INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2016

Public sitting

held on Tuesday, 20 September 2016, at 3 p.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)

Verbatim Record

Present:	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 *ad hoc*	Tullio Treves
		Gudmundur Eiriksson
	Registrar	Philippe Gautier

Panama is represented by:

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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.

THE PRESIDENT: The Tribunal will now continue the hearing of the *M/V "Norstar" Case* and I would like to invite Ms Caracciolo to continue her statement.

MS CARACCIOLO: Mr President, Members of the Tribunal, I shall resume my presentation where I left off before the lunch break, namely the second part of my submission, which will set forth the prevalent, if not exclusive, espousal nature of the claim by the Republic of Panama based on alleged indirect violations.

On a preliminary basis, let me underline that, contrary to Panama's allegation in its Request of 16 August 2016, this argument was already raised by Italy in Chapters 1 and 3.II.A of its Preliminary Objections.[1] Italy focused on the general requirements of diplomatic protection strongly contending that Panama "… is preponderantly – if not exclusively – seeking to exercise diplomatic protection for the benefit of … private persons", namely the owner of the *M/V Norstar*.[2]

Mr President, Members of the Tribunal, I shall not reiterate the written pleadings, where Italy extensively analyses the case law of this Tribunal and of the International Court of Justice on this issue, as well as the works of the International Law Commission on the diplomatic protection. Conversely, my intention is to underline that in the light of the test commonly applied by international courts, all the relevant elements in the present case demonstrate that it concerns prevalently, if not exclusively, the alleged violation of the rights of the owner of the *Norstar*.

Besides, determining the indirect nature of injuries invoked is not new for this honourable Tribunal, which in the *M/V "Virginia G" Case* (at paragraph 157 of the Judgment reproduced in tab 20 of your folder) affirms that

> When the claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant.[3]

On this point it is worth mentioning the Commentary to Article 14 of the Draft Articles on Diplomatic Protection adopted in 2006 by the International Law Commission, which is reproduced in tab 21 of your folder. The Commission states that

> In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant ….
>
> The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official, diplomatic official, or State property the claim will normally be direct, *and where the State seeks*

[1] Request of the Republic of Panama for a ruling concerning the scope of the subject matter based on the Preliminary Objections filed by Italy, 16 August 2016, para. V.
[2] Preliminary Objections, Chapter 1, para. 5(a), and Chapter 3.II.A, paras. 28 and 29.
[3] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 54, para. 157.

> *monetary relief on behalf of its national as a private individual the claim will be indirect* (emphasis added).[4]

Italy respectfully considers that these explanations exactly outline the situation in the instant case. Not only the subject of the dispute concerns the seizure of a private vessel occurring in the internal waters of Spain but also the monetary relief sought by Panama is preponderantly on behalf of the owner of the *Norstar*.

Most importantly, the grounds for this conclusion can be found in the Application of Panama.[5] Indeed Section 2, entitled "Subject of the Dispute", states that "[t]he Application concerns a claim for damages against the Republic of Italy caused by an illegal arrest of the *M/V Norstar* [...]". Furthermore the incipit of Section 5 on "Damages" is: "[a]s a consequence of the illegal acts of the Italian Republic, the vessel is now a total loss", while it ends by specifying that

> [t]he damages suffered by the vessel's owner *also* included the value of the ship, loss of revenues due to the unfulfilling of the Charter Party in force until detention, registration fees due to the Panamanian Maritime Authority for ships register, legal services, harbour costs, and others.

Mr President, Members of the Tribunal, in the light of the above considerations let me preliminarily contend an assertion contained in Panama's Observations according to which there would be a "clear parallel" between the instant case and the *M/V "SAIGA" Case*.[6] Conversely, Italy maintains that there are sufficient differences between the two cases. The most noticeable one is that in the *M/V "SAIGA" Case* the claimant States filed an application in connection with a specific legal ground, namely article 292 of UNCLOS concerning the prompt release procedure. Since prompt release cases are by nature coloured by urgency, this urgency cannot but influence the tests the Tribunal is called to apply in order to establish whether a claim is direct or indirect.

Mr President, Members of the Tribunal, the prevalence of a private interest underpinning this case is clear from the very beginning of this event.

To this end, it is worth mentioning a letter sent by Inter Marine & Co, the company owning the *Norstar*, to the Italian Embassy in Oslo on 2 February 1999. You may find the document in tab 19 of your folder.[7]

In this letter, the Chairman of the Board of Inter Marine & Co. states that it is:

> important to mention that the UN's Montego Bay Convention of 10/12/1982 clearly and fully makes the Italian State responsible to pay all or any damage *to any company* [...] by Mr Albert Landolfi's [*the Public Prosecutor at the Tribunal of Savona*] actions.

[4] Draft Articles on Diplomatic Protection with commentaries, in *Yearbook of the International Law Commission*, 2006, Volume II, Part Two, p. 24 et seq., at p. 46, paras. 11-12, commentary on article 14.
[5] Application, paras. 2 and 5.
[6] Observations, para. 73.
[7] Letter from Mr Morch to the Italian Embassy in Oslo, 9 February 1999.

> Our company alone are losing about USD 1000.000 each month due to Mr Landolfi's actions. [...] This payment of damage is not subject to any discussions as the Italian Government have signed the Montego Bay Convention.

The communication proceeds to refer to the request for assistance submitted by Inter Marine & Co. to the Government of Norway in the following terms:

> On our side we have now been in contact with the Norwegian Foreign Department in Oslo and the Norwegian Embassy in Rome to assist us in respect of the damage claim. The Panamanian consular in Venezia is preparing the formal protest regarding the seizure of the vessel *Norstar*.

Let me incidentally add that this formal protest from Panama has never reached the Italian Ministry of Foreign Affairs.

It is for the sake of the private interests of the *M/V Norstar*'s owner that Mr Carreyó subsequently and Panama later on operated.

Mr President, Members of the Tribunal, in order to further substantiate the preponderantly espousal nature of Panama's claim, I shall address three points:

First, the unofficial nature of the written communications sent by Mr Carreyó to the Italian Republic; second, the content of these communications; third, the content of the notes verbales sent by the Republic of Panama to the Italian Republic.

Mr President, Members of the Tribunal, Italy received in ten years, from 2001 to 2010, six written communications by Mr Carreyó that can hardly be deemed to have an official nature.[8] All these letters are reproduced in tab 3 of your folder. As my colleague Professor Tanzi has already duly elaborated, these communications were far from being in accordance with the practice of interstate and diplomatic relations.

In fact, Mr Carreyó was defending the financial interests of the *M/V Norstar*'s owner, acting in his capacity as a private lawyer specializing in commercial and maritime law.

This conclusion is underscored by two facts. First, the communications addressed to the Italian Minister of Foreign Affairs and the Italian Ambassador in Panama were on Mr Carreyó's personal headed paper.[9]

Secondly, some of his other communications[10] had recourse to a specific means of certification – the so-called apostille under the Hague Convention of 1961 Abolishing

[8] Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs, 15 August 2001 (Preliminary Objections, Annex F); 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, 3/6 August 2004 (Reply, Annex G); fax sent by Mr Carreyó to the Italian Embassy in Panama, 31 August 2004 (Reply, Annex H); letter of Mr Carreyó to the Italian Minister of Foreign Affairs, 17 April 2010 (Reply, Annex K).

[9] Letter of 6 June 2002 (footnote 8) and letter of 3/6 August 2004 (footnote 8).

[10] Letter of 15 August 2001 (footnote 8) and letter of 7 January 2002 (footnote 8).

the Requirements of Legalization for Foreign Public Documents.[11] As reiterated by Professor Tanzi and extensively indicated in the written pleadings,[12] this certification substitutes the legalization for documents issued in one State and to be utilized in situations or transactions taking place in other States.

Therefore, under any circumstance, the apostille of the Panamanian Minister of Foreign Affairs entails implicit acceptance or consent on the contents of the documents by the legitimizing authority. Indeed the only legal scope of an apostille is to certify the authenticity of the signature and the acting capacity of the signatory.

