INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2016

Public sitting

held on Wednesday, 21 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:

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.

THE PRESIDENT: The Tribunal will continue the hearing in the *M/V "Norstar" Case*. I now give the floor to the Agent of Panama, Mr Carreyó, to continue his statement.

MR CARREYÓ: Distinguished Members of the Tribunal, Mr President, good afternoon. I will try to take myself back to where I was. We were discussing the diplomatic protection issues brought forward by Italy and the cases that it relied on, such as the cases of *Interhandel* and *ELSI*. Our position was that those cases did not involve vessels owned by one of the Parties, but legal persons or corporations.

We also said that Italy had stated in paragraph 98 that the object and purpose of the applicants' claims in the *Interhandel* and *ELSI* cases was

> to secure the interests of their nationals and not to vindicate their own rights.

Panama did not contest this. We also said that what Panama challenged was that Italy has tried to equate the facts of the *Interhandel* and *ELSI* cases to those of the *M/V "SAIGA"* and the *M/V "Virginia G"* cases, which we will analyze in a moment, and that it was contradictory to say that ITLOS

> has repeatedly relied on the same line of reasoning

in the *M/V "SAIGA" Case*.

We purport to convince this Tribunal that this is misleading because the cases of *Interhandel* and *ELSI* did not involve freedom of navigation and, as was stated by the Chamber in the *ELSI* case, it was not possible

> to find a dispute over alleged violation of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of Raytheon and Machlett.

In the present case the dispute is over alleged violation of the Convention, resulting in direct injury to Panama, which is distinct and independent of the dispute over any violation in respect to any person related to the *M/V Norstar*. The breaches claimed by Panama are not those concerning the treatment of aliens, such as persons and corporations, but of the rights of Panama itself.

Panama avers that it has only used judicial proceedings, and that its communications are not to be taken as diplomatic actions, but only as evidence of compliance with paragraph 1 of article 283, as a true and good-faith intention to engage in negotiations before resorting to judicial proceedings.

Whereas all references of the ILC Draft Articles on Diplomatic Protection allude to *persons*, Italy has not presented any evidence, or clearly indicated who it considers to be the "national subject", or other person, whom Panama is supposed to be espousing. The only reference by Italy to the claimant has been made in paragraph 7 of its Objections, where several corporations related to the *Norstar* were mentioned.

In paragraphs 96-97 of its Reply Italy expressly accepted the Tribunal's ruling in the *M/V "SAIGA" Case* that

> the ship, everything on it and every person involved or interested in its operations are treated as an entity linked to the flag State.

However, in paragraph 98 Italy went on to say that the claims put forward by the flag State (Panama) were indirect and, when lodged to seek redress for the individuals involved in the operation of the ship, the local remedies rule would apply on the same grounds as in a diplomatic protection case.

Again, Italy did not define who the individuals involved in the operation of the ship were, nor to whom it was referring for the purposes of its contention that the claim was of an espousal or indirect violation nature. Instead, in paragraph 121, Italy said that it was the companies involved in the use of the *Norstar* which should have brought civil proceedings for compensation of damages under the Italian Civil Code, thereby suggesting that Panama is not entitled to bring this case to the Tribunal. As we have previously stated, Panama challenges this proposition because it finds it is an attempt to abridge its rights of national sovereignty.

Due to its relevance concerning the issue of exhaustion of local remedies, Panama will now proceed to the analysis of the *M/V "SAIGA" Case*, with certain detail.

Italy has tried to use the *M/V "SAIGA" Case* to support its contention of framing the instant case as one of an espousal nature by citing paragraph 98 of that Judgment where this Tribunal held that none of the violations of rights claimed by Saint Vincent and the Grenadines could be described as breaches of obligations concerning the treatment to be accorded to aliens.

On the contrary, this Tribunal held that those breaches were all direct violations of the rights of Saint Vincent and the Grenadines, and the injuries of the people involved in the operation of the ship arose from those violations, and their claims were not subject to the exhaustion of local remedies.

Therefore, the *M/V "SAIGA" Case* does not support the Italian position. As Panama explained in detail in its Observations, the *M/V "SAIGA" Case* supports the contention that all the rights claimed in its Application can be described as breaches of obligations concerning the treatment accorded to aliens but as breaches and rights directly concerning only the State of Panama itself.

In spite of the similarities between the *M/V "SAIGA"* and the *M/V "Norstar"* cases, Italy´s contention in paragraph 103 of its Reply that they are of a "different factual background" is misleading and promotes a line of reasoning contrary to reality. In fact, when instituting proceedings, Panama itself has specifically relied on paragraph 98 of the *M/V "SAIGA"* decision, because this Tribunal has already held in that case that the exhaustion of local remedies rule does not apply in the absence of a "jurisdictional connection" between the arresting state, in that case, Guinea, and the "natural or juridical persons" represented by the flag State bringing the action, Saint Vincent and the Grenadines, simply because the arrest was made outside its territorial waters.

If you turn to annex 29 of your folder, you will find that the rights that Saint Vincent claimed, according to paragraph 97 of the *M/V "SAIGA"* Judgment, were:

(i) freedom of navigation and other internationally lawful uses of the seas;
(ii) not to be subjected to the customs and contraband laws of Guinea;
(iii) not to be subjected to unlawful hot pursuit;
(iv) to obtain prompt compliance with the judgment of the Tribunal of 4 December 1997;
(v) not to be cited before the criminal courts of Guinea.

In the *M/V "SAIGA" Case*, the Tribunal affirmed that, according to article 22 of the Draft Articles on State Responsibility, the rule of exhaustion of local remedies is applicable when

> the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens ….

It was to this that Panama specifically referred when it cited the same paragraph that Italy had, adding that the Tribunal declared that none of the actions claimed by Saint Vincent and the Grenadines could be described as breaches of obligations concerning the treatment to be accorded to aliens by Guinea but rather were direct violations its rights. Any damage to the persons involved in the operation of the ship arose from those violations and therefore the Tribunal ruled that local remedies did not have to be exhausted.

