INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2016

Public sitting

held on Thursday, 22 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: Good afternoon. We will now hear the second round of oral arguments presented by Panama. I give the floor to Mr Olrik von der Wense. You have the floor, sir.

MR VON DER WENSE: Mr President, Members of the Tribunal, it is a particular honour to appear today before this Tribunal and to represent the Republic of Panama.

After addressing in detail the legal matters important for this stage of the proceedings over the past few days, I would like to focus on the aspects I believe to be most important and draw your attention to these arguments before presenting the final submissions of Panama for this hearing.

I would like to begin with the question of whether the Tribunal has jurisdiction over this case. In this regard, Italy objects to the idea that a dispute exists.

This objection, however, does not comply with the existing case law, which needs to be considered.

In the *Southern Bluefin Tuna* Cases, the Tribunal stated – as the International Court of Justice before – that

> a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of the interests" ... and "[i]t must be shown that the claim of one party is positively opposed by the other.[1]

Furthermore, in the *Land and Maritime Boundary* case, the International Court of Justice asserted

> the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference.[2]

Moreover, the International Court of Justice stated in the *CERD* case, that

> The existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for.[3]

Based on these rulings, there can be no doubt that a dispute exists in the present case.

[1] *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, para. 44.
[2] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, para. 89.
[3] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, para. 30.

In the letter of 3/6 August 2004,[4] Panama presented its interpretation of the law at length, arguing that the seizure of the vessel was a wrongful act. Panama pointed out that the illegal seizure resulted in substantial damages, which grew daily. The vessel had been damaged due to the long seizure and could no longer be used. Panama therefore requested Italy to indicate whether it intended to pay the damages caused by this illegal procedure. At that time Panama expressed its willingness to pursue this case before the Tribunal in accordance with article 287 of the Convention if the terms of a settlement could not be reached.

Given these circumstances, it would have been reasonable to expect a response from Italy. Based on Italy's failure to do so, however, Italy has shown its negative stance by inference.

The letter dated 2 December 2000[5] authorizing Mr Carreyó to act on behalf of Panama and the *M/V Norstar* covered all acts referring to the seizure of the ship, particularly the negotiation of claims for damages. Thus, this letter cannot be interpreted as relating to the execution of prompt release proceedings only. For Italy to now object that the 2004 communication from Mr Carreyó cannot be attributed to Panama as he did not possess representative power is, therefore, not justified. This is obviously an illegitimate attempt to explain why Italy had not replied to the letters of Panama at all.

As a result, Italy cannot of course successfully argue that Mr Carreyó was only a "private lawyer" using his "personal headed paper". In fact, the Rules of the Tribunal do not prohibit a party being represented by a "private lawyer". The letterhead used by Mr Carreyó merely displayed the simple fact that he was the correspondent. Mr Carreyó acted neither as a public servant nor as a member of the diplomatic corps of Panama, but simply as its representative.

It also needs to be stressed that a correspondence does not need to include a written representative power for representation to be effective. An indication of the person or State who is represented is sufficient. Also, the relevant authorization can be given with retroactive effect by the State represented.

In the present case, with note verbale 2227 of 31 August 2004,[6] Panama expressly confirmed to Italy that its Ministry of Foreign Affairs had certified that lawyer Nelson Carreyó was empowered to act as the representative of the Republic of Panama before the International Tribunal for the Law of the Sea.

With note verbale 97 of 7 January 2005,[7] Panama again confirmed the representative power of Mr Carreyó by referring to him without any restriction as

> Legal Representative of the Republic of Panama and of the interests of the owners of the motor vessel *Norstar*.

[4] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[5] Preliminary Objections of Italy of 10 March 2016, Annex L.
[6] Preliminary Objections of Italy of 10 March 2016, Annex M.
[7] Preliminary Objections of Italy of 10 March 2016, Annex N.

This note verbale does not contain any reference to prompt release proceedings. Thus, the authorization could not have been misunderstood as being restricted to prompt release proceedings.

Italy was therefore notified multiple times that Mr Carreyó was entitled to represent Panama in the present case and, in particular, was authorized to send the previously mentioned letter of 3/6 August 2004,[8] as well as other communications regarding this matter.

Ultimately, Italy did not object to the alleged lack of representative power until its Reply of 8 July 2016. With this behaviour, Italy has violated the principle of good faith. Therefore, Italy's argument that Mr Carreyó did not provide evidence of the mandate should not prevail, but rather should be dismissed.

Italy also argues that Mr Carreyó was acting in a private capacity, since his letters were certified under the Hague Convention of 5 October 1961. According to Italy, such a certificate or apostille may not relate to the content of the document nor may it ground the representative power of Mr Carreyó. This line of reasoning, however, misses the point since, according to the Rules of the Tribunal, whether the apostille fulfilled the requirements of the Hague Convention or not is of no relevance. Moreover, since Italy did not previously object to either the signature or the representative power of Mr Carreyó, the apostille is of no significance. The certification provided to Italy proved the authenticity of the signature and thus the identity of the correspondent. In this context, it must be noted that by initiating proceedings Panama was not pursuing diplomatic action or protection but a juridical decision.