That the action of Mr Carreyó is inspired by the intention of defending the private interests of the owner of the *M/V Norstar* is also corroborated by the petition of 23 August 2004 to the Ministry of Foreign Affairs of Panama, which is reproduced in tab 7 of your folder.[13] The petition is submitted on behalf of Inter Marine & Co. and in the name of Mr Carreyó to request *inter alia* of the Panamanian Minister of Foreign Affairs that the letters of claim to the Italian Government dated 3-6 August 2004 be sent through diplomatic channels.

In point three of the petition Mr Carreyó recalls that he has special power of attorney to represent Inter Marine before "the Panamanian authorities and the International Tribunal for the Law of the Sea". It is only in point four that Mr Carreyó adds that he represents the Panamanian State before this Tribunal. Moreover, this reference cannot but be to his capacity to represent Panama before ITLOS for the prompt release of the vessel, taking into account the note verbale of Panama AJ 2387 of 2 December 2000.[14]

Mr President, Members of the Tribunal, the formal features of the communications from Mr Carreyó prove that he cannot *de jure* but act for the redress of the economic losses allegedly suffered by the owner of the *M/V Norstar* because of the seizure of the vessel. Mr Carreyo's attempts to elevate these private claims to the status of an international dispute between Panama and Italy must be rejected.

Mr President, Members of the Tribunal, I shall now address the content of the written communications sent by Mr Carreyó to the Italian Republic. In line with the indications that emerged from the illustration given by Professor Tanzi earlier on, the content of the communications confirms that also *de facto* Mr Carreyó was not acting on behalf of the Republic of Panama. Indeed, all these communications consist of isolated requests for the compensation of damages allegedly caused to the *Norstar*'s owner.

[11] Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents (The Hague, 5 October 1961, entered into force: 24 January 1965).
[12] Preliminary Objections, para. 13, and Reply, paras. 11-20.
[13] Petition by Dr Nelson Carreyó dated 23 August 2004 in which he requests from the Ministry of Foreign Affairs of Panama a declaration accepting the jurisdiction of the International Tribunal for the Law of the Sea and that the letter of complaint be sent through diplomatic channels (Observations, Annex 6).
[14] 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).

The core of these communications is, on the one side, the description of the arrest of the *Norstar* in the Bay of Palma de Mallorca[15] and, on the other, the expressed assertion that the Italian Government is obliged to compensate the damages suffered by the vessel's owner.[16]

Specifically, in the first written communication of 15 August 2001 Mr Carreyó clearly states that he is acting "in order to obtain a damage compensation for damages caused by the arrest of *M/V Norstar* in Palma de Majorca Port (Baleari, Spain), still occurring at the moment".[17] Mr Carreyó also reserves the right to "apply to the Hamburg Tribunal" in the event that Italy has not responded "within the reasonable time" to a request to "release the vessel and pay the damages caused by the illegal procedures".[18]

In the second written communication of 7 January 2002, Mr Carreyó reiterates the request for compensation, stating that

> on the expiry of 21 days from the date of this letter, we will institute proceedings before the competent Court of Hamburg without any further notice.[19]

Also the third letter of 3-6 August 2004 proclaims that the request for compensation damages is the main scope of all contacts with the Italian Government. In this letter, Mr Carreyó acknowledges that:

> [a]s a consequence of the sentence of Savona Tribunal dated 13.03.2003, the vessel has been released.[20]

However, the letter continues

> [...] the owners cannot take hold of her before all necessary repair works will enable her to navigate again.[21]

Then Mr Carreyó adds that

> If there would be a general consent of the Italian Government to pay damages, the undersigned would be prepared to meet representatives of the Italian Government to explain the amount of damages.[22]

Eventually in the following unequivocal terms, Mr Carreyó concludes

> The undersigned (Carreyó) therefore respectfully requests that the Italian State, within reasonable time, decides whether it wants to pay the damages caused by the illegal procedure, *so that the owners can start all necessary*

[15] Letter of 15 August 2001 (footnote 8) and Letter of 3/6 June 2004 (footnote 8).
[16] *Ibid.*
[17] Letter of 15 August 2001 (footnote 8).
[18] *Ibid.*
[19] Letter of 7 January 2002 (footnote 8).
[20] Letter of 3/6 August 2004 (footnote 8).
[21] *Ibid.*
[22] *Ibid.*

> *repairs* (*emphasis added*) to restore the vessel to the condition she was prior to the illegal seizing ….[23]

Similarly, in Mr Carryó's last letter, dated 17 April 2010, Italy is requested to decide

> within reasonable time (...) if [it] will pay the damages caused by the illegal procedure adopted by its competent authorities"; otherwise Panama would have reserved the right to "apply to the Hamburg Tribunal.[24]

Then the compensation for any interest of the Panamanian Government injured by any international wrongful act committed by Italy in breach of UNCLOS was far from being the scope of Mr Carreyó's communications.

This assertion is further corroborated by the fact, already indicated by Professor Tanzi, that none of these communications indicates in a precise, unequivocal and appropriate manner the obligations owed by Italy towards Panama under UNCLOS. The sole reference to the law of the sea can be inferred from the mention, in very generic and inaccurate terms, in the first letter of Mr Carreyó of 15 August 2001 and in the written communication of 3-6 August 2004, of the general "principle of Freedom of Commerce outside territorial waters and Contiguous Zone".[25]

This vague allusion cannot evidence any specific, let alone serious intention on Mr Carreyó's part to claim on behalf of Panama that Italy had breached any obligations under UNCLOS. Even if the principle of freedom of commerce were considered to fall within the scope of article 87 of the UN Convention, as previously illustrated, this provision does not manifestly pertain to the conduct complained of in the present case.

Anyhow, still considering that the freedom of navigation includes activities undertaken not only by States but also by individuals or legal entities, as underlined by Judge Wolfrum in his Separate Opinion to the Judgment in the *M/V "SAIGA" (No. 2) Case*:

> it is questionable to qualify claims resulting from infringements upon the right of freedom of navigation as interstate disputes[26]

but also admitting that private entities are entitled under UNCLOS to the right of free trade on the high seas, any violation of this right can be ascribed to Italy for the arrest of the *M/V Norstar* since notably it took place in the Spanish internal waters.

In conclusion, Italy argues that the only reason triggering the efforts of Mr Carreyó, which have materialized in the communications just described, was the aim of obtaining economic redress in favour of the owner of the *M/V Norstar* for the damages incurred to the vessel following its detention in the Port of Palma de Mallorca and for lost profits because of the non-use of the *M/V Norstar*.

Mr President, Members of the Tribunal, I turn now to the content of the notes

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[23] *Ibid.*
[24] Letter of 17 April 2010 (footnote 8).
[25] Letter of 15 August 2001 (footnote 8) and letter of 3/6 August 2004 (footnote 8).
[26] M*/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10*, Separate Opinion of Vice-President Wolfrum*, para. 51.

verbales sent to the Republic of Italy by the Ministry of Foreign Affairs of the Republic of Panama, namely note verbale AJ 2227 of 31 August 2004 and note verbale AJ 97 of 7 January 2005, which you will find in tab 4 of your folder.[27]

My colleague, Professor Tanzi, submitted that with such notes verbales Mr Carreyó has not been empowered to legitimately represent the Panamanian Government in diplomatic exchanges with Italy.

For my part, I intend to expound that the two notes verbales support the contention that Panama's Application is preponderantly, if not exclusively, espousal in nature.

Indeed, both notes verbales laconically refer to the communications already sent to the Italian Government by Mr Carreyó, without adding anything new. Most importantly, they do not indicate the subject matter of the litigation between Panama and Italy in any way that links appropriately the facts complained of with an even manifest alleged breach of UNCLOS by Italy.

In particular, the first note verbale of 31 August 2004 (AJ 2227) simply refers to the fact that Mr Carreyó

> requested the transmission via diplomatic channels of the claim note addressed to the Italian Ministry of Foreign Affairs, regarding the detention of the Panamanian flagged vessel NORSTAR [...].[28]

Thus its scope is merely to formally accompany the claim from Mr Carreyó made in the interests of the owner of the *M/V Norstar*.

In the second note verbale of 7 January 2005 the Ministry of Foreign Affairs of the Republic of Panama does not oppose equally to Italy any violation of Panama's rights under UNCLOS. It simply mentions the memorial of 3 January 2005 that Mr Carreyó submitted a few days before to Italy in his capacity as legal representative not only of the Panamanian State but also:

> of the interests of the owners of the motor vessel NORSTAR.

