shall execute *in the manner provided for* by its law any  
3 letters rogatory relating to a criminal matter.<sup>71</sup>  
4

5 The provisions I have just quoted from the 1959 Strasbourg Convention clearly  
6 establish that the Spanish authorities, when arresting and detaining the *M/V Norstar*,  
7 were far from acting as organs placed at the disposal of Italy. They were far from  
8 acting, as put by the ILC, under “the exclusive direction and control”<sup>72</sup> of Italy and, as  
9 put by the European Commission of Human Rights, they were

10  
11 not act[ing] in distinction from their national competence [... but] exclusively in  
12 conformity with [Spanish] law.<sup>73</sup>  
13

14 On the basis of these considerations, Mr President, and with no inference  
15 whatsoever about the legality of the conduct in question attributable to Spain, it  
16 plainly appears that the Spanish judiciary, when performing the said conduct, was  
17 not an “organ placed at the disposal” of Italy under Article 6 of the Articles on State  
18 Responsibility.  
19

20 Mr President, in light of the quoted authorities and of the considerations just made, it  
21 results that the arrest and detention of the *M/V Norstar* cannot in any way be  
22 attributed to Italy. Therefore, the Panamanian claim is addressed to the wrong  
23 Respondent and this Tribunal should decline its jurisdiction.  
24

25 Mr President, Members of the Tribunal, each of the two foregoing objections is  
26 sufficient on its own to establish the Tribunal’s lack of jurisdiction, but I will now, in  
27 the last part of my speech, address a third objection. This third objection involves the  
28 application of the “indispensable party principle”.  
29

30 The “indispensable party principle” emerges from the ICJ case law as an established  
31 principle of general international law. As stated by the Court in the *Monetary Gold*  
32 Case,  
33

34 [w]here ... the vital issue to be settled concerns the international responsibility  
35 of a third State, [an international court or tribunal] cannot, without the consent  
36 of that third State, give a decision on that issue binding upon any State, either  
37 the third State, or any of the parties before it.<sup>74</sup>  
38

39 As put by Professor (now Judge) James Crawford, the principle in point reflects

40  
41 the importance of consent as the foundation for the exercise of the Court’s  
42 jurisdiction.<sup>75</sup>  
43

44 For an international court or tribunal to pass judgment over the legality of conduct

---

<sup>71</sup> European Convention (footnote 67), article 3(1).

<sup>72</sup> See above, footnote 60.

<sup>73</sup> See above, footnote 66.

<sup>74</sup> *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 19, at p. 33.

<sup>75</sup> Crawford, *State Responsibility: The General Part* (CUP 2013), p. 657.

1 attributable to a State which is not a party to the proceedings in question would flatly  
2 contradict this fundamental principle of international law.

3  
4 The ICJ applied and elaborated this principle in a number of cases, the second being  
5 the *East Timor* case. One of the passages most relevant to the present case is the  
6 one you may find in your folder at tab 14. It reads as follows:

7  
8 Australia's behaviour [could not] be assessed without first entering into the  
9 question why it [was] that Indonesia could not lawfully have concluded the  
10 1989 Treaty, while Portugal allegedly could have done so; the very subject-  
11 matter of the Court's decision would necessarily be a determination whether  
12 ... it could or could not have acquired the power to enter into treaties on behalf  
13 of East Timor relating to the resources of its continental shelf. The Court could  
14 not make such a determination in the absence of the consent of Indonesia.<sup>76</sup>

15  
16 Panama has by contrast relied on its Observations on the *Nauru* case in an attempt  
17 to demonstrate that the "indispensable party principle" does not apply to this case.

18  
19 However, it is helpful to set out the following passage from that decision in order to  
20 see clearly why the "indispensable party principle" was actually applied in *Nauru*,  
21 even though it was applied to the effect that under the factual circumstances of that  
22 case, it did not prevent the Court from exercising its jurisdiction. In that case, where  
23 Australia had jointly administered Nauru alongside New Zealand and the United  
24 Kingdom, the Court stated as follows:

25  
26 the interests of New Zealand and the United Kingdom do not constitute *the*  
27 *very subject-matter of the judgment* to be rendered on the merits of Nauru's  
28 Application and the situation is in that respect different from that with which  
29 the Court had to deal in the *Monetary Gold* case. In the latter case, the  
30 determination of Albania's responsibility was a *prerequisite* for a decision to  
31 be taken on Italy's claims. In the present case, the determination of the  
32 responsibility of New Zealand or the United Kingdom *is not a prerequisite* for  
33 the determination of the responsibility of Australia, the only object of Nauru's  
34 claim.<sup>77</sup>

35  
36 By the same reasoning, had the interests of New Zealand and the United Kingdom  
37 constituted the very subject matter of the requested judgment, the Court would  
38 clearly have applied the same principle to the effect of preventing the exercise of its  
39 jurisdiction.