Italy's objection to the representative power of the agent of Panama further contradicts the principle of good faith, since Italy expressively confirmed in note verbale 332 dated 25 January 2005[9] the receipt of Panama's note verbale 97 dated 7 January 2005[10] in which Mr Carreyó was expressly named representative of the Republic of Panama. Since this confirmation refutes the Italian argumentation of the alleged missing representative power, the question why Italy concealed this piece of evidence is self-explanatory.

In any event, the existence of a dispute cannot be denied even if the representative power of Mr Carreyó were in question.

In conclusion of that, despite Italy's protests to the contrary, a dispute most certainly exists.

Mr President, Members of the Tribunal, I will now address the next question pertaining to the jurisdiction of the Tribunal, which is based on whether the requirement of exchanging views, in accordance with article 283, has been met.

As previously stated, Panama has conveyed its position several times and has requested Italy to enter into negotiations particularly with respect to compensation for

[8] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[9] Observations and Submissions of Panama of 5 May 2016, Annex 5.
[10] Preliminary Objections of Italy of 10 March 2016, Annex N.

damages. In its letter dated 3 August 2004[11] Panama expressly referred to article 283.

I would like to emphasize the remarkable failure by Italy to refer to this letter. Why did Italy conceal this important message? The answer to this question seems obvious, since the letter clearly contradicts Italy's thesis that Panama did not meet the requirements of article 283.

This was also an attempt to conceal the fact that Italy has simply refused to enter into negotiations. With this refusal, the requirements of article 283 can be considered as met. Along these lines, Panama refers to the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor.*[12] In this case the Tribunal stated that

> the obligation to "proceed expeditiously to an exchange of views" applies equally to both parties to a dispute[13]

and that

> a State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention on the Law of the Sea when it concludes that the possibilities of settlement have been exhausted.[14]

Italy alleges that the Panamanian attempts at dialogue have not been "appropriate", "genuine" or "meaningful". The fact that Italy refuses to specify these objections reflects on its own confusion of this issue, however.

Furthermore, Italy has neglected its duty to proceed with an exchange of views and, by doing so, has also prevented Panama from fulfilling its corresponding duty to proceed appropriately.

Based on Italy's refusal, the possibilities of a settlement must therefore be considered exhausted and thus the requirements of article 283, paragraph 1, of the Convention on the Law of the Sea have been met.

Mr President, Members of the Tribunal, I will now move on to the last point pertaining to the jurisdiction of the Tribunal, being whether the Tribunal has jurisdiction *ratione personae* or, in other words, whether Italy is the proper respondent in this case.

Italy is pleading that it did not actually carry out the seizure of the vessel but that the seizure was carried out by Spain and that Italy is therefore not the proper respondent in this case.

However, Italy can of course not succeed with this argument. After all, Spain itself had no interest in the seizure of the vessel. Without the order of Italy, Spain would

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[11] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[12] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10.
[13] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 38.
[14] *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, para. 47.

never have carried out the seizure. Italy therefore merely used Spain as its executive body.

As already the title of Annex D,[15] "International Letters Rogatory of the Tribunal of Savona to the Spanish Authorities, 11 August 1998" reveals, Italy's order was an international request for judicial assistance made by Italy to Spain. Italy is therefore responsible for the letters rogatory being issued and, therefore, is also responsible for the commission of the actual offence. Spain, as the State providing judicial assistance, was neither obligated nor expected to investigate whether an offence existed or whether the seizure was justified. Spain was merely responsible for the manner and methods of the seizure, that is to say, for example, the careful attention of the integrity of the ship and its crew during the seizure. This definition of mutual accountability is immanent in the system of mutual assistance.

This distinction in accountability between the State seeking and the State providing judicial assistance also entails that if a criminal charge were not ratified, the State seeking judicial assistance would be liable for paying damages, not the State providing judicial assistance. Any other conclusion would cause States to be unwilling to provide judicial assistance at all.

Italy's argument that, according to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ASR), Italy is not responsible in this case, is not correct. Italy argues that when drafting article 6, the International Law Commission was referring to the *Xhavara* case[16] where the European Court of Human Rights found Italy responsible for the sinking of an Albanian ship in the course of an investigation at sea by Italian authorities even though this investigation had been requested by Albania under the Convention between Italy and Albania of 1997. However, this case is not comparable with the present case. In the *Xhavara* case Italy did not act in the context of mutual assistance, but rather based on a bilateral agreement authorizing the Italian navy to board and search Albanian boats. Thus, Italy's action was made in execution of its own decision and not a mere execution of mutual assistance. The *Xhavara* case is also different from the present case since during the execution of the seizure several crew members were killed.