The same has become true in this particular case of the *Norstar*.

Panama has strongly relied on this Tribunal case law doctrine. Before instituting proceedings, Panama identified instances in which this Tribunal has not required the exhaustion of local remedies. In spite of this case law, Italy insists on pursuing the need for Panama to exhaust local remedies, first by framing the claim of Panama as a claim of diplomatic protection and then, along the same lines, by describing Panama´s claim as one of indirect violation and of a predominantly espousal nature.

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

It is therefore misleading for Italy to claim, as it has in paragraphs 101-103 of its Reply, that ITLOS "repeatedly relied on the same line of reasoning" in the *M/V "SAIGA" Case* when referring to the ICJ *Interhandel* and *ELSI* cases, because it is clear that the *M/V "SAIGA" Case* was fundamentally different from both of those.

Panama will now analyze the *M/V "Virginia G" Case*.

The misleading supposition of Italy that, compared to the *M/V "SAIGA" Case*, there is a "different factual background to the present case" was repeated when Italy

remarked that the case of the *Saiga* “seems all the more corroborated by the *Virginia G* case” in paragraph 104 of its Reply.

Italy holds that in order to establish whether a given claim is ”direct” or “indirect”, ITLOS case law shows a consistent application of the "preponderance test". Italy relied on paragraph 157 of the *M/V “Virginia G” Case* to support its view. But when we read this paragraph, we will notice that Italy only cited its first part which says:

> [w]hen 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.

The Tribunal continued, however, by saying that it was of the view that

> the principal rights that Panama alleges have been violated by Guinea-Bissau include the right of Panama to enjoy freedom of navigation and other internationally lawful uses of the seas in the exclusive economic zone of the coastal State and its right that the laws and regulations of the coastal State are enforced in conformity with article 73 of the Convention. Those rights are rights that belong to Panama under the Convention, and the alleged violations of them thus amount to direct injury to Panama. Given the nature of the principal rights that Panama alleges have been violated by the wrongful acts of Guinea-Bissau, the Tribunal finds that the claim of Panama as a whole is brought on the basis of an injury to itself.

On the basis of paragraph 157 of the Tribunal’s finding in the *M/V “Virginia G” Case*, Panama challenges Italy’s argument because the Tribunal concluded that the rights Panama has under the Convention had been violated by Guinea-Bissau and that these violations were injurious to Panama. In other words, the Tribunal found that the claim as a whole was justified on the basis of this injury inflicted.

To support its Objection to Panama’s invocation of case law related to international judicial proceedings, Italy has suggested that the facts of the present case are fundamentally different from those in the *M/V “Virginia G” Case*.

However, this is not a valid conclusion. Instead, Panama argues that the circumstances of the *M/V “Virginia G” Case* are largely similar to the instant one because Panama is once again defending its basic rights concerning the freedom of navigation within the economic zone and on the high seas. That the Tribunal confirmed that Guinea-Bissau had indeed infringed the freedom that Panama claimed in the *M/V “Virginia G” Case* only strengthens, rather than weakens, Panama’s position before this Tribunal. The Tribunal found that the preponderance test in that case fell on the side of an injury to a State, thereby precluding the need to exhaust local remedies. Panama contends that this is also the case here.

Yesterday Italy was very interested in telling us about its municipal law; it mentioned the Vassalli law, the Pinto law; but it completely forgot that the rule of local remedies in this Tribunal has already clarified it in two different cases that are germane to the instant case, as we have demonstrated.

I will now introduce the issue of *locus* with regard to the exhaustion of local remedies.

Whether the local remedies rule applies also depends on the *locus* where the vessel carried out its activities. In paragraph 7 of its Objections, Italy merely confirms in its Statement of Facts, that the *M/V Norstar* was "off the coast" of Italy. It says:

> From 1994 to 1998 *M/V Norstar*, a Panamanian flagged vessel, carried out bunkering activity off the coasts of France, Italy and Spain.

In its submissions to the Tribunal, however, Italy has never explained what "off the coast" means. Nevertheless, this very ambiguous reference can be clarified by evidence revealed in the Italian Criminal Court, showing that the *Norstar* was, in fact, on the high seas and therefore outside the territorial waters of Italy. The Court of Savona referred several times to the *locus* of the *Norstar*, saying that it was operating either on the high seas, within the economic zone or within the contiguous zone, but certainly outside the territorial sea of Italy. This was the principal reason that Italy ordered the release of the *Norstar*. According to the Italian judiciary, the locus was outside the territorial jurisdiction of Italy. The Court of Appeal of Genoa came to the same conclusion when it held that:

> no offence is committed by anyone who provides bunkering on the high seas, … when the gasoil has been sold or trans-shipped on the high seas ... once the vessel has left the port, or once it has gone beyond the limit of territorial waters.

In view of these statements, the question remains: why has Italy still failed to specify what it means by "off the coast" in its arguments in this case? We already know that the purpose of its vagueness is to hide the fact that it was outside its territorial jurisdiction.

Italy was not entitled to apply its customs rules to the operations of the *Norstar* because there was neither a jurisdictional connection between Italy and the *Norstar* nor one with the juridical and natural persons that Italy identified as shipowner, charterer, captain, and crew.

Italy has also raised the issues of time-bar and estoppel. We will start with time-bar.

As has been accepted by Italy, Panama began contact on 15 August 2001. Beginning with this first communication, Panama has asserted that the arrest of the *Norstar* was contrary to article 297 of the Convention and to the principle of freedom of commerce. As we have already stated, and as Italy has recognized, this very first claim "stopped the clock" as far as a time-bar is concerned.

We have referred to the *Gentini* case, where the tribunal stated that

> the presentation of a claim to competent authority within proper time will interrupt the running of prescription.