40  
41 Mr President, Members of the Tribunal, I will now illustrate, by reference to these  
42 authorities, how the "indispensable party principle" prevents this Tribunal from  
43 exercising its jurisdiction in the present case. To that end, I would like to draw your  
44 attention, once again, to its basic factual background.

45  
46 Although Italy made the order for seizure of the *M/V Norstar*, it is Spain, and Spain  
47 alone, that has arrested and detained the *M/V Norstar*. It is this arrest and detention  
48 that is the focus of Panama's claim before this Tribunal, and this arrest and

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<sup>76</sup> *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 28.

<sup>77</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at p. 261, para. 55.

1 detention, having been carried out solely by Spain, does not involve the kind of joint  
2 conduct between Italy and Spain as there was in *Nauru* between Australia, New  
3 Zealand and the United Kingdom. Spain's conduct is distinct from Italy's, and  
4 Panama has no claim without Spain's arrest and detention of the vessel. The latter  
5 conduct constitutes the very subject matter of the judgment that Panama asked this  
6 Tribunal to render.

7  
8 Against the backdrop of these facts, it is unquestionable that, to use the ICJ  
9 terminology, it is Spain's arrest and detention of the vessel that constitutes the very  
10 subject matter of the judgment that Panama asked this Tribunal to render.

11  
12 With those basic facts in mind, I would like to revert to the passage quoted a minute  
13 ago from the ICJ in *East Timor* and show its application to the present case. To that  
14 end, I will paraphrase the same passage in light of the factual background under  
15 consideration by placing Italy in the position of Australia and Spain in that of  
16 Indonesia. You may find the language of this paraphrasing in tab 14, page 2, of your  
17 folder.

18  
19 [Italy]'s behaviour cannot be assessed without first entering into the question  
20 why it is that [Spain] could not lawfully [arrest and detain the *M/V Norstar*]; the  
21 very subject-matter of the [Tribunal]'s decision would necessarily be a  
22 determination whether, having regard to the circumstances [relating to Spain's  
23 right to exercise enforcement jurisdiction over the *M/V Norstar*], it could or  
24 could not [arrest and detain the ship in accordance with UNCLOS]. The  
25 [Tribunal] could not make such a determination in the absence of the consent  
26 of [Spain].

27  
28 Mr President, to put it another way, and in the language of the ICJ in *Nauru*,  
29 determining Spain's responsibility for the arrest and detention of the *M/V Norstar* is a  
30 "prerequisite" for the determination of Italy's responsibility. Spain, in conclusion, is an  
31 "indispensable party", and this precludes the Tribunal from exercising its jurisdiction  
32 over this claim.

33  
34 The principle in question prevents the exercise of jurisdiction because the  
35 assessment of the legality of the order for seizure issued by Italy could not be made  
36 irrespective of the assessment of the legality of the arrest of the vessel in question  
37 by Spain, but the reverse is equally true, namely, this Tribunal's jurisdiction would  
38 likewise be prevented, by way of corollary, because the assessment of the legality of  
39 the order for seizure by Italy would *a fortiori* imply an assessment of the legality of its  
40 enforcement by Spain.

41  
42 This is corroborated by *East Timor* in a passage already quoted by Italy in its Reply:

43  
44 the Court could not rule on the lawfulness of the conduct of a State when its  
45 judgment would imply an evaluation of the lawfulness of the conduct of another  
46 State which is not a party to the case. Where this is so, the Court cannot act.<sup>78</sup>

47  
48 Mr President, this reasoning was confirmed in *Germany v. Italy*. There, the question  
49 was whether Italy was in breach of the international obligation on jurisdictional

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<sup>78</sup> *East Timor* (footnote 76), p. 102, para. 29.

1 immunity vis-à-vis Germany by enforcing judicial decisions rendered by the Greek  
2 judiciary.