In the present case, it was not Spain as the executing State but Italy who decided and ordered the seizure of the *M/V Norstar*; Spain merely provided judicial assistance. Italy is therefore responsible for the consequence of its wrongful order.

Italy has suggested during the first round of the hearing that Spain made clear that its assistance will only be given when the alleged offence of the vessel is also a breach of Spanish law.

However, this suggestion redounds upon Italy itself, because it is obvious that this implies that Italy has pretended that there has been a breach of Spanish law. It is undisputed, however, that there has been no breach of law at all, neither of Italian law nor of Spanish law. Thus, the responsibility and guilt of Italy is to be assessed even more evident.

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[15] Preliminary Objections of 10 March 2016, Annex D.

[16] *Xhavara and Others* v. *Italy and Albania*, Application No. 39473/98, ECHR, Judgment of 11 January 2001.

Furthermore, Italy has pointed out during the first round of the hearings that Spain was not obliged to execute the seizure. This, however, is of no relevance for this case. Spain acted on the basis of mutual judicial assistance. Doing this, Spain obviously relied in a reasonable manner on the information they had received from Italy. Thus Italy bears full responsibility for its action.

Italy's responsibility is also proven by the communication between Italy and Spain. This communication not only reveals that Italy was fully responsible for the seizure but also that both States, Italy and Spain, assessed the responsibility of Italy accordingly.

Attached to the letter of Italy dated 18 March 2003[17] Italy has submitted the judgment of the Court of Savona to Spain and requested to execute the release order. Thus Italy itself assumed that a request of Italy was necessary to release the vessel.

By letter dated 6 September 2006 Spain asked Italy to authorize the demolition of the vessel. This demonstrates however that Spain also assumed that the vessel was still at order of Italy.

Thereby both States revealed that only Italy was responsible for the decision to seize the vessel and also had sole power to decide on the subsequent fate of the vessel.

Italy contests that the Court of Appeal of Genoa on 31 October 2006 answered, on request of Spain, not to have jurisdiction and "there is no necessity to decide". The grounds of this verdict however read as follows:

> Being of the opinion that this Court confirmed entirely the first instance judgment ordering the release from seizure and restitution of the said m/v "NORSTAR" to the company INTERMARINE A.S.;
>
> Having noted that this judgment obviously has to be enforced and there is no decision to be taken given that the destiny of the vessel, after having been given back to the party entitled, does not fall within the competence of this Court (and in any case, given that the first instance judgment was confirmed, any issue on the enforcement of the said judgment would be the competence of the Court of Savona pursuant to Article 665 of the Code of criminal procedure).[18]

The Court of Appeal of Genoa did not deny the necessity of a decision due to the alleged jurisdiction of Spain. On the contrary, the Court's decision was based on a prior decision of the Court, thereby implicitly affirming the competence of the Italian jurisdiction. Thereby the Court of Appeal of Genoa has confirmed that Italy had the competence and obligation to decide upon the fate of the vessel until its restitution to the owner.

Should the Tribunal not follow our argumentation, it should be considered in the alternative that, even if Spain would have conducted a wrongful act itself, the

[17] Observations and Submissions of the Italian Republic of 8 July 2016, Annex J.
[18] Preliminary Objections of Italy of 10 March 2016, Annex O.

responsibility of Italy's actions were not affected. In this case Italy and Spain would be independently liable to Panama for the damage incurred, and Panama was entitled to make a claim to Spain as well as to Italy. Therefore Italy would be the proper respondent also in the case of a wrongful act of Spain. Therefore the question whether Spain conducted a wrongful act is of no relevance for this case.

This also revokes the basis of Italy's further argument, which is that Panama's claim would involve the ascertainment of rights and obligations of a third State, in its absence from the present proceedings and without its consent. As stated before, Italy is responsible for its actions, since Italy based its request for judicial assistance on an alleged offence which was not actually committed. The claim is, therefore, not about the rights or obligations of Spain, but only about the obligations of Italy. This also applies under hypothetical consideration of Spain and Italy being jointly and severally liable for the damage incurred. In that case also the present case would not affect the interest of Spain. In the hypothetical event of a claim of Panama against Spain, the present case would in no way prejudice the legal situation of Spain in that case.

In conclusion, Italy is the proper respondent in this case. The fact that the seizure was carried out by Spain does not prevent the Tribunal from having jurisdiction over this case.

Mr President, Members of the Tribunal, I will now move on to the question of whether the claim is admissible.

Italy argued that the claim is one of diplomatic protection, and that Panama allegedly did not exhaust local remedies. This reasoning cannot be accepted. In the *M/V "Virginia G" Case* the Tribunal declared that the exhaustion of local remedies rule does not apply where the claimant State is directly injured by the wrongful act of another State.