On this mere premise, Panama asked Italy "to provide information on the progress of the case at issue".[29]

Italy considers that the vague and generic wording of this note verbale is again emblematic of the indirect nature of Panama's claim. Panama is hardly invoking the responsibility of Italy for the infringement of UNCLOS and agitating an international dispute.

From the above, Italy contends that the two notes verbales, far from notifying Italy of a legal claim stemming from the interpretation or application of UNCLOS, are aimed

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[27] Note verbale A.J. No. 2227 sent by the Ministry of Foreign Affairs of Panama to Italy, 31 August 2004 (Preliminary Objections, Annex M) and note verbale A.J. No. 97 sent by the Ministry of Foreign Affairs of Panama to Italy, 7 January 2005 (Reply, Annex M)
[28] Note verbale A.J. No. 2227 (footnote 27).
[29] *Ibid.*

predominantly, if not exclusively, at supporting the vindication of the private interests of the owner of the *M/V Norstar*.

Mr President, Members of the Tribunal, in conclusion, Italy respectfully considers that Panama's claim would not have been brought but for the damages on behalf of the owner of the *M/V Norstar*. Therefore this claim is espousal in nature and consequently the rule of the exhaustion of local remedies applies.

Mr President, Members of the Tribunal, I have finished my presentation. I would request that you now invite my colleague Professor Francesca Graziani to the podium. Professor Graziani will show how the remedies available under the Italian legal order have not been exhausted by the private entities allegedly affected by the arrest and detention of the *M/V Norstar*.

Mr President, Members of the Tribunal, I thank you for your attention.

THE PRESIDENT: Thank you, Ms Caracciolo. I now invite Ms Graziani to make her statement. You have the floor, madam.

MS GRAZIANI *(Interpretation from French)***:** Mr President, Members of the Tribunal, it is a singular honour and a great privilege for me to appear for the first time before this esteemed Tribunal on behalf of the Italian Republic.

My colleague Professor Caracciolo has just shown, on the one hand, that the disputed rights do not fall within the ambit of the United Nations Convention on the Law of the Sea and, on the other, that Panama's claim is based predominantly on damage caused to the owner of the *M/V Norstar*.

Since the relevant facts of the present case suggest the conclusion that Panama has suffered indirect injury, that is to say, through the intermediary of a legal person, the rule on exhaustion of local remedies is applicable in this case.

It is necessary in particular to examine, on the basis of the facts of the case, the legal remedies which the owner of the *M/V Norstar* could and should have pursued with the Italian judicial authorities before any international proceedings were instituted by Panama before this Tribunal.

To that end, may I divide my presentation into two parts, which will hinge around the judgment of the Court of Savona, which was handed down on 13 March 2003.

In the first part I will focus on the legal remedies available to the owner of the *M/V Norstar* to challenge the seizure of the vessel before the Court of Savona's judgment.

The second part of my presentation concerns the legal remedies which the owner of the *M/V Norstar* should have exhausted after March 2003 in order to obtain compensation for the damage allegedly suffered as a result of the detention of the vessel.

In my presentation I shall be referring to the provisions of the Italian Code of Criminal

Procedure and to the Italian laws which are pertinent to this case. You will find them in your folders at tab 23.

Mr President, as I have just said, the first part of my presentation concerns the remedies which, before the Court of Savona's judgment, would have allowed the owner of the *M/V Norstar* to challenge the order for the seizure of the vessel.

Although the present case does not concern the seizure "as such", but only the claim for compensation for the damage allegedly suffered by reason and as a result of the detention of the vessel, Italy feels it necessary to draw the Tribunal's attention to the fact that the owner of the *M/V Norstar* had available to him a number of remedies to challenge the seizure, but – and this is the important point to bear in mind – he did not exhaust "all" the remedies that were open to him in order to defend his rights.

Account must be taken of this wilful inactivity on the part of the owner of the *M/V Norstar* when we look in detail, in the second part of my presentation, at the claim for compensation for damage made by Panama. Having said that, first of all it should be made clear that the order for the seizure of the *M/V Norstar* issued by the public prosecutor at the Court of Savona on 11 August 1998 is based on article 253 of the Code of Criminal Procedure.[1]

Under that article, the criminal seizure of property which has been used directly to commit the offence in question is a measure whose primary purpose is to obtain evidence in criminal proceedings.

In this regard, article 262 of the Code of Criminal Procedure states that property which has been the subject of criminal seizure may be returned even before the judgment has been delivered by the court of first instance. The judicial authority may, if necessary, make the return of the seized property subject to payment of a bond.[2]

It is therefore in light of the normative provisions which I have just mentioned that the relevant facts of the present case must be examined in order to determine whether the owner of the *M/V Norstar* utilized all the available remedies to challenge the detention of the vessel.

Mr President, Members of the Tribunal, since the seizure of the *M/V Norstar* was executed by the Spanish judicial authorities in this case, an initial clarification must be given.

As Professor Tanzi made clear this morning, it must be borne in mind that the Spanish judicial authorities enforced an order for the seizure of the *M/V Norstar*, acting with full decision-making autonomy on the basis of the European Convention on Mutual Assistance in Criminal Matters, done in Strasbourg in 1959.[3]

The point that I think must be stressed here is that in practice relating to cooperation in criminal matters, when a seizure has been requested by letters rogatory, which is

[1] Italian Code of Criminal Procedure, article 253.
[2] *Ibid.*, article 262.
[3] European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959; entry into force: 12 June 1962).

the case here, the foreign authority, after assessing the admissibility of the request made by the requesting party, issues its own seizure order for the property.

Consequently, the "property" is subject to seizure either in the territory of the requesting State or in the territory of the requested State.

It also follows that the owner of the *M/V Norstar*, who is affected by the seizure, could have pursued two different remedies: an action before the Italian judicial authorities – which ordered the seizure – and an action before the Spanish judicial authorities – which had jurisdiction over the enforcement of the seizure order.

Mr President, with your permission, I will now focus on the action which the owner of the *M/V Norstar* could have brought in Italy.

In its Application instituting proceedings, the Republic of Panama maintained that the owner of the *M/V Norstar* filed an application for review of the seizure order with the public prosecutor at the Court of Savona.[4]

In January 1999 the public prosecutor refused the request to release the vessel from detention. However, the public prosecutor offered the owner of the *M/V Norstar* to return the vessel against a security of 250 million lire (representing about US $ 145,000).[5]

Again, according to Panama, the owner of the *M/V Norstar* was unable to pay such an amount of money. In its Application instituting proceedings Panama explicitly claims that this was an amount

> which the owner of M/V Norstar could not provide as through the long arrest the market for such business had been destroyed with no further income.[6]

Italy notes these statements made by the Republic of Panama. However, at the same time, Italy would like to stress that these statements cannot be considered as either exhaustive or sufficient to justify the willful inaction on the part of the owner of the *M/V Norstar*.

This is because the owner of the vessel could have pursued "other" legal remedies to challenge the seizure or to contest the amount of the security demanded.

Allow me, in this context, Mr President, to highlight the fact that the Italian Code of Criminal Procedure devotes a number of provisions to remedies against a seizure order.

In particular, any person who claims to have a right to previously seized property may make a request to the public prosecutor for the return of the property under article 263 of the Code of Criminal Procedure.[7] This is the request for the return of

[4] Application, para. 7.
[5] *Ibid.*
[6] *Ibid.*
[7] Italian Code of Criminal Procedure, article 263.

the vessel made by the owner of the *M/V Norstar* which the Italian public prosecutor refused.

Nevertheless, it must be made clear that the public prosecutor's decision was not final.

On the contrary, an appeal could have been brought against that decision before the judge in charge of the preliminary investigations under article 263, paragraph 5, of the Code of Criminal Procedure. If the judge in charge of the preliminary investigations then refuses the request to release the property from detention, an appeal on a point of law may be lodged in accordance with the settled case law of the Court of Cassation itself.[8]

Furthermore, it is important to state that the remedies relating to the seizure order issued by the public prosecutor are not limited to the remedies I have just mentioned.