3  
4 For the purposes of the present case, the Court highlighted that

5  
6 [I]t is unnecessary, in order to determine whether the Florence Court of Appeal  
7 violated Germany's jurisdictional immunity, to rule on the question of whether  
8 the decisions of the Greek courts did themselves violate that immunity –  
9 something ... which it could not do, since that would be to rule on the rights  
10 and obligations of a State, Greece, which does not have the status of party to  
11 the present proceedings.<sup>79</sup>

12  
13 The same principle has been recently confirmed in *Philippines v. China*.<sup>80</sup> Like in  
14 *Nauru*, the Tribunal applied the principle in question finding that it would not prevent  
15 the Tribunal's exercise of jurisdiction.

16  
17 However, it is useful to look at the reasoning followed by the Tribunal which  
18 corroborates the principle in point and its application to the instant case preventing  
19 the Tribunal's exercise of its jurisdiction:

20  
21 The present situation is different from the few cases in which an international  
22 court or tribunal has declined to proceed due to the absence of an  
23 indispensable third party, namely in *Monetary Gold Removed from Rome in*  
24 *1943* and *East Timor* before the International Court of Justice and in the  
25 *Larsen v. Hawaiian Kingdom* arbitration. In all of those cases, the rights of the  
26 third States (respectively Albania, Indonesia, and the United States of  
27 America) would not only have been affected by a decision in the case, but  
28 would have 'form[ed] the very subject-matter of the decision'. Additionally, in  
29 those cases the lawfulness of activities by the third States was in question,  
30 whereas here none of the Philippines' claims entail allegations of unlawful  
31 conduct by Vietnam or other third States.

32  
33 Clearly, Mr President, the position of Spain in the present proceedings is different  
34 from that of Vietnam in the just quoted case.

35  
36 Mr President, Members of the Tribunal, this ends my presentation and I thank you for  
37 your attention. The next speaker will be Professor Ida Caracciolo, and I would  
38 request that you invite her to the podium.

39  
40 **THE PRESIDENT:** Thank you, Mr Tanzi. I now invite Ms Caracciolo to make her  
41 statement.

42  
43 **MS CARACCILO:** Mr President, Members of the Tribunal, I am honoured to  
44 appear today before you, and to do so on behalf of my country, Italy.

45  

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<sup>79</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *I.C.J. Reports* 2012, p. 99, pp. 150-151, para. 127.

<sup>80</sup> *The Republic of Philippines v. The People's Republic of China*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, pp. 71-74, paras. 179-188; *The Republic of Philippines v. The People's Republic of China*, PCA Case No. 2013-19, Award, 12 July 2016, p. 60, para. 157.

1 My task is to address the issue of the inadmissibility of the claim of the Republic of  
2 Panama. In particular I shall assess that the claim by the Republic of Panama  
3 pertains predominantly – if not exclusively – to alleged “indirect violations” and that  
4 therefore it is inadmissible because the local remedies have not been exhausted.

5  
6 To that end, my submission will be divided in two parts. The first one will expound  
7 the manifest irrelevance and incoherence of the UNCLOS provisions relied upon in  
8 Panama’s Application with respect to the facts of the present case.

9  
10 The second part will deal with the written communications and the notes verbales  
11 sent respectively by Mr Carreyó and by Panama to Italy. Both the written  
12 communications and the notes verbales corroborate the preponderance of the  
13 “indirect” character of the injury invoked by Panama.

14  
15 Let me preliminarily maintain that all my considerations hereafter will be made with  
16 all due respect to the function of Mr Carreyó as the Agent of the Republic of  
17 Panama.

18  
19 Finally, by way of introduction, Mr President, Members of the Tribunal, I should  
20 stress that all of my arguments, as well as those put forward by my colleagues on  
21 the inadmissibility of the Panamanian claim, are advanced on a subsidiary basis and  
22 are without prejudice to Italy’s contentions concerning the lack of jurisdiction of the  
23 Tribunal over Panama’s Application.

24  
25 Mr President, Members of the Tribunal, I come now to the first part of my submission  
26 on the manifest irrelevance of the UNCLOS provisions relied upon by the Republic of  
27 Panama.

28  
29 This point is equally relevant in relation to the objection to jurisdiction due to the  
30 absence of a dispute between the Parties prior to the filing of the Application.  
31 Therefore my arguments on this matter should be considered as complementary to  
32 what has been said by Professor Tanzi, as well as in both our written pleadings. That  
33 is why Italy finds Panama’s Request of 16 August 2016 difficult to understand and  
34 totally unfounded, as Professor Tanzi has already underlined.