In that case, the claimant had challenged the violation of its freedom of navigation and other internationally lawful uses of the seas in the exclusive economic zone of a coastal State, as well as the contention that the coastal State had enforced its laws in conformity with article 73 of the Convention. In response, the Tribunal reiterated the rights that belonged to the claimant State under the Convention and that their violation thus amounted to direct injury to the claimant State. Given the nature of the rights which were claimed to be violated, the Tribunal found that the claim as a whole was brought by the claimant on the basis of an injury to itself. The Court dismissed the fact that the claimant also demanded compensation for damages on behalf of the owner and the crew, none of which were of the same nationality as the claimant.

The decision in the *M/V "Virginia G" Case*[19] applies to the present case. Panama is *inter alia* claiming the violation of its freedom of navigation. The claim as a whole is therefore brought on the basis of an injury to Panama itself. This also derives from the fact that these injuries of Panama itself constitute the first Request preceding the claim for damages. I quote the Application:

> Accordingly, Applicant requests the Tribunal to adjudge and declare that:

[19] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4.

> 1. Respondent has violated articles 33, 73 (3) and (4), 87, 111, 226 and 300 of the Convention;
> 2. Applicant is entitled to damages as proven in the case on the merits, ….[20]

The fact that Panama is also demanding compensation for damages suffered by the vessel's owner therefore should not impact the Tribunal's decision here.

In conclusion, this is not a case of diplomatic protection and, consequently, the local remedies rule is not applicable.

In this context, Italy's further objection to Panama's assertion of the violation of its freedom of navigation and other rights asserted is not convincing. Italy argues that Panama has not established, at least *prima facie*, an adequate link between the facts of the present case and the provisions of the Convention on the Law of the Sea referred to with respect to the seizure of the *M/V Norstar* in the Bay of Palma de Mallorca, that is, in Spanish internal waters. However, it is not important where the seizure took place, since Italy accused Panama of having committed tax offences by supplying oil to mega yachts on the high seas. Italy intended to restrict Panama's freedom of navigation and had the seizure carried out in order to assert this violation. Panama has in fact shown that Italy has violated its rights, particularly its freedom of navigation, by applying its national customs laws on the high seas.

Even if one were to presume that the violation was not primarily one against Panama's rights but rather against the rights of an individual, namely the owner of the vessel, this would not affect the applicability of the local remedies rule. In the *M/V "SAIGA" Case*[21] the Tribunal explained that, even if some of the claims made in respect of natural or juridical persons did not arise from direct violations of the rights of the claimant State, the question remains whether the rule that local remedies must be exhausted still applies.

A prerequisite for the application of this rule is that there must be a jurisdictional connection between the person suffering damage and the State responsible for the wrongful act which caused the damage.[22] The Tribunal further explained:

> In the opinion of the Tribunal, whether there was a necessary jurisdictional connection between Guinea and the natural or juridical persons in respect of whom Saint Vincent and the Grenadines made claims must be determined … on the question whether Guinea's application of its customs laws in a customs radius was permitted under the Convention. If the Tribunal were to decide that Guinea was entitled to apply its customs laws in its customs radius, the activities of the Saiga could be deemed to have been within Guinea's jurisdiction. If, on the other hand, Guinea's application of its customs laws in its customs radius were found to be contrary to the Convention, it would follow that no jurisdictional connection existed.[23]

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[20] Application of the Republic of Panama of 16 November 2015, p. 4.
[21] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10.
[22] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 99.
[23] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 100.

As a result, the Tribunal concluded that

> by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention[24]

and therefore that

> there was no jurisdictional connection between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims. Accordingly, on this ground also, the rule that local remedies must be exhausted does not apply in the present case.[25]

In this case, as the Court of Appeal of Genoa determined, Italy did not apply its customs laws or its criminal law in its actual internal waters but on the high seas. According to the ruling in the *M/V "SAIGA" Case*, this does not constitute a jurisdictional connection, further indicating that the local remedies rule does not apply.

In his statement of this morning Professor Tanzi argued that the reference to the *M/V "SAIGA" Case* is not admissible since that case referred to prompt release proceedings. This argumentation must be rejected, however, since the Tribunal was confronted with two cases concerning the *M/V Saiga*. The prompt release proceedings were subject to case number one. Panama refers, however, to Case No. 2, which did not relate to prompt release proceedings.

Professor Tanzi has argued this morning that Panama's claim is concerned essentially with private law issues, issues which have been dealt with by the Italian national courts. Italy is therefore arguing that Panama's claim is not justiciable in terms of public international law. Panama does not deny the fact that the *Norstar* was the subject of cases before national courts. However, Panama contends that there can be private law issues which have preceded this case at the Tribunal, and that the task of the Tribunal is to identify and adjudicate on public international law issues.

Just because there were other issues involving the *Norstar,* that does not impede the Tribunal from having jurisdiction in this case. This approach, suggested by Italy, would limit the competence of the Tribunal drastically, since it would exclude all cases which have other, private aspects as well. There is extensive case law supporting Panama's view.