Indeed, under articles 257 and 324 of the Code of Criminal Procedure it is possible to request a full review of the seizure order before the court of the capital of the province where the office of the judicial authority which ordered the measure is situated.[9]

All these points demonstrate clearly and unequivocally that the owner of the *M/V Norstar* did not utilize all the possibilities available to him to defend his rights before the Italian judicial authorities.

In the view of Italy, the owner of the *M/V Norstar* could have disputed, at various levels, either the merits of the decision by which the public prosecutor had refused the request to release the vessel from detention or the payment of the security proposed by the public prosecutor. As regards the merits of the decision by the public prosecutor, the owner of the *M/V Norstar* could have disputed the validity, or even the legality, of the seizure of the vessel. On the other hand, as regards the payment of the security, the owner of the *M/V Norstar* could have disputed the excessive amount of the security in relation to the value of the seized vessel and/or the financial resources of the owner of the *M/V Norstar*.

Mr President, Members of the Tribunal, I would now like to look at the remedies provided for under Italian legislation which the owner of the *M/V Norstar* should have exhausted, after the judgment of the Court of Savona had been delivered, in order to obtain compensation for the damage allegedly suffered as a result of the seizure of the vessel.

This is a key aspect of my presentation, so I will devote particular attention to it.

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[8] See Court of Cassation, Chambers for criminal matters sitting in plenary session, 31.01.2008, No. 7946: "... La giurisprudenza è infatti schierata da tempo nel senso che l'ordinanza del gip ... sia impugnabile con ricorso per Cassazione indipendentemente dalla mancata previsione esplicita di questo mezzo di impugnazione nella norma di rinvio ...". ("... According to long-established case law, an appeal on a point of law may be brought ... against an order of the judge in charge of the preliminary investigations even though the relevant provision of the Code of Criminal Procedure (the fifth paragraph of article 263) does not mention such a means of redress ... ").

[9] Italian Code of Criminal Procedure, articles 257 and 324.

First of all, it should be borne in mind that on 13 March 2003 the Court of Savona acquitted all the accused and – the point of interest to us – ordered the release from seizure and immediate return of the *M/V Norstar* to Inter Marine SPA, the owner of the vessel.[10]

As we know, on 18 August 2003 the public prosecutor at the Court of Savona appealed against that judgment.[11] However, on 25 October 2005 the Court of Appeal of Genoa upheld the judgment given by the court of first instance.[12]

In this regard, I should clarify that the appeal lodged by the public prosecutor concerned only the part of the judgment of the Court of Savona relating to the acquittal of the accused and did not therefore concern the decision relating to the lifting of the seizure order.

It is in light of this clarification that Italy calls into question paragraph 8(4) of the Application instituting proceedings, in which Panama, referring to the judgment of the Court of Savona, maintains:

> *(Continued in English)* However, the judgment was not full and final.[13]

(Interpretation from French) Mr President, allow me to say once again that, contrary to the claim made by Panama, the appeal certainly did not concern the seizure of the *M/V Norstar* because the Italian public prosecutor did not request the Court of Appeal of Genoa to suspend the order to return the vessel.

This point of clarification is extremely important and it must therefore be taken seriously. As the appeal did not challenge the seizure of the vessel, it is on the period from 13 March 2003, the date of the judgment of the Court of Savona, that attention should be focused in order to determine the local remedies provided for in the Italian legal system which the owner of the *M/V Norstar* should have exhausted.

Having said that, Italy would like to make four comments on the judgment of the Court of Savona that was delivered in March 2003.

Mr President, Members of the Tribunal, my first comment concerns the scope of the judgment of the Court of Savona in the present case.

Allow me, first of all, to make a critical comment with regard to a statement contained in the Written Observations of Panama.

The Republic of Panama contended that in its Preliminary Objections Italy did not refer to the reasoning in the decision by which the Court of Savona acquitted the accused and ordered the release of the *M/V Norstar*.[14]

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[10] Judgment by the Tribunal of Savona, 13 March 2003 (Preliminary Objections, Annex B).
[11] Appeal by the public prosecutor against the judgment of 13 March 2003, 18 August 2003 (Preliminary Objections, Annex J).
[12] Judgment by the Court of Appeal of Genoa, 25 October 2005 (Preliminary Objections, Annex K).
[13] Application, para. 8.
[14] Written Observations, paras. 47-48, Annex 11.

We would like to reassure Panama that if Italy did not deem it necessary to explore that reasoning it was because it is totally irrelevant in the present case.

As the Permanent Court of International Justice stated in the *Case concerning certain German interests in Polish Upper Silesia*:

> From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[15]

Paraphrasing the Permanent Court of International Justice, it could be said that this Tribunal is not called upon to interpret Italian law or the judgment delivered by the Italian court.

This Tribunal's task is very different: it must rule on whether or not the organs of the Italian State, including the organs of the judiciary, complied with their obligations under the United Nations Convention on the Law of the Sea vis-à-vis Panama.

It is from this perspective, and from this perspective alone, that the judgment of the Court of Savona should rightly be considered. This is a perspective to which Italy pays the greatest attention and which Panama, on the other hand, seems to ignore altogether.

By this I mean that, as Italy has asserted many times and as Professors Tanzi and Caracciolo have just stated, the Court of Savona acted in full compliance with international law. In other words, the judgment delivered by the Court of Savona in 2003 precludes the assertion that Italy infringed provisions of the United Nations Convention on the Law of the Sea.

Mr President, Members of the Tribunal, this brings me to my second comment. Italy wishes to make it clear that when the Court of Savona ruled on the return of the vessel to the owner of the *M/V Norstar*, the Italian judiciary exhausted all jurisdiction in this regard.

On this subject it is important to make clear that on 18 March 2003, five days after its judgment of 13 March, the Court of Savona transmitted the decision regarding the return of the *M/V Norstar* to the judicial authorities in Spain, as the authorities responsible for enforcing the seizure of the vessel.[16]

In particular, the Court of Savona invited the Spanish authorities to implement the order for the return of the vessel and to transmit that order to the vessel's custodian. At the same time, the Court of Savona asked the Spanish judicial authorities to ensure that the vessel had really been returned and, to that end, to send a record confirming that it had been returned.[17]

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[15] *Certain German interests in Polish Upper Silesia, Judgment, P.C.I.J. Reports Series A, No. 7*, p. 19.
[16] Communication to the Spanish authorities of the judgment of 13 March 2003, 18 March 2003 (Preliminary Objections, Annex I).
[17] *Ibid.*

In the light of what I have just said, once the Court of Savona had decided on the return of the vessel, and once that decision had been communicated to Spain, the Italian judicial authorities no longer had jurisdiction regarding the return of the vessel.

This is because as of March 2003 the judgment of the Court of Savona constituted an "enforcement order" for the immediate return of the *M/V Norstar* to its legal owner.

It is for this very reason that on 31 October 2006 the Court of Appeal of Genoa ruled that it could not decide on the request made by the Spanish port authorities concerning the demolition of the vessel.[18]

Mr President, Members of the Tribunal, my third comment concerns the claim for damages to compensate the injury allegedly suffered by the owner of the *M/V Norstar*, which Panama has made against Italy.

First of all, it should be recalled that the owner of the *M/V Norstar* has not claimed the vessel since March 2003, even though the Court of Savona had ruled that it should be returned immediately.

In his letter of 3 and 6 August 2004 Mr Carreyó stated that it was materially impossible for the owner of the *M/V Norstar* to take possession of the vessel because of the long period of detention and the damage suffered as a result of that detention.[19]

According to Mr Carreyó, it follows that the Italian Government should have provided compensation for that damage immediately, that is to say, as soon as the Court of Savona had ruled that the *M/V Norstar* should be returned. Mr Carreyó also claims that, in the absence of such compensation, the Republic of Panama was entitled to submit an application to this Tribunal and to claim compensation for damage caused by the seizure of the *M/V Norstar* without exhausting all the relevant local remedies provided for in the Italian legal system.[20]

I would like to point out that there is absolutely no foundation to this reasoning.