It means that if a claim is made, there is no reason to argue validly that delay is affecting the claim.

In the *Certain Phosphate Lands in Nauru* case, the ICJ rejected an objection by Australia that Nauru had made a claim against it 20 years after having become independent and stated that

> international law does not lay down any specific time-limit.

How many years is Italy considering that Panama has been delaying – 18, 15, 5? We do not know.

Panama has not ceased pursuing this case. The fact that Italy concedes that as early as 2001 Panama sought redress and the prompt release of the *Norstar* clearly indicates that Italy took notice of the claim at that time, as has been shown over and over in this hearing, and as you will find out, within all the evidence that is presented even by both Parties as annexes to their pleadings.

We will now deal with the objection concerning estoppel.

We have already cited Wagner and other authors.

We would like now to ask some questions. Did Italy rely on the statement that it argues Panama made? At page 35, paragraph 173, of its Reply, Italy stated that it did rely on it. However, to say that it relied on it is not enough to estop Panama from bringing this case. Italy still needed to prove that it suffered any harm – or, as Wagner says, some detriment. What damage has Italy suffered with the Panamanian representation that Italy is presumably relying on?

In claiming estoppel, Italy founds its objection on Panama's expressed intention to apply for a prompt release that it ultimately never carried out. However, in order for estoppel to arise, there had to be a change in the Panamanian representation. But what was the position that Italy changed due to the communications it received from Panama?

Panama has not changed its position in terms of its claim because it has always stated that Italy should account for the wrongful arrest. The fact that it did not file for prompt release in no way changes its claim.

Panama was very diligent in pursuing its claim, but Italy has never explained why it did not answer, apart from saying that it was because of lack of powers vested in the Agent, as previously discussed.

Yesterday Mr Busco said that it was wrong to state that Italy never described the conduct of Panama as acquiescence, trying to include it as extinctive prescription, stating that

> acquiescence is therefore an integral part of the arguments that Italy is making with respect to the prescription.

If they are the same, then there was no point to present them separately as Italy did. In fact, although they are intimately related, both institutions have differences.

I will not dwell on these theoretical or academic issues to differentiate between acquiescence, prescription, time-bar or estoppel.

Relying on article 38 of the Statute of the ICJ, Italy contends that Panama has failed to assert its claim for an excessive period of time and that, under the doctrine of acquiescence, such inaction forfeits the right to claim. Specifically, Italy states that Panama remained completely silent, not communicating with Italy for five years and seven months, before commencing proceedings and bringing a claim against Italy *ex abrupto*.

Citing the *Grisbadarna* case and the author Tams, Italy has also determined that this period is considerably longer than what Panamanian law allows regarding the prescription of claims for damages. Italy further suggests, in paragraph 131 of its Reply, that Panama's failure to institute proceedings for five years and seven months has led it to expect that the claim would no longer be asserted. In order to validate this objection we would have to forget all the Panamanian times, all the written communications by means of which Panama claimed Italy.

The defence of acquiescence and the issue of delay have been the subject of comments by the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC. Paragraph (b) of article 45 deals with this issue by stating that the responsibility of a State may not be invoked if

> the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary 6 to this article repeats this, emphasizing the conduct of a State, including a test of unreasonability, as the determining criteria for the lapse of the claim.

However, the ILC concludes that

> Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

In its commentary No. 7 the ILC also cites the *Certain Phosphate Lands in Nauru* case in which the ICJ concluded that if a claim has not been resolved, no objection of acquiescence should be admitted, especially if the injured State has taken, as Panama has shown it has, every reasonable step to keep its claim alive.

In the same commentary the ILC also referred to the *LaGrand* case, saying that

> the Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it

after giving weight to factors relating to the delay due to any “additional difficulties” that may have affected the respondent due to the lapse of time, and that the only example of such difficulty was “the collection and presentation of evidence” without reference to interest.

In relation to this particular aspect I would like to emphasize the question: what is the purpose of these institutions? The purpose is to avoid the claim being filed without expectations from the other party, to allow the potential defendant to collect evidence and seek any means by which to defend its case. Has Italy been affected by this fact? Has Italy been affected by Panama during all these years if the entire criminal law files in the courts of Savona and Genoa are easily available for Italy to access? It is Panama that has experienced difficulties in obtaining evidence for this case, and it still has many steps to surmount to know exactly what happened in the Italian criminal courts.

Italy also has cited paragraph 197 of the *ICS Inspection and Control Services Limited* case to support its reasoning regarding acquiescence, but only paraphrases the arguments of the defendant in that case.

It is much more revealing also to include the arguments of the claimant, who said in paragraph 213 that acquiescence in international law is

> a tacit agreement or an implied consent to act, to ascribe a legal consequence to certain factual circumstances

and that

> it must therefore be restrictively interpreted to ensure that acquiescence corresponds accurately with the implied intention.

Panama is certain that no acquiescence could have been inferred from its conduct in this case because it has never expressed an intention to cease its pursuit of justice for the *Norstar*.

On the other hand, Panama wonders why it should have been necessary for it to continually assert its claim when Italy, despite having received eight communications from Panama, had not even bothered to acknowledge them.

In any event, it is clear that Italy has been notified of the claim and that it has never been dropped. The plea of delay was rejected by the ILC, stating that the respondent State could not establish the existence of any prejudice because

> it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.

The presentation of the claim to Italy has at least put it on notice of the existence of the claim. In the *Ambatielos* case the tribunal dismissed the laches claim by the United Kingdom on the grounds that it did not suffer any harm in the preparation of its defence. This relates closely to the notice argument adopted in the *Giacopini* case, holding that the claim of laches must be defeated because the defending State was put on notice years earlier and had an “ample opportunity to prepare its defence”. Has Italy not had an ample opportunity to prepare its defence in this case?