A very important Advisory Opinion concerning the *Conditions of Admission of a State to Membership in the United Nations* made it even more clear. The ICJ said:

> The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the

[24] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 136.
[25] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, para. 100.

> interpretation of a treaty provision. The Court is not concerned with the motives which may have inspired this request … It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it.[26]

So even when there are other motives behind the request, Panama has invited the Tribunal to rule on aspects concerning UNCLOS.

In the *Teheran Hostages* case the ICJ maintained that to dismiss a case because the legal aspect is only one element of a political dispute would be to impose a

> far-reaching and unwarranted restriction upon the role of the Court in the peaceful settlement of disputes.[27]

In the *Case concerning Military and Paramilitary Activities in and against Nicaragua* the US produced an argument claiming that Nicaragua's allegations were

> but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region.[28]

The Court rejected the argument, holding that it should not decline to take cognizance of the legal aspects of a dispute merely because the dispute had other aspects as well.[29] In that respect, the [Tribunal] should also declare that it has jurisdiction by focusing on the public international issues, despite other private law aspects preceding this case.

Mr President, Members of the Tribunal, as my last point on the matter of admissibility of the claim, I would like to address Italy's arguments regarding acquiescence, extinctive prescription and estoppel.

Before doing so, however, I would like to point out strongly that Panama argues that the examination of this principle is a matter of the merits only. Thus, the fact that we are discussing these objections must not be deemed as prejudicial to the question of whether the principles are a matter of admissibility or of the merits.

The following applies to all three of these principles: contrary to national law, international law does not provide deadlines for a claimant to assert his claim. The amount of time which must have passed for acquiescence, extinctive prescription or estoppel to apply is therefore not set, but is instead determined by the courts, based on the specific circumstances of the case.

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[26] *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, I.C.J. Reports 1948,* p. 57, <http://www.icj-cij.org/docket/files/3/1821.pdf> accessed 30 May 2015 [61].
[27] Rebecca Wallace and Olga Martin-Ortega, *International Law* (6th ed., Sweet and Maxwell 2009), p. 355.
[28] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392.
[29] Eduardo Valencia-Ospina, The Role of the International Court of Justice in the Pact of Bogotá, in C.A. Armas Barea et al. (ed.), *Liber Amicorum 'In Memoriam' of Judge José María Ruda* (Kluwer Law International 2000), p. 327.

Italy's opinion that the statute of limitation of its respective national laws should serve as a guideline is therefore incorrect. This is not a national case, but an international dispute between States.

Further, the case law of the Tribunal and the International Court of Justice does not substantiate the belief that the statute of limitation in national laws is applicable or should serve as a guideline for an international ruling. On the contrary, in the *Certain Phosphate Lands in Nauru* case,[30] the International Court of Justice considered the action as admissible even though nearly 20 years had passed before the action was filed and despite the fact that the Parties had not communicated for almost nine years.

I would now like to address the principle of acquiescence.

Acquiescence requires the claimant to have failed to assert its claims in circumstances that would have required action. This includes circumstances where the respondent State could legitimately expect that the claim would no longer be asserted.

Whether this requirement has been met in this case must be established by the Tribunal based on the specific circumstances of the case.

It is our opinion that the following points should be considered: (1) Panama has sent Italy numerous letters claiming the existence of a wrongful act. Panama further made it clear in its communication that it had suffered substantial damages and that Italy is obligated to pay damages. Panama further announced that proceedings would be initiated before the Tribunal if the parties were unable to reach a settlement. After the Court of Savona lifted the arrest of the vessel, Panama declared, in its letter of 3 August 2004,[31] that Italy was obligated to pay damages and that if no agreement was reached, Panama would initiate proceedings before the Tribunal. In its letter dated 17 April 2010,[32] Panama again declared that if Italy was not willing to pay damages, Panama would apply to the Tribunal. (2) During all of this time, Italy did not return the vessel to the owner despite the ruling of the Court of Savona and despite the final and resolute determination of the Court of Genoa that Italy was obligated to release the vessel. Thus, Italy knew the case was not yet closed.

In its note verbale No. 332 dated 25 January 2005,[33] Italy disclosed having received the Panamanian note verbale No 97 dated 7 January 2005[34] saying that the Italian Embassy would forward the response to the Ministry of Foreign Affairs of Panama after receiving it from the Italian Foreign Ministry. This response, however, never came.

[30] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240.
[31] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[32] Preliminary Objections of Italy of 10 March 2016, Annex P.
[33] Observations and Submissions of Panama of 5 May 2016, Annex 5.
[34] Preliminary Objections of Italy of 10 March 2016, Annex N.

After seizing the vessel on 11 August 1998 and after the owners' application for a release of the vessel was refused by the authorities of Italy in January 1999, the Italian courts took until October 2005 to effectively dismiss all criminal charges.