As you know, States are not exempt from expenditure obligations in connection with the custody and conservation of seized property. In passing, I would point out that the Italian legal order governs expenditure in connection with the custody and conservation of seized property both in the Consolidated Act on Legal Costs[21] and in the Code of Criminal Procedure.[22]

Nevertheless, it is not sustainable or logical to assert that decisions of national courts regarding the return of seized property entail an immediate obligation on the State to

[18] 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).
[19] Letter sent by Mr Carreyó to the Italian Embassy in Panama, 3/6 August 2004 (Reply, Annex G).
[20] Written Observations, para. 45 et seq. and para. 75 et seq.
[21] Consolidation Act on Legal Costs (Presidential Decree No. 115/2002), articles 58 and 150, Annex 23, p. 67.
[22] Italian Code of Criminal Procedure, article 259.

return previously seized property in the same condition as it was before the seizure was made.

Furthermore, it seems quite reasonable to pay particular attention to paragraph 8, last subparagraph, of the Application instituting proceedings, where Panama asserts that, since in 2005 the Court of Appeal of Genoa upheld the judgment of the Court of Savona in March 2003:

> Local remedies had been exhausted.[23]

It should be noted in this regard that it is not possible to assert from a legal point of view that once the Italian judicial authorities decided that the *M/V Norstar* should be returned, Panama was entitled to claim immediate compensation for the damage allegedly suffered as a result of the seizure, without the owner of the *M/V Norstar* exhausting the relevant local remedies available in the Italian legal system.

In conclusion, Italy would like to point out once again that compensation for the damage that the *M/V Norstar* may have suffered as a result of the seizure could not be demanded directly from the Italian Government. First, Mr Carreyó, as the lawyer for the *M/V Norstar*, was not entitled to claim such compensation from the Italian Ministry of Foreign Affairs, and, second, the Republic of Panama was not entitled to bring proceedings against Italy before this Tribunal.

This is because, as will be explained shortly, the owner of the *M/V Norstar* should have exhausted the legal remedies offered by the Italian legal system for obtaining compensation for the damage allegedly suffered as a result of the seizure.

Mr President, Members of the Tribunal, I am now coming to my fourth and last comment.

At this point it is necessary to consider the local remedies in the Italian legal system that the owner of the *M/V Norstar* should have exhausted before Panama brought any international proceedings to obtain damages.

First of all, I would like briefly to look at the principles of customary international law that govern the rule of the exhaustion of local remedies, as recognized by the International Law Commission in its 2006 Draft Articles on Diplomatic Protection.[24]

In this context, I will simply say that redress available to foreign nationals inevitably varies from one State to another. As a result, only one essential question remains: whether the remedies, be they ordinary or extraordinary, are effective, reasonable and sufficient.

The International Law Commission has stated that in order to assess the effectiveness or futility of local remedies:

[23] Application, para. 8.
[24] Draft Articles on Diplomatic Protection with commentaries, in *Yearbook of the International Law Commission*, 2006, Volume II, Part Two, p. 24 et seq.

> it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible, but whether the municipal system of the respondent State is reasonably capable of providing effective relief.[25]

It can therefore be said that the exceptions to the rule of exhaustion of local remedies are based on a specific two-fold assessment to be made by the international court: first, the effectiveness of the remedy and, second, the level of due diligence required of an individual in defending his rights before domestic courts.

In the light of what I have just said, it is now possible to resolve the question whether the rule of exhaustion of local remedies applies in the present case in respect of the remedies under the Italian legal system for obtaining compensation for damage allegedly suffered as a result of seizure.

Mr President, Members of the Tribunal, in Italy's Preliminary Objections Italy mentioned the possibility of a claim based on article 2043 of the Civil Code. This is a rule of general application which seeks to safeguard a fundamental principle, namely the principle that everyone is entitled to compensation for the breach of a subjective right. Under article 2043, any person who, by an intentional or negligent act, causes unfair damage to another must compensate the victim.[26]

This provision thus focuses on the need to compensate any unfair prejudice, with the result that it is precisely the unfair nature of the act which constitutes the legal test for determining whether or not certain prejudice is eligible for compensation. The compensable damage includes the loss suffered and loss of income but also, in certain cases, non-pecuniary damage, even if it is non-patrimonial. The right to compensation lapses after five years from the date when the wrongful act took place.

While, as I have just said, article 2043 of the Civil Code is a rule of general application, regard must now be had to other remedies which could have been pursued with the Italian judicial authorities.

Mr President, the owner of the *M/V Norstar* could have brought an action to assert the civil liability of the Italian judicial authorities. In the Italian judicial system the civil liability of judicial and legal officers is governed by Law No. 117 of 13 April 1988, known as "Vassalli law".[27] That law was recently amended in 2015 (Law No. 18 of 27 February 2015).

In any event, even in the preceding version the law establishes the principle that judicial officers – a term encompassing both judges and public prosecutors – are accountable for their professional conduct.

[25] *Ibid.*, article 15(a), para. 4, p. 81.
[26] Italian Civil Code, article 2043.
[27] Compensation for damage caused in the exercise of judicial functions and the civil liability of the judiciary (Law No. 117 of 13 April 1988), Annex 23, p. 25 et seq. Article 111 of the Italian Constitution, as amended by Constitutional Law No. 2 of 23 November 1999, sets out the principles of "*giusto processo*" ("due process").

Thus, under article 2, the law affirms the principle of compensation for any unfair prejudice caused by any conduct, act or judicial decision where there is intent or gross negligence on the part of a judicial officer in the exercise of his functions. In view of the need to safeguard the independence of judicial officers, the law makes it possible to hold judicial officers liable in strictly defined cases.

Where the personal fault of a judicial officer relates to judicial activity, the legislature opted for a specific liability regime based on a mechanism whereby the liability of the State is directly substituted for that of judicial officers. More specifically, liability for compensation for damage lies with the State. which in all cases is the guarantor for compensation for damage to be made to the victim. If it is found that the State is liable, it may in certain conditions seek redress against the judicial officer by means of an action for indemnity.

It should be pointed out that the law provides for a time-limit for bringing such actions regarding liability, which is normally three years.

As regards procedure, this takes place at first instance before the court having jurisdiction, which is determined on the basis of the rules of the Code of Criminal Procedure. That court brings the matter before the judge as a panel. A party may bring an appeal and then an appeal on a point of law against a decision on inadmissibility.

Mr President, Members of the Tribunal, we must lastly consider the local remedies to which the owner of the *M/V Norstar* could have had recourse in order to object to the length of the seizure procedure.

In its Application instituting proceedings, Panama stated that the decision of the Court of Savona was adopted

> many years after *mv Norstar* was alleged by Italian authorities to have violated Italian laws and about 5 years after following long criminal proceedings against the owner of the vessel and others.[28]

It is important to state in this regard that on 24 March 2001 the Italian Parliament adopted Law No. 89, better known as a “Pinto law”. This law is intended to guarantee the right to a fair trial within a reasonable time.[29]

More specifically, the Pinto law established a remedy before the Italian courts for objecting to an excessively long procedure and, where appropriate, for obtaining “equitable compensation” covering pecuniary and non-pecuniary loss suffered.

The application is directed against the State and, in particular for procedures before an ordinary judicial authority, against the Minister for Justice. The claim for fair compensation must be made to the court of appeal having jurisdiction no later than

[28] Application, para. 3.

[29] Award of just satisfaction in the event of a breach of the requirement to dispose of proceedings within a reasonable time and amendment to article 375 of the Code of Civil Procedure (Law No. 89 of 24 March 2001), Annex 23, p. 59 et seq. The law was amended by Law No. 34 of 7 August 2012 and by Law No. 64 of 6 June 2013.

six months after the end of the procedure concerned. The court of appeal decides in chambers by an executive decree. Its decision may be subject to an appeal on a point of law.

Under the law, in order to assess whether a procedure was excessive, it is necessary to review the complexity of the case, the conduct of the parties, of the court and of any other authority which contributed to the case, including the preliminary investigations. It is important to draw your attention to the fact that the criteria I have just set out are very similar to the criteria established by the European Court of Human Rights, bearing in mind that the Italian court must interpret national law in accordance with the settled case law of the Strasbourg Court.

It is worth noting that in its decision in *Brusco* v. *Italy* delivered on 6 September 2001 the European Court of Human Rights held that the mechanism established by the Pinto law must be considered an accessible remedy and that its effectiveness is beyond doubt.[30]

In any case, it should be observed that if the claimant considers the compensation for damage to be inappropriate and inadequate, he could bring the matter before the Strasbourg Court. In its decision on 27 March 2003 in *Scordino* v. *Italy*, the Strasbourg Court stated that it could legitimately hear such claims because the compensation awarded did not constitute adequate compensation for the alleged breach compared with the amounts normally awarded by the Court.[31]

Mr President, Members of the Tribunal, this brings me to my conclusion.