There are other similar instances in which international law courts have held that a claim that has been well documented since its inception by both the claimant and

respondent States will defeat a defence of laches. This is a citation from King, page 90:

> If the defendant has, or might have had, a clear record of the facts, or if the facts are admitted, prescription will not lie.

Borchard, page 831:

> Where public records support the existence of the claim, the reason for the principle ceases.

You can also see the *Tagliaferro* case in 1903. All these cases show that the main issue in cases involving delay – allow me to be repetitive – is to collect evidence and prepare the defence of the case.

In paragraph 9 of article 45, the ILC continued by saying that

> contrary to what may be suggested by the expression "delay", international courts have not engaged simply in measuring the lapse and applying clear-cut time limits, that no generally accepted time limit, expressed in terms of years, has been laid down

and concluded that

> none of the attempts to establish precise limits for international claims had achieved acceptance.

Probably the most relevant passage of the ILC commentaries to the present case is in paragraph 10, where the ILC stated that

> Once a claim has been notified to the respondent State, delay in its prosecution will not usually be regarded as rendering it inadmissible.

This statement was supported by the ruling in the *Certain Phosphate Lands in Nauru* case, in which the ICJ looked at the conduct of the parties as the "determining criterion" rather than "mere lapse of time".

In the *ICS Inspection and Control Limited* case, the Permanent Court of Arbitration found that

> any form of protest, action, or activity aimed at protecting rights or negating the status quo will preclude acquiescence.

Panama has continued to protect its rights by both actively asserting them throughout the communications it sent and by assiduously avoiding the indication that any lapse would lead the respondent to believe that Panama had acquiesced due to the circumstances as a whole, particularly in light of the breaches of the Convention by Italy.

On the other hand, the respondent has not provided any evidence as to why the lapse of time would have made it believe that the claimant was not going to institute

proceedings, nor has it demonstrated why it believed that the claimant would ever abandon its claim.

Panama concurs with Italy that in the *Wena* case the arbitral tribunal invoked the principle of repose, according to which

> a respondent who reasonably believes that a dispute has been abandoned or laid to rest long ago should not be surprised by its subsequent resurrection.

I do not know how this quotation helps Italy's case, because it says only that they should not be surprised by the resurrection of the case. However, while Italy suggests that this was only because "Wena had continued to be aggressive in prosecuting its claims", implying, therefore, that Panama has not, there is no clear-cut time limit for the purposes of invoking responsibility; the decisive factor being whether the respondent could have reasonably expected that the claim would no longer be pursued, thus making the delay unreasonable.

It is important to note that although Italy has relied on chapter 72 of Tams on "Waiver, Acquiescence and Extinctive Prescription" (pages 1043 and 1044), it has not provided copies of such citation as far as I know; I might be mistaken. Once researched then, we can conclude that the reason for not providing such citation, if that was the case, is that on page 1044 the author states that

> It is clear that only under specific circumstances can inaction amount to acquiescence. In order to entail legal effects, a State must have failed to assert claims in circumstances that would have required action.

Panama did not need to act more than it did in terms of pursuing its claim against Italy. The examples given by Tams refer to situations where the claimant "has failed to energetically pursue other, related claims" and where "the respondent State could legitimately expect that the claim would no longer be asserted", or "where it was prejudiced by the long period of passivity". None of these examples is applicable to the present case.

Tams again confirms that "it can hardly be overstated that much turns upon the specific facts of the given case." This author concludes his commentary by saying that

> a State bringing forward a claim based on estoppel would have to more carefully establish that it had been prejudiced by the other State's change of attitude

which Italy has not been able to evidence in this case.

The final argument that Panama would like to bring before this honourable Tribunal is that Italy still holds jurisdiction and has control over the *Norstar*.

Yesterday Italy said that once the decision had been made to return the vessel and communicated from Savona to Spain, the Italian judicial authorities had no further jurisdiction regarding the return of the *Norstar*. This is because as of March 2003 the Savona Court's ruling was an enforcement order for the immediate return of the

Norstar to the legal owner. With all respect to my colleague Ms Graziani, this is incorrect. In her own statement Ms Graziani had previously acknowledged that on 18 March 2003, five days after issuing the 13 March ruling, the Savona Court transmitted the decision regarding the return of the *Norstar* to the judicial authorities in Spain, but she did not say that the public prosecutor appealed the first-instance decision of the Savona Court, which made impossible the compliance of the Savona Court's ruling on the return of the vessel.

It is then important to note that upon receiving a petition from the Spanish authorities to demolish the *Norstar* on 31 October 2006 the Court of Appeal of Genoa stated that there was a decision still pending as to the destiny of the vessel and that it lacked jurisdiction to decide on this matter. In fact, this was the same quotation made by Italy. However this Italian Court said something else. It said that

> having noted that this judgment obviously has to be enforced and there is no decision to be taken given that the destiny of the vessel, after having been given back to the party, entirely does not fall within the competence of this Court

– that is the Court of Genoa –

> and in any case, given that the first instance judgment was confirmed, any issue on the enforcement of the said judgment would be the competence of the Court of Savona.

Italy has recognized that enforcement of the judgment ordering the release of the vessel would come from the Court of Savona. However, to date that Court has not issued a decision on this matter, so it is still pending. In fact, Italy has not even informed Panama of its intention to either return the ship or to pay damages. Notwithstanding this, Italy still considers this claim is affected by delay in terms of acquiescence, time-bar and estoppel.

In any event, the *Norstar* (the object of these proceedings) has not yet been returned. In fact, Italy has made not a single effort to facilitate this or to provide redress for the damages caused by its order of arrest. This signifies that Italy's compliance with the judgment by its own authorities is still unrealized. For Italy to argue that the Panamanian claim is affected by delay with reference to any of the three institutions – acquiescence, prescription and estoppel – denies all of the efforts Panama has made to communicate in order to obtain redress. Italy intends to reap advantage from its own failure to make timely reparations to Panama as a consequence of its unlawful arrest of the *Norstar*, thereby contravening the principle in law of *nullus commodum capere de sua injuria propria,* namely, that no one can be allowed to take advantage of his own wrong.