35  
36 I shall demonstrate that because all the articles of UNCLOS relied upon by Panama  
37 are *prima facie* manifestly irrelevant to the facts of the present case. Consequently  
38 there has been no breach of the UN Convention that could be attributed to the Italian  
39 Republic. Thus the claim cannot but be predominantly one of an espousal nature,  
40 pertaining to alleged indirect violations and seeking redress for the owner of the  
41 *M/V Norstar*.

42  
43 To that end I would like to briefly summarize the facts which Italy considers relevant  
44 to determine the irrelevance of the alleged provisions of UNCLOS on which the  
45 Panamanian claim is grounded.

46  
47 Mr President, Members of the Tribunal, at the basis of the instant case there is the  
48 seizure of the *M/V Norstar*, a Panamanian-flagged vessel, owned by Inter Marine &  
49 Co. AS, a Norwegian company. The latter and the *M/V Norstar* were managed by  
50 another company, Borgheim Shipping, also established in Norway. Inter Marine

1 chartered out, through Borgheim Shipping, the vessel to Normaritime Bunker  
2 Company, a Maltese company, which was *de facto* managed again by Borgheim  
3 Shipping.<sup>1</sup>

4  
5 The seizure was executed by the competent Spanish authority on 28 September  
6 1998 when the *M/V Norstar* was moored in the Spanish Bay of Palma de Mallorca,<sup>2</sup>  
7 following a request for judicial assistance from the Public Prosecutor at the Tribunal  
8 of Savona in accordance with the European Convention on Mutual Assistance in  
9 Criminal Matters of 1959.<sup>3</sup>

10  
11 The rationale of seizing the *M/V Norstar* was to acquire what was deemed to be a  
12 *corpus delicti* by the Public Prosecutor of Savona during criminal preliminary  
13 investigations on the alleged offences of criminal association aimed at smuggling  
14 mineral oils and tax fraud.

15  
16 The core of the conduct under scrutiny by the Italian prosecutorial authority  
17 consisted in the purchase of oil products as ship's stores in non-EU countries, in Italy  
18 and in other EU ports under a customs-free regime. These oil products were to be  
19 then used to refuel yachts and mega-yachts, included many registered in Italy.  
20 These yachts and mega-yachts subsequently introduced the fuel into the Italian  
21 territorial sea without making a declaration for customs purposes.<sup>4</sup>

22  
23 The *M/V Norstar* loaded marine gas oil on four occasions in the ports of Gibraltar,  
24 Livorno, Barcelona, and Livorno again. The loading operations at the Italian port of  
25 Livorno were carried out on 28 June 1997 and 12 August 1997. In particular  
26 Normaritime, through an Italian national, purchased and loaded on *M/V Norstar* at  
27 the port of Livorno marine gas oil totalling about 1,844,000 litres, exempt from taxes,  
28 as it was declared to be destined to the stores of that motor vessel.<sup>5</sup> This disputed  
29 trade was always brokered by an Italian Company, Rossmare International s.a.s,  
30 whose managing director was Italian as well.

31  
32 The preliminary investigations directed by the Public Prosecutor at the Tribunal of  
33 Savona started from a tax audit on Rossmare<sup>6</sup> and ended with the criminal  
34 prosecution of four Italian nationals and four foreign citizens (three Norwegians and  
35 one Maltese). With the judgment of 13 March 2003 the Court of Savona acquitted all  
36 the accused.<sup>7</sup> Notably, the same judgment also revoked the seizure the  
37 *M/V Norstar*.<sup>8</sup>

38  
39 Mr President, Members of the Tribunal, in view of the above factual narrative, I shall  
40 demonstrate the manifest irrelevance and incoherence of the UNCLOS provisions

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<sup>1</sup> International Letters Rogatory of the Tribunal of Savona to the Spanish Authority, 11 August 1998 (Preliminary Objections, Annex D (Confidential Annex), p. 3).

<sup>2</sup> *Ibid.*, p. 1.

<sup>3</sup> European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959; entry into force: 12 June 1962).

<sup>4</sup> Judgment by the Tribunal of Savona, 13 March 2003 (Preliminary Objections, Annex B (Confidential Annex); International Letters Rogatory, 11 August 1998 (footnote 1)).

<sup>5</sup> International Letters Rogatory, 11 August 1998 (footnote 1), p. 3.