The obligation to exhaust local remedies is laid down by international law in order to give the State concerned the possibility to compensate the damage attributed to it. It is only after giving this option to the State that the dispute can be brought into the international arena.

Bearing in mind that in the present case the owner of the *M/V Norstar* has not exhausted local remedies, Italy takes the view that Panama's Application is inadmissible.

Members of the Tribunal, thank you for listening to me so patiently.

Mr President, I would be most grateful if you would be so kind as to give the floor to my colleague Paolo Busco, who will continue with Italy's presentation.

THE PRESIDENT: Thank you, Ms Graziani, for your statement. I now invite Mr Busco to make his statement. The floor is yours, sir.

MR BUSCO: Mr President Golitsyn, Members of the Tribunal, it is a honour to appear before you today and to do so on behalf of my country, Italy. In my presentation this afternoon, I will develop Italy's argument that Panama's claim is

[30] European Court of Human Rights, *Brusco* v. *Italy*, Application No. 69789/01, decision of 6 September 2001, ECHR 2001-IX.
[31] European Court of Human Rights, *Scordino* v. *Italy*, Application No. 36813/1997, decision of 27 March 2003, ECHR 2006-V, in particular, para. 94.

inadmissible due to acquiescence and extinctive prescription. I will focus my speech on these two aspects and, in consideration of time constraints, I would ask you to refer to Italy's written pleadings as regards our contention that Panama's Application is inadmissible also due to estoppel.[1]

Before I start, I would like to make two preliminary points.

First, I would like to stress once again what the Agent of Italy, Avvocato Palmieri, and my other colleagues said this morning, namely that Panama's arguments should fail already at the level of objections to jurisdiction. The fact that I am now addressing you on issues that go to the question of the admissibility of Panama's claim is therefore without prejudice to Italy's respectful contention that this Tribunal lacks jurisdiction to entertain the *M/V "Norstar" Case* in its entirety.

Second, I would like to address the question of the scope of the subject matter of Italy's Objections to the admissibility of the claim brought by Panama, which was raised by Panama in its letter to the Tribunal of 16 August 2016. Mr President, Members of the Tribunal, Professor Tanzi has already explained this morning in general terms how the arguments that Italy advanced in its Reply are not new, but rather are connected with the points raised by Italy in its Objections, and by Panama in its Reply.

Allow me to give just a couple of examples in this regard, specific to the subject matter of my presentation.

In its letter of 16 August 2016 Panama says, at paragraph 28,[2] that Italy should not be allowed to refer to the laws of either Italy or Panama on statutes of limitation because, according to Panama, this is a new argument. In reality, this is not a new argument. By referring to the domestic laws of Panama and Italy, Italy is only explaining why Panama's claim is extinct internationally – a position that Italy has maintained from the start. Also, it is wrong to state that Italy never described the conduct of Panama as acquiescent. In its Reply, Italy explains the relationship between acquiescent conduct by a Party and extinctive prescription of a claim. Italy quotes scholarship according to which, in the context of extinctive prescription,

> the inquiry shifts towards the extent the party can be considered as having by reason of its conduct validly acquiesced in the lapse of the claim.[3]

Acquiescence is therefore an integral part of the arguments that Italy is making with respect to the prescription of Panama's claim.

Mr President, Members of the Tribunal, with these specifications, and with your permission, I would now like to turn to the question of acquiescence.

Acquiescence is a general principle of law within the meaning of article 38 of the

[1] Preliminary Objections, p. 7; Reply by the Italian Republic, pp. 33-34.
[2] Request of the Republic of Panama for a ruling concerning the scope of the subject matter based on the Preliminary Objections filed by Italy, 16 August 2016.
[3] Silvestre, *The Financial Obligation in International Law* (OUP 2015), p. 605. Italy's Reply, p. 29

Statute of the International Court of Justice[4]. A State that remains inactive with respect to a claim is precluded from bringing it if, under the circumstances, that State would have been expected to display some form of activity with respect to its claim.

Certain conditions are necessary for acquiescence to operate and render a State's claim inadmissible: first, the claimant State must have failed to assert its claim or to pursue it;[5] second, the failure to assert or pursue the claim must have extended over a certain period of time; and, third, it is necessary that the claimant must have failed to assert or pursue its claim in circumstances that would have required action.[6] These circumstances include situations in which the respondent State could legitimately expect that the claim would no longer be asserted.[7]

Mr President, Members of the Tribunal, all the conditions for the operation of acquiescence are present in the *M/V "Norstar" Case*.

First, Panama has not validly asserted its claim. This morning Professor Tanzi explained why the various communications from Mr Carreyó, including his last communication of 17 April 2010, were incapable of validly asserting the claim that Panama is now making before this Tribunal. Professor Tanzi has also explained why the only two official communications sent by Panama by note verbale to Italy did not validly assert Panama's claim. Mr President, Members of the Tribunal, the consequence of this is that Panama is making its claim for the first time before this Tribunal and is doing so more than 18 years from the date when the event complained of by Panama allegedly occurred.

As will emerge in the course of my presentation, it takes much less than 18 years of inactivity to bar a State from bringing a claim due to acquiescence or extinctive prescription.

However, Mr President and Members of the Tribunal, in the event that the Tribunal should disagree with Italy and hold that the claim that Panama is now making has at some point been asserted prior to the December 2015 Application, it is still evident that Panama has failed to pursue its claim over a number of years. I would like to refer to the last communication sent by Panama by note verbale AJ 97, dated 7 January 2005, which you can find at page 5 of tab 4 of your Judges' folder, and to the last communication sent by Mr Carreyó dated 17 April 2010, which you can find at page 13 of tab 3.

The reasons why I have brought these two documents to your attention are as follows:

With respect to note verbale AJ 97, this is the last formal communication sent by Panama to Italy on 7 January 2005. If this Tribunal should disagree with Italy and hold that Panama's claim has been validly asserted by Panama, but should still

[4] Crawford, *Brownlie's Principles of Public International Law* (OUP 2012), p. 699.
[5] *Wena Hotels Ltd.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 105
[6] Crawford, Pellet, Olleson (eds.), *The Law of International Responsibility* (OUP 2010), pp. 1035-1049, at p. 1043
[7] *Ibid.*, at p. 1044

agree with Italy that the last communication from Mr Carreyó does not validly make Panama's claim, then 7 January 2005 is the date from which Panama's inactivity as regards the pursuit of its claim starts. Under this scenario Panama would have remained silent for ten years and 11 months before bringing its claim before this Tribunal.

As regards the communication of 17 April 2010 from Mr Carreyó, this is the last communication that Italy received with respect to the *M/V Norstar*. This is a matter of fact, which is undisputed between the Parties. Therefore, if the Tribunal should not share Italy's view that this communication does not validly make Panama's claim, it would still be a fact that Panama remained silent for five years and eight months before turning to ITLOS in December 2015.

Mr President, Members of the Tribunal, that acquiescence operates also in situations in which a State fails to pursue a claim that it had originally asserted is a consolidated position in case law. In this regard I would like to refer you to the case of *Wena Hotels* v. *Egypt*. You can find the relevant passage of this case at tab 25, page 7, of your Judges' folder. In that decision the arbitral tribunal confirmed the existence in international law of the principle of repose, according to which a State should not be surprised by the resurrection of a claim that, after being originally asserted, has not been pursued for some time.[8]

As regards the second condition of acquiescence, Italy wishes to stress that Panama's failure to assert or pursue its claim has indeed extended over a certain period of time. Mr President, Members of the Tribunal, we are discussing a claim for damages. Professor Tanzi and Professor Caracciolo have explained this point this morning and Panama frames its claim in these terms when it states in its Application that "the application concerns a claim for damages against the Republic of Italy".[9] The time of the inactivity of Panama in asserting or pursuing its claim must be considered against what is customary in the context of claims for damages, such as the present one. I shall address this point later in the context of extinctive prescription, but I would like to note from now that not asserting or not pursuing a damage claim for, at the very least, five years and eight months would result in the extinction of the claim in the vast majority of the jurisdictions of the world. The time frame of reference to assess Panama's non-assertion or non-pursuance of its claim in this case is not centuries or decades; it is years, and indeed very few years.