Yesterday we heard that Italy's arguments were developed upon the fact that the Agent had never been vested with representative powers. However, we know now that the only reason to bring forward this objection was because there was no answer to the question of why Italy has not responded to any of the communications of Panama. If you think about it, in the Preliminary Objections of Italy as put forward originally, there was no reference to this issue; the reference to this issue came after our Observations, which made clear that Italy had not responded.

Italy also mentioned yesterday Panama's invocation of rights that are manifestly irrelevant to the instant case. Italy clearly raised this point in its Preliminary Objections. Panama acknowledged this when it recorded in its Observations at paragraph 50 that Italy asserts that there is a manifest irrelevance of the UNCLOS provisions invoked by Panama. How can I better explain the relationship of the provisions invoked by Panama to the facts that Panama depicted alongside all the communications that we filed as evidence and that Italy has recognized that it received?

From the very first letter, Panama stated all the facts of the case. Italy has sometimes referred to the fact that Panama did not refer exactly to the wording of the Convention – that is probably true – or that Panama only referred to freedom of commerce, but is it not true that freedom of commerce is part of freedom of navigation? What was the activity that the *Norstar* was performing when it was arrested by Italy? It was performing a trade activity. That is the main purpose of a ship, to make money to obtain some rewards for its work. Italy completely eliminated the possibility for the *Norstar* to continue as an asset, and that is against the freedom of commerce that is performed by the freedom of navigation of ships.

Italy also said yesterday that no allegedly wrongful act in the present case is attributable to Italy, and Italy addressed this point with the same language that has just been referred to and that Panama has likewise acknowledged. We are fully convinced, Italy said, that all the arguments serve to show clearly that in the case before us today we find ourselves precisely in a situation in which such a response is not required, so Italy still considers it does not have to answer our communications.

I would even put forward an ethical issue here. When somebody asks someone a question, the person who asks the question expects an answer. As a matter of courtesy, we should be expecting Italy to have answered, at least that they had received the communications. Panama did not know that Italy had received the communications until the time that Italy filed its Preliminary Objections. All these years Panama did not know if Italy had received the communications.

Another issue that Italy raised yesterday is that Panama had not communicated to the Italian Government in a diplomatic and proper way. I would like to know why I had to communicate with Italy in a diplomatic way. I am not a diplomat. I have stated this over and over. I do not have to communicate in diplomatic language or with a note verbale. Perhaps presuming that Italy would raise this issue, I went to the Ministry of Foreign Affairs of Panama and requested that the communications I had been sending to Italy be then sent through diplomatic channels. That is why you will find in the files two notes verbales, 2227 and 97. Even using those channels, Italy did not respond.

Italy has also said that the communications did not in any way refer to rights deriving from the provisions of the Convention which Panama invoked in its Application. I have made clear that all the facts that were explained in our letters clearly indicated that it was the affectation of the rights of Panama in terms of freedom of commerce and freedom of navigation. It is not difficult to deduce. Is it true that we have to explain precisely in a letter purporting only to obtain feedback from the other party as

if we had to write in a claim or in an application? We do not; there is no provision that requires that.

There is something else that Italy referred to yesterday. It said that an authorization to litigate is something entirely different, that these are two separate roles which Mr Carreyó confused over the years, starting in 2001; that clearly Panama made the same confusion when it authorized the current litigation. However, it also made this confusion at an earlier stage. The confusion, Italy continued, is very clearly visible in the communication of 31 August 2004, because I sent a fax. There was a confusion in the fax attaching the power of attorney. Mr President, Italy says this language is not at all in line with the text of the document accompanying it. I am sure you will have a look at those documents. The document accompanying it is simply a letter from the Panamanian Ministry of Foreign Affairs, sent to the Registrar of this Tribunal four years previously. It is simply a letter from the Ministry of Foreign Affairs to the Registrar of this Tribunal.

As you see, Mr President, Italy says this document most certainly does not authorize Mr Carreyó to intervene in the name of the Panamanian Government in the case of the *M/V Norstar* as such, as the fax which Mr Carreyó sent to Italy says. Coming back to the words of the ILC, the document does not show that Mr Carreyó in any way acted, says Italy, "under the direction, instigation or control of Panama". The document simply restricts itself to authorizing him to litigate on behalf of Panama. What else do I need if I am being authorized to litigate on behalf of my country? It only adds that it was for the prompt release procedures. I ask myself, when a lawyer obtains a power of attorney to lift the arrest of a vessel, is it not also authorized to communicate with another party in any terms? Does he have to obtain a new power of attorney in order to comply with the article 283 requirements to exchange views?

Italy says, Mr President, as I have just shown, that this authorization to litigate could not also give Mr Carreyó the authorization to represent Panama in diplomatic dealings with Italy. I was not interested in dealing with Italy as a diplomat, that is to say, the only level at which any dispute could arise between the two Parties.

Of course, after the presentation of the Reply I understood that Italy wanted to frame this case as a diplomatic protection case at the start.

The Panamanian Government says that Italy did not trouble to inform the Italian Government of the authorization in question until almost four years later. In any case, by that time the power to litigate through a prompt-release procedure had become entirely moot. There is confusion, says Italy, regarding the role of the Panamanian Government in this case, notably as to the question if up until the date of the Application it acted.

There are three possibilities raised by Italy: (a) as a subject with the authority to initiate prompt-release proceedings in its name – tick – it is true; (b) as an instrument for transmitting to Italy a private communication – tick, true; and (c) as a State acting in order to obtain reparation of the damage caused through an international wrongful act, allegedly ascribed to Italy – true as well – all of them. Why should there be any doubt about it?