<sup>6</sup> *Ibid.*, p. 2.

<sup>7</sup> Judgment by the Tribunal of Savona, 13 March 2003 (footnote 4).

<sup>8</sup> *Ibid.*

1 which, according to Panama's Application, were breached by Italy, namely  
2 articles 33, 73, paragraphs 3 and 4, 87, 111, 226 and 300 of the Convention.

3  
4 Article by article, I shall elaborate the argument already put forth in the Italian written  
5 pleadings that all the provisions mentioned are "totally inconsistent, both *ratione loci*  
6 and *ratione materiae* with respect to the seizure of the *M/V Norstar* [...]".<sup>9</sup>

7  
8 To begin with, the claim of the Republic of Panama grounded on article 33 of  
9 UNCLOS – which deals with the contiguous zone – is clearly *prima facie* misplaced.  
10 As well known, "[t]he contiguous zone may not extend beyond 24 nautical miles from  
11 the baselines from which the breadth of the territorial sea is measured".

12  
13 Therefore because the seizure of the *M/V Norstar* took place in the Spanish internal  
14 waters, when the vessel was moored at the Bay of Palma de Mallorca, the reference  
15 to article 33 made by Panama in the Application is manifestly irrelevant.

16  
17 As far as the alleged breach of article 73, paragraphs 3 and 4, is concerned, it is just  
18 worth recalling that this provision only refers to the arrest and the detention of  
19 vessels by coastal States in the course of ensuring compliance with the laws and  
20 regulations concerning the conservation and management of fish stocks in the  
21 exclusive economic zone.

22  
23 In the light of the contents of article 73, Italy does not see any relation between this  
24 provision and the present case *ratione loci* and *ratione materiae*.

25  
26 Firstly – and this point is not contested by Panama – the seizure of the Panamanian-  
27 flagged vessel was executed in the internal waters of Spain. Then clearly the event  
28 triggering the present case occurred outside the exclusive economic zone which  
29 notably is "[...] an area beyond and adjacent to the territorial sea".

30  
31 Secondly – and also this point is not disputed by Panama – the activities of  
32 bunkering in which the *M/V Norstar* was involved clearly did not concern fishing  
33 vessels but pleasure boats: yachts and mega-yachts.<sup>10</sup>

34  
35 As in the *M/V "Louisa" Case* – which is akin to the instant case<sup>11</sup> – the seizure of the  
36 *M/V Norstar* had no connection either with fishing activities or with laws and  
37 regulations on fishing. Indeed the Italian judiciary exercised its criminal jurisdiction  
38 with reference to conduct allegedly amounting to offences of criminal association  
39 aimed at smuggling mineral oils and tax fraud.

40  
41 Turning to article 87, it codifies the principle of the free use of the high seas for all  
42 States. This provision delineates a non-exhaustive list of freedoms of the high seas,  
43 among which the freedom of navigation stands out.

---

<sup>9</sup> Reply, para. 32.

<sup>10</sup> Judgment of the Tribunal of Savona, 13 March 2003 (footnote 4); International Letters Rogatory, 11 August 1998 (footnote 1), p. 3; and Judgment of the Court of Appeal of Genoa, 25 October 2005 (Preliminary Objections, Annex K).

<sup>11</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, at pp. 35-36, para. 104.

1 In accordance with article 86 of UNCLOS, the freedoms of the high seas  
2  
3 apply to all parts of the sea that are not included in the exclusive economic  
4 zone, in the territorial sea or in the internal waters of a State, [...].  
5

6 The Panamanian allegation must also be seen in the context that the entire  
7 Convention should be interpreted taking into consideration that it provides for  
8 different regimes depending on different maritime spaces.<sup>12</sup>  
9

10 Italy firmly considers that the freedom of navigation as established in UNCLOS  
11 cannot be interpreted to include a right to leave a port in order to have access to the  
12 high seas in all circumstances. Italy also definitely affirms that the freedom of  
13 navigation cannot be interpreted to include any immunity from the detention of a  
14 vessel in internal waters because of legal proceedings against it.<sup>13</sup>  
15

16 Then Italy strongly maintains that article 87 is – even *prima facie* – manifestly  
17 irrelevant *ratione loci* with regard to the instant case.  
18