Even in cases where territorial claims and claims over sovereignty are made, a short time of passivity is sufficient to bar the claim. Professor Christian Tams, commenting on the *Grisbadarna* case between Norway and Sweden, noted how the International Court of Justice found that Norway had been acquiescent, even if it had failed to assert its claim only for a rather short period of time, and concluded that

> there is no reason why the same argument should not be applied to situations involving claims for State responsibility.[10]

[8] *Wena Hotels Ltd*. (footnote 65), para. 105
[9] Application, para. 3.
[10] Tams, *Waiver, acquiescence and extinctive prescription*, in Crawford, Pellet and Olleson (eds.), *The Law* (footnote 66), pp. 1035-1049, at p. 1043.

Mr President, Members of the Tribunal, if a short time of passivity is sufficient to bar a territorial claim, then, all the more so, it is sufficient to render inadmissible a claim for damages.

As regards the third condition, namely the fact that the claimant must have failed to assert its claim in circumstances that would have required action, I would be grateful if you could turn to tab 3, page 14. Again, I assume, *in arguendo* only, that this communication from Mr Carreyó was capable of asserting Panama's claim *vis-à-vis* Italy. In this communication Mr Carreyó stated that Panama would commence legal proceedings within a reasonable period of time before this Tribunal, had Italy not paid damages.[11] Italy did not respond, did not pay damages and, as we know, five years and eight months passed from this communication before Panama eventually turned to ITLOS.

Mr President, Members of the Tribunal, a situation in which someone says that they would commence proceedings in a reasonable time, and yet they do nothing for five years and eight months, is a situation in which the claimant has failed to assert its claim when action would have been required. The threat of the commencement of legal proceedings within reasonable time, and Italy's failure to acknowledge the request for damages, are precisely circumstances that would have required action on the part of Panama.

Mr President, Members of the Tribunal, I would like to point to a case that you can find at tab 25, page 2, *ICS Inspection* v. *Argentina*.[12] The defendant State argued that the investor's conduct had been acquiescent because

> despite the fact that the Claimant notified the respondent of a BIT dispute and threatened international arbitration

in a letter dated 27 November 2006,

> the Claimant did nothing further until June 2009,

when it eventually instituted arbitral proceedings. This is the same pattern as in the present case, except that in this case the delay is much greater.

There is therefore State practice that points towards the fact that threatening a certain course of action, giving the time frame for that course of action, and yet doing nothing for several years in the face of non-response by the respondent State, amounts to acquiescence on the part of the claimant.

Mr President, Members of the Tribunal, in concluding on this aspect, Italy's position is that Panama's failure to assert or pursue its claim for a number of years, at the very least – and I stress this – five years and eight months, and the modalities of this failure to assert and pursue the claim determine that the claim before this Tribunal is inadmissible due to acquiescence.

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[11] Letter of Mr Carreyó to the Italian Minister of Foreign Affairs, 17 April 2010 (Reply, Annex K).
[12] *ICS Inspection and Control Services Limited (United Kingdom)* v. *The Argentine Republic*, UNCITRAL, PCA Case No. 2010-9, Award on jurisdiction, 10 February 2012, para. 197.

Mr President, with your permission perhaps we may break now and I could continue on extinctive prescription after the break.

THE PRESIDENT: Yes. Thank you, Mr Busco. We have reached the time for a break in our proceedings for 30 minutes. We will break for 30 minutes and resume the hearing at 5 p.m. and then you will continue your statement.

(Break)

THE PRESIDENT: Mr Busco, I invite you to continue your statement.

MR BUSCO: Mr President, Members of the Tribunal, having addressed acquiescence, I will now move on to discuss the question of extinctive prescription, which is of course strictly connected with acquiescence.

Extinction of a right by prescription is also a general principle of law according to the definition of article 38 of the Statute of the International Court of Justice.[13]

I would like to quote from a passage from a Resolution of the *Institut de Droit International* that highlights what the rationale of extinctive prescription is, in international law. According to the *Institut* (tab 26):

> Considerations of order, stability and peace … require that extinctive prescription of obligations between States be listed among the general principles of law recognized by civilized nations, and that International Tribunals be called upon to apply it.[14]

Order, stability and peace. The purpose of extinctive prescription is therefore that of ensuring the certainty of legal relationships in the face of the passage of time.

I focus on the rationale of extinctive prescription because it constitutes the necessary background against which the question of the admissibility of Panama's claim has to be assessed by this Tribunal.

Indeed, Mr President, Members of the Tribunal, it is a fact that the event that gave rise to Panama's alleged right to seek damages from Italy, on the one hand, and these proceedings, by which Panama does so, on the other hand, are 18 years apart. I would like to stress that this is the first time that Panama has brought proceedings against Italy to seek damages allegedly stemming from something that happened 18 years ago. As my colleague Professor Graziani has shown you, it was not because it was not possible to file suit earlier, but only because the owner of the *M/V Norstar* has been incredibly neglectful in pursuing its claims.

The question that this Tribunal is therefore called upon to answer is straightforward: is it compatible with the necessity to guarantee certainty of legal relationships to

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[13] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 253-254, para. 32; *Grand River Enterprises Six Nations, Ltd., et al* v. *United States*, UNCITRAL, *Decisions on Objection to Jurisdiction, 20 July 2006*, para. 33.

[14] *Résolution concernant la prescription libératoire en droit international public*, in *Annuaire de l'Institut de Droit International*, Vol. 32, 1925, p. 558 et seq., at p. 559, para. I.

allow Panama's claim to proceed, after 18 years, in the circumstances of this case?

Mr President, Members of the Tribunal, let me show you what these circumstances are that I am referring to and why Italy believes that the Tribunal should answer the question that I just put to you in the negative.

The first circumstance of this case is that Panama's alleged right for damages is extinct as a matter of both Italian law and the law of Panama. This is a fact, regardless of the start date that one chooses to select. Indeed, for the reasons that were explained earlier, at least five years and eight months have passed without the claim having been pursued. If, as Italy claims, Mr Carreyó's last communication was not capable of making Panama's claim, then 10 years and 11 months have elapsed between the last note verbale from Panama and the commencement of these international proceedings. This is of course assuming, for the sake of argument, that those communications, and the others sent by either Panama or Mr Carreyó, were able to assert the claim that Panama is now making before this Tribunal. This is an assumption I am making for the sake of argument.

Mr President, Members of the Tribunal, as Professor Graziani has explained, it generally takes five years for claims for damages to be extinct due to prescription under Italian law. It takes just one year for these claims to be prescribed under the law of Panama.

I would ask you to kindly turn to tab 27, where the relevant provision of the Civil Code of Panama is reported, showing that it takes one year for claims for damages to be extinct due to prescription.

There are judicial decisions according to which a claim that cannot be pursued domestically due to prescription is also automatically barred at the international level. I should again be grateful if you would turn to tab 25, page 5. In *Yuri Bogdanov* v. *Moldova*,[15] an arbitral tribunal held that in the absence of any indication in the international instrument that governed the relationship between two countries, a claim by one Party would be barred if the right at issue were extinct as a matter of the domestic laws of either country. It may be worth going through the text of this decision quickly. This is the decision of the tribunal.

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

Panama's claim is extinct according to the laws not of *either* Italy *or* Panama, but according to the laws of *both* Italy *and* Panama.

Even if the Tribunal should find that there is not any automatism between international time bar and domestic time bar, one thing appears to be clear,

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

Mr President and Members of the Tribunal: the expiry of a domestic statute of limitation does have a bearing on the question of the international prescription of a claim.

In *Alan Craig* v. *Iran* the Iran-US Claims Tribunal held that a domestic statute of limitation may be taken into account by a tribunal in determining the effect of unreasonable delay in pursuing a claim.[16] Indeed, reference to domestic statutes of limitation is a method routinely employed by international tribunals in deciding on the international prescription of claims. In the *Gentini* case,[17] the arbitral tribunal could not say exactly what the period of prescription was in international law. However, it took notice of the statutes of limitation of a number of countries, according to each of which the claim would have been extinct, and concluded that the claim was extinct also in the case brought before it. You can find this at page 1 of tab 25.