So in summary, these circumstances show: (1) Panama announced several times and emphatically that if Italy did not compensate the damages, it would initiate proceedings before the Tribunal; (2) Italy has been aware that the matter was in no way closed; (3) Italy delayed settling the dispute by either failing to respond or by promising a response which never came; (4) the Italian courts took a total of seven years since the vessel was seized in 1998 to effectively conclude the case.

Since it was therefore obvious to Italy that Panama would not forego seeking damages but would instead assert these before the Tribunal, the argument that action being filed in 2015 could not have been anticipated is misleading, particularly since Italy itself delayed the settlement of the dispute by failing to respond to Panama's letter while promising a response which was never fulfilled.
Based on all of this, the present case does not meet the requirements for acquiescence.

I will now address the principle of extinctive prescription. Again, there is no specific time-limit within which a claim is to be asserted. The period is to be determined by the circumstances of the case.

At this point I refer to my previous remarks, as they also apply to the principle of acquiescence.

Italy has asserted that a claim may be barred in circumstances when its late pursuit would create unjust prejudice to the respondent. In Panama's calculation, damages suffered as a consequence of the allegedly illegal conduct of Italy have only increased due to the extended lapse of time. If Panama had been able to pursue its claim in a timely fashion, the prejudice that would derive to Italy would have been significantly less.

However, Italy itself is responsible for the accrual of damages that have increased over time.

Panama has repeatedly pointed out to Italy that the damages were increasing. I refer to the letters dated 15 August 2001,[35] 3 August 2004,[36] and 17 April 2010,[37] in which Panama *inter alia* stated, that the damages, roughly calculated, amounted to no less than 6 million dollars and were increasing day by day, due to inactivity of the ship and its continuous degradation.

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

[35] Preliminary Objections of Italy of 10 March 2016, Annex F.
[36] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[37] Preliminary Objections of Italy of 10 March 2016, Annex P.

Regarding the principle of extinctive prescription, it follows that the circumstances of the case do not lead to the claim being inadmissible on these grounds.

Finally, we come to our last point: the principle of estoppel.

International estoppel requires the fulfilment of three elements. First, the statement creating the estoppel must be clear and unambiguous; second, the statement must be voluntary, unconditional, and authorized; and finally, there must be good-faith reliance upon the representation of one party by the other party either to the detriment of the relying party or to the advantage of the party making the representation.

In the present case, none of these conditions apply.

Firstly, Panama has made no statement that compensation for damages would not be claimed from Italy. On the contrary, Panama has consistently stated that it would claim compensation before the Tribunal if Italy does not agree to pay damages beforehand.

Secondly, Italy has not stated in any way why it trusted Panama to not claim compensation for the damages.

Thirdly, Italy has not demonstrated that it has changed its position to its detriment or to the advantage of Panama on the basis of this trust.

Moreover, Panama's notes verbales of 31 August 2004[38] and of 7 January 2005[39] cannot – as Italy contends – be interpreted as a clear statement that Panama would submit prompt release proceedings but not a compensation claim for damages. As I have already pointed out, Panama has not only written these two notes verbales to which Italy refers, but has also expressively and clearly stated, in the letters of 3 August 2004[40] and of 17 April 2010,[41] that unless Italy agreed to pay compensation for damages procedures would be initiated before the Tribunal.

Taking the entire correspondence from Panama to Italy into consideration, it is clear that Panama has in no way given the impression that it would waive its compensation claim for damages or neglect to initiate proceedings before the Tribunal concerning this matter.

It thus follows that the conditions of the principle of estoppel are not met.
This brings me finally to the end of my remarks with the overall conclusion that all of Italy's objections are unfounded and the Tribunal has jurisdiction over the case and the claim is admissible.

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

I would now like to ask you to give the floor to Mr Hartmut von Brevern.

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[38] Preliminary Objections of Italy of 10 March 2016, Annex M.
[39] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[40] Observations and Submissions of Panama of 5 May 2016, Annex 3.
[41] Preliminary Objections of Italy of 10 March 2016, Annex P.

THE PRESIDENT: Thank you, Mr von der Wense. I now give the floor to Mr von Brevern.

MR VON BREVERN: Mr President, distinguished members of the Tribunal, it is a special honour to appear before this Tribunal again after 19 years when I was privileged to participate in the very first case, *M/V "SAIGA"*, of which you and I have best memories. I am proud that the *M/V "SAIGA" Case* is quoted in many, many books. I have to thank Panama for my taking part in its representation here.

In my presentation I will address the question whether Panama is in any form time-barred from having assessed its claim on the merits. This question has been discussed already with regard to the principles of acquiescence, extinctive prescription and estoppel by both Parties, as we have just heard.

However, in the following I want to stipulate in short (at the end of these three days it is good to have a short intervention) certain aspects of the application of these principles to our case.

Italy has argued that due to the lapse of 18 years since the seizure of the vessel *Norstar* and Panama's contradictory attitude throughout that time, Panama's claim is time-barred and [Panama is] estopped from validly bringing this case to the International Tribunal for the Law of the Sea. According to Italy, the principles of acquiescence, extinctive prescription and estoppel apply, rendering the claim by Panama inadmissible.