Mr President, allow me to repeat my refrain once again: we cannot confuse the power to litigate on behalf of a State with that of representing it in its diplomatic relations. I am not confused; I am very clear that I have been acting, since the very beginning of this case, as having the power to litigate. Before litigating, the Convention requires me to try to communicate with the other Party to see whether we can do several things – not only one. Article 283 is not only concerned with exchange of views for nothing. If we review some cases, and what has been happening in this case, Italy in its Preliminary Objections, at paragraph 26, suggests that Panama did not comply with its own obligation to exchange views, because Panama mentioned immediately in the first communications recourse to ITLOS as a means to settle the dispute. The *travaux préparatoires* of UNCLOS do not only demonstrate that the obligation to exchange views was included to avoid surprises, but also in order to define as quickly as possible the procedure for settling the dispute. The intention of the States Parties for article 283 during the draft negotiations can be deduced from various statements made by the participants themselves. The following account of discussions has been given by a participant, Mr Adede from Kenya:

> One of the fundamental features of the comprehensive system for the settlement of disputes combining flexible choices of non-compulsory and compulsory procedures was the right of the parties to agree on the appropriate procedure for a particular dispute. There was accordingly the need to create an obligation for an exchange of views between the parties on the selection of the appropriate mode of settlement … The emphasis was also placed on an expeditious manner in exchanging views so as to avoid turning the procedure into a mechanism of delaying the process of actual settlement.

Italy has used silence to delay the process of settlement.

Another participant, Mr Ranjeva, of the Malagasy Republic, has stated the following:

> Those who drafted the informal basic text intended to prompt parties to enter into negotiations in order to define, by common agreement, and as quickly as possible, the procedure for settling the dispute. As far as the participants were concerned, exchanging views was designed to make it easier to decide on the means of settlement acceptable to both parties, rather than to resolve the dispute. It is not a question only of settling the case, but selecting the means for settling it.

The two participants, Shabtai Rosenne, Israel, and Louis Sohn, the United States, include in the *Virginia Commentary*:

> This mandatory exchange of views is not restricted to negotiations but also includes all the peaceful means, thus re-emphasising the provision in article 280 that Parties are free to agree at any time on the settlement of the dispute by any peaceful means of their choice.

Panama had, consequently, every right to mention recourse to the Tribunal at the beginning of the communications. As a choice of dispute settlement procedure, the fact that Panama did not do so does not mean that it did not comply with its own obligation to exchange views. The statements made by the participants – the intention of the States Parties to enter into negotiations – are reflected in the

Convention itself. If you read the Convention within the context, article 283 in section 1 of Part XV contains seven articles, the first five of which are interlinked. In particular, article 283 follows article 279, recapitulating the general obligation to settle disputes by peaceful means; and there is a close link between article 280 concerning the choice of means of dispute settlement and article 283, providing for the obligation to exchange views.

The subject-matter of this exchange is precisely the choice of a peaceful means of settlement, as has been said by the author David Anderson. Another link can be seen between article 282 governing the situation where the parties to a dispute have agreed upon a procedure that entails a binding decision, and article 283 which is concerned with identification of the appropriate means of settlement of disputes.

For this reason and others, Panama finds that it has indeed complied with its own obligation to exchange views and Panama finds that it has made enough efforts.

In the *Cameroon* v. *Nigeria* case the ICJ stated that there exists no rule to the effect that "the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred" to the Tribunal. Panama's own obligation to exchange views was to a certain extent dependent upon a response from Italy. Italy never responded with regard to recourse to ITLOS as a choice of procedure, not even answering Panama when it said "we could use arbitration". If you read all the documents that Panama sent to Italy, we mentioned arbitration as a choice of procedure and a way to resolve the dispute.

In the *Right of Passage* case (*Portugal* v. *India*), the Court held that the prior diplomatic negotiation requirement had been complied with to the extent permitted by the circumstances of the case. Panama contends that if one party, like Italy, remains silent, it is a circumstance to be taken into consideration, since that did not permit a bilateral exchange views on the choice of a dispute settlement procedure.

Now, we also have to consider what was done by Italy, not by Panama only. Italy failed to comply with its own obligation to exchange views. Remember that when we were beginning our presentation we made reference to article 283 and we said "the Parties" – plural. Italy omitted to respond to any communication sent by Panama and that alone is an omission and is an act contrary to the general principle of good faith recognized in public international law.

The duty to act in good faith is also enshrined in UNCLOS. Panama respectfully asks the court to take this into consideration, and also because Judge [Chandrasekhara] Rao noted in his Separate Opinion in the *Land Reclamation* case that the obligation under article 283 must be discharged in good faith, and it is the duty of the Tribunal to examine whether this is being done.

Italy is the one that has failed to comply with this obligation to exchange views.

We will also argue, on the basis of recognized principles and case law, that Italy is not acting in good faith when using its own failure to comply with the obligation to exchange views as a means to object to the Tribunal's jurisdiction.

Page 31 of the Judgment by the ICJ on the *Factory at Chorzów*, in the case between Germany and Poland, stated:

> It is … a principle generally accepted in the jurisprudence of international arbitration … that one Party cannot avail himself of the fact that the other has not fulfilled some obligation … if the former Party has … prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.

This case is the classic application of an existing principle, the maxim *nemo ex propria turpitudine commodum capere potest*. This maxim is a concrete decision of the principle of good faith or *bona fides*.

> *Nul ne peut profiter de sa propre faute*.

Another application of the maxim in question is to be found in the jurisdiction of the *Danzig* case. In that case the Court recalled that Poland could not be heard when invoking the competence of its municipal tribunals if this incompetence resulted from Poland's own failure diligently to transform the provisions of an international treaty into internal law. The point is that a State cannot plead an objection that would be tantamount to pleading the non-execution of one of its own international obligations.