Mr President, Members of the Tribunal, if this same method as in the *Gentini* case is used in the present case, one should consider that Panama's claim would be extinct not just as a matter of the laws of Panama and Italy, but also as a matter of the laws of the vast majority of other jurisdictions. A claim like the one made by Panama in the present case would be extinct by prescription in five years in France,[18] in Belgium,[19] in the Netherlands,[20] in Scotland[21] and, as we have seen, in Italy. It would be extinct in three years in Germany, in Poland and in Finland and in two years in Malta.[22] It would be one year in Spain, Switzerland[23] and Panama. Also, it would be extinct by prescription in three years in Japan,[24] in South Korea and in the Russian Federation[25]. Panama's claim would also be extinct in three years in South Africa.[26] I am just quoting a few examples, but there are of course many more.

The second circumstance of this case that I would like to bring to your attention has to do with the nature of Panama's claim. Mr President, Members of the Tribunal, in its Observations Panama mentions that the various communications sent by Mr Carreyó *s*topped the clock as far as a time bar was concerned.[27] Italy has already explained why the communications from Mr Carreyó were not able to assert Panama's claim, let alone "stop the clock", as Panama puts it. Italy has also explained that, in any event, the last communication received from Mr Carreyó dates back to 17 April 2010, and the last note verbale from Panama to 7 January 2005.

However, in support of its point, in its observations, Panama quotes the decision by the International Court of Justice in the case of *Certain Phosphate Lands* between

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[16] *Alan Craig* v. *Ministry of Energy of Iran*, Award No. 71-346-3, 2 September 1983, in *Iran-United States Claim Tribunal Reports*, 1983, p. 280 et seq., at p. 287.
[17] *Gentini* case, in *Reports of International Arbitral Awards*, Vol. X, pp. 551 et seq., at p. 561.
[18] French Civil Code, article 2224.
[19] Belgian Civil Code, articles 1382 and 1383.
[20] Source: http://www.twobirds.com/~/media/pdfs/brochures/dispute-resolution/client-know-how/client-briefings--bird--bird-comparative-table--statute-of-limitation-5.pdf?la=en.
[21] Prescription and Limitation (Scotland) Act 1973, Section 6.
[22] Civil Code of Malta, article 2153.
[23] Source:http://www.twobirds.com/~/media/pdfs/brochures/dispute-resolution/client-know-how/client-briefings--bird--bird-comparative-table--statute-of-limitation-5.pdf?la=en.
[24] Source: http://uk.practicallaw.com/9-502-0319#a640603.
[25] Source: http://uk.practicallaw.com/5-502-0694.
[26] Prescription Act No. 68 1969, Section 11(d).
[27] Observations, para 61.

Nauru and Australia. In that decision the Court held that, even in the absence of any applicable treaty provision, delay on the part of a claimant may render an application inadmissible.[28] It also noted that international law does not lay down any specific time-limit in that regard, and that it is therefore for a court to determine, in the light of the circumstances of each case, whether the passage of time renders the claim inadmissible.[29]

Panama tries to use this case to prove its argument. In particular, according to Panama, Australia and Nauru kept communicating over the years, with periods of time during which the parties did not communicate in relation to the claim of Nauru. Since the case was not deemed inadmissible by the International Court of Justice, the consequence should be, according to Panama, that this Tribunal should automatically reach the same conclusion in this case.[30]

However, Mr President and Members of the Tribunal, the decision that Panama quotes goes against the very argument that Panama is trying to make. The International Court of Justice stated that, in the absence of a set period of time for time bar to occur, an *ad hoc*, case-by-case analysis is required. Here, the nature of Panama's claim cannot be overlooked.

The cases of *Panama* v. *Italy* and *Nauru* v. *Australia* are so different that it is of no use to Panama to compare them.

Mr President, Members of the Tribunal, Panama is advancing a claim for damages, a pure monetary claim. The application made by Nauru was an application regarding rehabilitation of land and self-determination; also, in the case of *Nauru* v*. Australia* there was no domestic statute of limitation to use as a comparison for the conduct of the Parties, unlike in the present case; also, the relief that Nauru asked of the International Court of Justice was a relief that was only available under international law, whereas the damages that Panama is now asking this Tribunal could have been asked of domestic courts, if only the claim had been pursued in a timely manner.

Indeed, Mr President, Members of the Tribunal, if a comparison has to be made, it has to be made between the present case and cases where damages were sought against a defendant State at the international level. In *Wena* v*. Egypt*, the tribunal explained that claims must be pursued diligently and accepted the principle that they can be barred when they are not so diligently pursued.[31]

In *Wena*, the tribunal found the claim admissible, but only because *Wena* had been diligent throughout the years in pursuing its claim. In giving an example of what this diligence consisted of, the tribunal specifically referred to a letter sent by *Wena*, the investor, to Egypt dated 23 February 1998, with which *Wena* restated its claim with the Prime Minister of Egypt. International proceedings in the *Wena* case were commenced on 10 July 1998.[32] This was only four and a half months after the letter to the Prime Minister of Egypt was sent – not years, just four months.

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[28] *Certain Phosphate Lands in Nauru* (footnote 13), pp. 253-254, para. 32.
[29] *Ibid.*
[30] Observations, para 61
[31] *Wena Hotels Ltd.* (footnote 65), para. 105
[32] *Ibid.*, para. 105, footnote 253.

Mr President, Members of the Tribunal, the third circumstance regards the prejudice that Italy would suffer if the claim by Panama were allowed to proceed. Panama is essentially claiming a certain sum of money, which is bound to increase as interest accrues. Indeed, Panama has already claimed interest against Italy in addition to the alleged economic value of the *M/V Norstar.* Negligence in the pursuit of the claim causes prejudice to Italy as the amount for which Italy is being held liable has been artificially increasing over the years due to Panama's inaction.

Mr President, Members of the Tribunal, in concluding on extinctive prescription, I would like to sum up and stress a couple of points.

The owners of the *M/V Norstar* have had a number of years to pursue their claim domestically, both in Italy and in Panama. At present, the right to claim these alleged damages is extinct as a matter of both Italian law and the law of Panama, and indeed as a matter of the laws of the vast majority of countries. Therefore, Panama is resorting to this Tribunal, to persuade it to remedy the lack of diligence in pursuing the claim related to the *M/V Norstar* in the appropriate avenues and within the appropriate time frame. It is asking this Tribunal to grant the very same remedy that could have been asked of the Italian courts, or of the courts of Panama, over the course of a number of years.

Panama also seems to treat the *M/V Norstar* as some kind of safe investment, an investment that has been appreciating over the years of Panama's inactivity, and that Panama now thinks is ripe to be cashed out.

However, the machinery of international justice should not be the avenue of last resort for late claimants who have not been diligent in pursuing their claims domestically. The lack of any set period of time for time bar to operate at the international level should not be exploited to seek to obtain internationally what is no longer available at the domestic level. If the uncontested statement that extinctive prescription is a general principle of international law and that international tribunals must apply it is not to remain a mere illusion, one has to draw the line somewhere.

Mr President, Members of the Tribunal, Italy is not asking you to declare generally what the period of time for extinction by prescription of international claims should be. It is simply asking you to declare that this specific case and this specific claim for damages, in the circumstances of this specific case, is extinct due to prescription. If Panama's claim for damages were to be considered admissible, the resulting principle would be that a State could hold off pursuing a claim for damages simply for the purposes of maximizing its advantage while holding a respondent State liable potentially for an indefinite period of time internationally. This goes against the very rationale of prescription of claims, which I discussed earlier – certainty of legal relationships.

Mr President, Members of the Tribunal, this concludes my presentation. It also concludes Italy's pleadings today. The Agent of the Republic of Italy will present Italy's final submissions the day after tomorrow.

Thank you for your attention, Mr President and Members of the Tribunal.

THE PRESIDENT: Thank you, Mr Busco. I understand that Ms Palmieri will present her statement the day after tomorrow.

That concludes our proceedings for today and tomorrow we will have the second round of oral arguments and presentations, which will be made by the delegation of Panama. The sitting is now closed.

(The sitting closed at 5.30 p.m.)