19 Turning to article 111 of UNCLOS, this provision is also fully unrelated to the facts of  
20 the present case.  
21

22 In fact article 111 codifies a well-established customary rule under which a State has  
23 the right to pursue into the high seas and arrest a foreign vessel which has  
24 committed an offence within its internal waters, territorial sea and contiguous zone  
25 and which must come to an end when the vessel enters the territorial sea of her own  
26 State or of a third State.  
27

28 But no hot pursuit was put in place by the Italian authorities. The facts of this case  
29 are clear and not contested by the claimant State. The same facts are also  
30 confirmed in Panama’s Application wherein it is stated that the arrest of the  
31 *M/V Norstar* occurred.  
32

33 when the vessel was anchored at the Palma de Mallorca Bay waiting for orders  
34 under the running Charter Party.<sup>14</sup>  
35

36 Also the claim grounded in article 226 of UNCLOS is again obviously irrelevant  
37 *ratione materiae* in the present case.  
38

39 The article on the “Investigation of Foreign Vessels” is contained in Part XII of the  
40 Convention which provides for a legal regime on *The Protection and Preservation of*  
41 *the Marine Environment*. Specifically article 226 copes with investigations of foreign  
42 vessels for violation of internal or international rules and standards on the protection  
43 of the marine environment.  
44

45 Thus, this provision is very specific in scope, not only because it is confined to the  
46 protection of marine environment but also because its purpose is to set out some

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<sup>12</sup> *Ibid.*, para. 27.

<sup>13</sup> *M/V “Louisa”* (footnote 11), Dissenting opinion of Judge Wolfrum, p. 77, at pp. 83-84, para. 22.

<sup>14</sup> Application, para. 5, p. 3.

1 conditions to those investigative activities within the competence of port States  
2 established in articles 216, 218 and 220.

3  
4 This Tribunal, in the *M/V "Louisa" Case*, has already interpreted article 226 taking  
5 into account its express language, its object and purpose, thus rejecting any  
6 broadening of its scope of application.<sup>15</sup>

7  
8 Then Italy strongly argues that article 226, dealing with marine environmental issues,  
9 is not evidently related to the seizure of a vessel in internal waters within criminal  
10 proceedings concerning smuggling and tax fraud.

11  
12 Concluding with article 300 of UNCLOS, it is well established that it cannot be relied  
13 upon independently of the other UNCLOS provisions. In other words, an abuse of  
14 right may be invoked only in respect of the exercise of the rights, jurisdictions and  
15 freedoms recognized in UNCLOS. It is only when such rights, jurisdictions and  
16 freedoms are abused that article 300 may be applicable as this Tribunal has already  
17 made clear in the *M/V "Louisa" Case*.<sup>16</sup>

18  
19 Therefore, since all the provisions identified by Panama in the Application are  
20 manifestly irrelevant to the present case, its claim based on article 300 of the  
21 Convention is altogether unfounded as well.

22  
23 Mr President, Members of the Tribunal, in view of these considerations, Italy firmly  
24 contends that the provisions of UNCLOS invoked by the Republic of Panama in its  
25 Application are patently extraneous to the facts of the present case so that the  
26 inconsistency of the alleged violations by the Italian Republic of the rights and  
27 freedoms of Panama under the Convention are doubtless even *prima facie*.

28  
29 This confirms Italy's conviction that the dispute between the Parties, far from being a  
30 dispute concerning the interpretation or application of UNCLOS, is related mainly  
31 and preponderantly to the indirect violations of the rights of the owner of the  
32 *M/V Norstar* and to the redress of the alleged injury it suffered as a result of the  
33 seizure executed by the Spanish authorities.

34  
35 Mr President, Members of the Tribunal, I turn now to the second part of my  
36 submission which will set forth the prevalent, if not exclusive, espousal nature of the  
37 claim by the Republic of Panama, based on alleged indirect violations.

38  
39 **THE PRESIDENT:** Ms Caracciolo, I would like to apologize for interrupting you. We  
40 are coming towards the end of this morning's sitting. How long will it take for you?

41  
42 **MS CARACCILO:** Mr President, my second part will take around 20 to 25 minutes  
43 at most.

44  
45 **THE PRESIDENT:** We will interrupt now and you will continue your presentation  
46 when we meet in the afternoon.

47  

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<sup>15</sup> *M/V "Louisa"* (footnote 11), at p. 37, para. 111.

<sup>16</sup> *Ibid.*, para 137.

1 We will adjourn the present sitting and resume it at 3 p.m.  
2  
3 *(Luncheon adjournment)*