However, Italy failed to substantiate their legal basis and the application of their prerequisites to this specific case. Instead, Italy describes those principles abstractly simply as representing the fundamental purpose of ensuring

> the guarantee, the certainty of rights and the predictability of their exercise.

Even though the application of the above principles in international law might be accepted generally, which, however, is not the case, just to mention the European Convention on Human Rights, it is important to point out that since there are no fixed rules based on prerequisites, the criteria given by Italy as to "the guarantee, the certainty of rights and the predictability of their exercise" are of no relevance on a stand-alone basis.

Also, contrary to the attempt of Italy, it is not legitimate to draw any conclusions from national statutory law. According to McGibbon the development of estoppel from a municipal into an international concept has broadened the principle so greatly that the analogy with municipal estoppel is misleading.[1]

There is no procedural limitation of action under international law. Nor is a claim barred or estopped after a particular lapse of time, say 20 or 30 years.

[1] MacGibbon, *Estoppel in International Law*, 7 INT'L AND COMp. L.Q. (1958), p. 468, at p. 477.

Instead it is also necessary to establish both the behaviour of both parties and the effect of the alleged time lapse on the party which invokes the above principles. According to Wagner[2] this also can be described as the "good faith basis" of estoppel or as McGibbon has underlined with regard to estoppel

> the emphasis ... upon an insistence on good faith and equitable conduct coupled with a lively awareness of the dangers of adopting inconsistent attitudes at different times.[3]

Any use of extinctive prescription and related provisions should aim to find a fair and just result. To achieve this, the relevant actions of the parties involved have to be considered in order to determine why and how this dispute arose.

Therefore, it is inadmissible for Italy to merely rely on the lapse of time and assert that because 18 years had elapsed from the seizure of the *Norstar* until the institution of proceedings, time bar, acquiescence, and estoppel do automatically apply. This approach does not consider that the applicability of these principles is dependent on the particular circumstances of this case. "Given the particular circumstances of this case" is the key to deciding the case.

In specification of the circumstances of the case it is necessary to assess the timeline and behaviour of the parties involved.

Therefore, I would like to address the behaviour and actions of the Parties since the vessel was seized, firstly with regard to Panama.

The seizure of the vessel took place in 1998.

The decision of the Court of Savona stating that this was illegal was made in 2003.

The Appeal Court of Genoa did not confirm the judgment of the Court of Savona until 2005.

However, the Appeal Court of Genoa was unable to issue its reasons for the verdict in due time. These were issued and subsequently transmitted to Panama only years later, not before 2009. Imagine: the decision was in 2005 and the reasons came in 2009! The grounds of the verdict however are of course relevant for the decision of Panama how to pursue its claims.

Thus another time-consuming aspect for Panama was the question where the claim should be registered, be it in an Italian civil court or with ITLOS. This decision included the evaluation of the economic consequences of the illegal arrest, the difficulties in determining where to register the claim within Italy's jurisdiction, the numerous meetings needed between the Government of Panama, the Tribunal, and various parties involved, and the need for Panama to ratify the jurisdiction of the Tribunal.

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[2] Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, California Law Review, Vol. 74 (1986), p. 1777, at p. 1778.

[3] MacGibbon, *Estoppel in International Law*, 7 INT'L AND COMp. L.Q. (1958), p. 468, at p. 487.

The same applies to the time-consuming efforts to get a new power of attorney for Mr Carreyó. The decision not to pursue claims before the Italian courts was made in due course to receiving the grounds of the verdict of the Court of Appeal of Genoa. This decision followed the recommendations of experts of Italian law and Italian litigation procedures. Furthermore the decision was made in the awareness of the own experience in regard to the fact that the Appeal Court in Genoa was not able to deliver the grounds for its verdict within reasonable time and also in awareness of many cases relating to the European Convention on Human Rights, due to the extreme long duration of court cases in Italy. Taking these circumstances into account, the decision against pursuing the claims before the Italian courts must be considered reasonable.

Subsequently Panama was confronted with the question deriving from the fact that when ratifying UNCLOS Panama had not opted for ITLOS. Accordingly, it was necessary to establish the procedures which were necessary to lay the foundation for bringing the case to ITLOS.

The time-consuming clearance with the concerned parties and institutions including ITLOS, as stated before, started in 2010. As a result of that clearance, a declaration of the Government of Panama was submitted in 2015 to the United Nations to opt for the Tribunal with respect to the case of the *M/V Norstar*.

Lastly, it needs to be stressed that the institution of proceedings by one State against another is not something to be taken lightly. Governments have to invest a great deal of time, personnel, and material resources to prepare a case of such importance as we have it. In addition, it must be kept in mind that the proceedings have involved the review of many documents to be copied and translated in order to be analyzed by the Panamanian Government.