The Court expressed itself in the following terms:

> The Court would have to observe that at any rate Poland could not avail herself of an objection which, according to the construction placed upon the *Beamtenabkommen* by the Court would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international agreement.

I do not know if I have pronounced that word correctly; forgive me if I have not done it properly.

There is another parallel, since Italy is pleading an objection to the jurisdiction of the Tribunal, which is the same as pleading the non-compliance with its own international obligation to exchange views.

We will now summarize our case, Mr President.

Fuel purchased outside the territorial sea is not a crime. Therefore, this Tribunal has jurisdiction to entertain this case because the wrongful arrest order of the *Norstar* is disputed and because Italy's refusal to respond to any of the formal communications it received from Panama has prolonged the existence of this dispute

Furthermore, the facts of this case allow the Tribunal to have jurisdiction *ratione personae* and to continue proceedings with Italy, the presence of Spain not being indispensable for its adjudication. While Panama has conscientiously attempted to settle this dispute through bilateral means, Italy has advanced a contradictory interpretation of article 283, contending that there is no dispute while simultaneously declaring that Panama was unilaterally "obligated to exchange views". This paradoxical approach has inhibited the very exchange that Italy has professed to want.

The allegation that the Panamanian attempts at dialogue have not been "appropriate, genuine or meaningful" lacks specificity, substance, evidence and a legal foundation. Italy's failure to file all the communications received from Panama has been amplified by its omission of highly relevant facts about both its conduct and the case itself. It is extremely significant to note, as Italy has neglected to do, that the *Norstar*'s release was ordered because its activities were carried out beyond the Italian territorial waters and thus were not criminal acts. Such omissions have not only affected Italy's interpretation of the case but have also impeded the Panamanian right to seek a resolution in an expeditious manner.

Italy, however, has described Panama's efforts to negotiate as "an absence of meaningful attempts", despite the fact that the communication has been entirely one-sided on the part of Panama.

As a result, Panama now wonders how a negotiated settlement could be considered feasible when Italy has added belittling comments, such as this one, to its previous refusal even to acknowledge receipt of any of the Panamanian communications, much less expend any energy on reaching a settlement.

In fact, Panama first learned that Italy had received its messages only when Italy appended them to its Objections. Thus, it is ludicrously hypocritical for Italy to accuse Panama of failing to make "meaningful attempts" at negotiation.

Italy has also referred to its juridical relationship with Panama as merely a putative "difference", but it is clear from Italy's Objections that its interpretation of the law and facts in this case differs greatly from that of Panama. By rejecting all Panama's formal requests to engage, Italy has essentially confirmed the existence of a serious disagreement.

On top of this, Italy now proposes to put an end to the proceedings without even advancing its view regarding the Panamanian claim. In other words, Italy intends to take advantage of its own inaction by requesting that the Tribunal dismiss this case without regard to its merits.

Although many jurisdictions have established fixed rules regarding prescription, this is not the case with international law. There is no provision in UNCLOS regarding prescription, the doctrine of laches or any of the delay institutions claimed by Italy to be applicable in this case.

In the absence of a clearly stated period, all those objections do not hold, particularly when the behaviour of Panama has always been to demonstrate its good faith intention to communicate its claim, whereas its counterpart has used silence as its only means of defence until filing its Preliminary Objections.

Panama asserts that its claim *remains* admissible because, by notifying Italy of its intentions as early as 2001, Panama extended any time limitation period in effect, thus eliminating any question of a time-bar, estoppel, prescription or acquiescence and because this case represents the unmet obligation of Italy to release the *Norstar*, which is still under the jurisdictional control of the Italian authorities.

Estoppel is not invoked merely because a claimant decides against filing a prompt release request in order to let the process take its course, but rather depends on whether the complaining Party (Italy) relied on the statement of the Party making the representation (Panama), which in this case it did not.

Finally, the need to exhaust local remedies is not applicable in this case, as it was not in the *M/V "SAIGA"* and the *M/V "Virginia G"* cases, due to the lack of a jurisdictional connection between Italy as the arresting State and Panama, where the *Norstar* is registered, because the arrest was based only upon activities of the vessel carried out in the high seas outside of the territorial waters of Italy.

Panama has shown that it has always been an interested party seeking a mutually agreeable solution to this case according to the United Nations Convention on the Law of the Sea, whereas Italy has always intentionally procrastinated in the resolution of this dispute, using silence as a means of evading justice.

The decision whether to restore the *Norstar* to its original state at the time of its seizure, with updated class and trading certificates delivered to its owner, or to pay compensatory damages, still rests with Italy.

If, after all this time, the Italian courts having jurisdiction over the *Norstar* have not acted regarding the *Norstar*'s devolution nor made any arrangement with the Spanish authorities to this end, there is no validity in any of the objections raised by Italy concerning the passage of time, such as acquiescence, time-bar, prescription and estoppel. Finally, it seems that Italy intentionally omitted to respond in order to allow time to pass and then defend itself by saying that it was the claimant's fault not to institute proceedings on time.

Thank you, Mr President.

THE PRESIDENT: I would like to thank the Agent of Panama for his statement. That brings us to the end of the first round of Panama's oral arguments. We will continue the hearing tomorrow at 10 a.m. to hear the second round of oral arguments of Italy in the morning, followed by Panama in the afternoon.

MR CARREYÓ: May I have the floor?

THE PRESIDENT: Yes, please.

MR CARREYÓ: Mr President, I understood that you had allowed a further half hour to refer to the petition of Panama.

THE PRESIDENT: I asked the Registry to check with you whether you had any additional statement today and I have not been informed of any, but if you have an additional statement, we will adjourn for 30 minutes and resume at 5 o'clock, when you will have 30 minutes in which to respond.