Considering all this activity, it can be concluded that, contrary to Italy's allegations, Panama's conduct and activities cannot be considered as waiving its rights. Even more, Italy could not reasonably rely on that conduct and conclude that Panama would not pursue its claims any more. As has been shown, the contention of Italy that Panama has shown a contradictory attitude throughout that time is to be dismissed.

Italy's objections with regard to the above principles must also be dismissed based on its own contradictory behaviour. The conduct of Italy with reference to the series of letters sent by Panama in connection with this case has already been addressed in the previous statements of my colleagues. As has already been stated above, it was only in 2009 that the grounds of the verdict of the Appeal Court of Genoa were received by Panama.

The comparison of the behaviour of both Parties can be summarized as follows: Panama's actions were exclusively aimed at the persecution of its rights; there is no single action of Panama which might be interpreted differently. In contrast, the behaviour of Italy is characterized, against all diplomatic rules and law principles, by refusing any reasonable action or response.

As a result, it can be concluded that Italy does not deserve protection by means of the principle of legitimate expectations, which are a core of extinctive prescription, acquiescence and estoppel.

In the alternative to the dismissing of the objections, Panama contests that the objections by Italy on the basis of extinctive prescription, acquiescence and estoppel do not constitute a *prima facie* defence. Under the particular circumstances of this case, the Written Observations and Submissions of Italy dated 10 March 2016 and 8 July 2016 do not meet the necessary requirements of a preliminary nature as described by article 294 of the Convention because in order to examine such circumstances the Tribunal would have to get into its merits.

Thank you, Mr President. I come to the conclusion that the objections of Italy on the basis of extinctive prescription, acquiescence and estoppel have to be dismissed.

I would now ask you, Mr President, to pass the floor to my colleague Mr Nelson Carreyó.

THE PRESIDENT: Thank you, Mr von Brevern, for your statement. I understand that this was the last statement made by Panama during this hearing. Article 75, paragraph 2, of the Rules of the Tribunal provides that at the conclusion of the last statement made by a party to the hearing, its agent, without recapitulation of the arguments, shall read the party's final submissions. The written text of these submissions, signed by the agent, shall be communicated to the Tribunal and a copy of it shall be transmitted to the other party. I now invite the Agent of Panama, Mr Carreyó, to take the floor to present the final submissions of Panama.

MR CARREYÓ: Good afternoon, Mr President, distinguished Members of the Tribunal, members of the Italian delegation. I will proceed to read the final submissions of Panama.

22 September 2016
Final submissions of Panama concerning jurisdiction and admissibility

> For the reasons explained in the Application and the Observations and during the oral hearings the Republic of Panama requests the International Tribunal for the Law of the Sea to adjudge and declare that:
>
> (1) The Tribunal has jurisdiction over this case;
>
> the claim made by Panama is admissible; and
>
> (2) As a consequence of the above declarations the Written Preliminary Objections made by the Italian Republic under article 294, paragraph 3, of the Convention are rejected.
>
> Nelson Carreyó, Agent
> Dr Olrik von der Wense, Counsel

With your permission, Mr President, I will now take this opportunity to thank God for allowing me to be here before this honourable Tribunal; to you, Mr President, for

permitting me and the Republic of Panama to make use of its rights, as well as conducting this hearing in an orderly manner; and, through you, Mr President, to all of the honourable Judges for listening attentively to the Parties' oral arguments during these three days; to you, Ms Palmieri and, through you, to all members of the Republic of Italy's delegation; and to the Registrar, Mr Gautier, and the members of staff for giving us all the necessary support concerning logistics, and especially to the interpreters for their patience and understanding when I was speaking too fast.

With that, Mr President, I end my presentation of the Republic of Panama's submissions and final remarks.

THE PRESIDENT: Thank you, Mr Carreyó. This brings us to the end of the hearing on the preliminary objections raised by Italy in the *M/V "Norstar" Case*. On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the representatives of both Italy and Panama. I would also like to take this opportunity to thank both the Agent of Italy and Agent of Panama for their exemplary spirit of cooperation. The Registrar will now address questions in relation to documentation.

THE REGISTRAR: Thank you, Mr President. Pursuant to article 86, paragraph 4, of the Rules of the Tribunal, the Parties may, under the supervision of the Tribunal, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the meaning and scope thereof. Those corrections should be done only as regards the official language used by the Party concerned during the hearing. I should add that these corrections relate to the checked versions of the transcripts in the official language used by the Party in question. The corrections should be submitted to the Registry as soon as possible and, at the latest, by Monday 26 September 2016 at 4.00 p.m. Hamburg time. Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Registrar. The Tribunal will now withdraw to deliberate. The date for the reading of the Judgment on preliminary objections raised by Italy in this case is tentatively scheduled to take place at the beginning of November 2016. The Agents of the Parties will be informed reasonably in advance of the date of the reading of the Judgment on the preliminary objections.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the Judgment.

The hearing is now closed.

(*The hearing closed at 4.10 p.m.*)