MR CARREYÓ: I do not want to impose on the Tribunal. I know that it will have been very tiring for you listening to me for such a long time, but I understood that we could

sustain our request to deal with the scope of the subject-matter of the new issues raised by Italy at any time that we wanted, and we decided to do it at the end of our verbal statement.

MR PRESIDENT: As I said, I asked the Registry to check with your delegation during the lunch break what time you would be using this afternoon, but probably there was some kind of misunderstanding. Yes, you do have time, and we will then adjourn for a break of 30 minutes and resume at 5 o'clock, when your delegation will have 30 minutes in which to provide an additional statement.

MR CARREYÓ: Thank you, sir.

THE PRESIDENT: We will adjourn for 30 minutes and resume at 5 o'clock.

(*Break*)

THE PRESIDENT: We resume our oral hearing. I will give the floor to Mr Carreyó to continue his statement and exercise the right to the additional 30 minutes allocated to each delegation. You have the floor.

MR CARREYÓ: Thank you, Mr President. I apologize for the misunderstanding in our communications. As you know, Panama filed a request for a ruling concerning the scope of the subject matter based on the Preliminary Objections filed by Italy. This is a very important issue for Panama because we feel we have not had the opportunity Italy has had to approach several issues not included in its original Preliminary Objections.

There are six issues Panama has identified in this area.

The first concerns the lack of representative powers. Italy has answered this particular issue by saying that this is part of the objection that a dispute does not exist. I do not see how you can extend one objection to include another. As we have already said, the only reason for Italy to include this new objection is because there is no answer to the fact that Italy did not respond to the Panamanian communications, but it is not fair that Panama does not have the opportunity to reply to the objection by Italy except by way of these oral proceedings.

Article 97 of the Convention is very clear about the time-limit within which parties are allowed to present their preliminary objections and that time-limit had already passed when Italy filed this Reply. It is very easy to compare the Preliminary Objections of Italy originally against the Reply in terms of extension. Italy has said that Panama had ample opportunity to respond to these objections and it has the further ability to respond to them during this hearing, and even cited a case where it says that a jurisdictional objection raised at the merits stage of the proceedings could be considered – but this is not the case. They are of course trying to apply this case *a fortiori* but it is nothing to do with what I am claiming as a Party which has not had the opportunity to make written submissions; it is not a question of oral hearings. I am very happy to have this opportunity to reply to Italy's new objections, but this has only been orally, not in writing, and I feel there is a difference between putting something into writing and only having the opportunity to refer to it orally. I have not

found a single reference in Italy's original Preliminary Objections to the lack of representative powers of Panama. There is none, and it is very hard to accept that Italy would have reason in saying it is part of the objection that a dispute does not exist.

The second new objection is that Italy says in the Reply that the rights invoked by Panama are manifestly irrelevant. I concede that there is a line and a half in the Preliminary Objections that states

> apart from the manifest irrelevance of the UNCLOS provisions invoked by the Applicant to sustain its claim.

That is the only reference to the irrelevance of the provisions invoked by Panama in the Application. Less than two lines. If you read, there are 21 new paragraphs concerning this alleged irrelevance of the provisions that Panama invoked. Has Panama had the opportunity to reply in writing to these new objections? No.

The third new issue is the order. The difference in the new hypothesis between a State's conduct that completes a wrongful act and the conduct that precedes such conduct, the preparatory conduct to an international wrongful act. I do not know whether this is a part of the tradition. This may be the first time this will be discussed in this Tribunal because this is the first time, as far as I know, that a Preliminary Objection has been presented. I understand that the provisions give the opportunity to the respondent to file the objections and then to the applicant to observe, but then another opportunity to the respondent to reply, without the opportunity for the applicant to submit anything in writing. This is an imbalance that I would appreciate if you would consider.

The fourth is that no internationally wrongful act is attributable to Italy. Italy says that it addressed this point with the same language I have just quoted and Panama has likewise acknowledged, but it does not give any other explanation. I have seen no reference in the original Preliminary Objections, which are covered in the Reply, with regard to the attribution of an international wrongful act and the independent responsibility principle, bringing up all the issues of the ILC and the Strasbourg Convention on Mutual Assistance in Criminal Matters and the *Xhavara* case, the fact that Italy did not actually carry out the arrest. This question of attribution; the attributability was not raised in its Preliminary Objections either.

The fifth, the espousal nature of the claim – of course it is related to diplomatic protection but it was not elaborated in the Preliminary Objections how far we can say that something is related to something. Everything is related to the law in fact but I have not seen in the Preliminary Objections any reference to the espousal nature of the claim, nor any reference to the *Interhandel* or *ELSI* cases cited by Italy. We did not say that we explicitly recognized the espousal character of its claim in our Observations. Of course we did not say that, because there was no reference to espousal nature of the claim in the Preliminary Objections.

The last one, Mr President, is acquiescence. I have already referred to the fact that Italy seemed to rely on them being synonymous; Italy considers acquiescence and timely prescription are synonyms or at least that one covers the other. I am not sure

that these institutions are not different, otherwise Italy would not have considered them separately in its Reply.

May I conclude, Mr President, in just 13 minutes, that we have not had the opportunity to respond; to respond, yes, but not in writing. I do not know whether this could be an issue in future for this Tribunal that a respondent which files preliminary objections then takes advantage of the fact that the Applicant will not have an opportunity in writing to oppose a whole gamut of new issues that could be introduced in the Reply.

With that, I conclude my oral arguments today. Thank you for your patience, for your attention, for your kindness and for the opportunity to speak before such an important, high and honourable Tribunal. Thank you, Mr President.

THE PRESIDENT: I thank the Agent of Panama for his statement. That brings us finally to the end of the first round of arguments of Panama. We will continue the hearing tomorrow at 10 a.m. to hear the second round of oral arguments of Italy in the morning, followed in the afternoon by oral arguments of Panama.

The sitting is now closed.

(The sitting closed at 5.15 p.m.)