

**WRITTEN PRELIMINARY OBJECTIONS UNDER ARTICLE 294,
PARAGRAPH 3, OF THE UNITED NATIONS CONVENTION ON
THE LAW OF THE SEA, SUBMITTED BY ITALY ON 11 MARCH
2016**

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

THE M/V “NORSTAR” CASE

THE REPUBLIC OF PANAMA v. THE ITALIAN REPUBLIC

WRITTEN PRELIMINARY OBJECTIONS
UNDER ARTICLE 294, PARAGRAPH 3, OF THE
UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

10 MARCH 2016

TABLE OF CONTENTS

	<i>Page</i>
CHAPTER 1: INTRODUCTION	1
CHAPTER 2: STATEMENT OF FACTS	2
CHAPTER 3: OBJECTIONS TO JURISDICTION AND ADMISSIBILITY	4
I. The Tribunal has no jurisdiction to entertain the present case	4
A. The inexistence of a dispute between Panama and Italy	4
B. Lack of jurisdiction <i>ratione personae</i> and the question of the involvement of a third State, not a Party to the proceedings	5
C. Non-compliance with the obligation to exchange views	6
II. The Applicant's claim is inadmissible	6
A. The claim is one of diplomatic protection	6
B. Time Bar and Estoppel	7
CHAPTER 4: CONCLUSIONS AND SUBMISSIONS	7

LIST OF ANNEXES	13

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**CHAPTER 1
INTRODUCTION**

1. By written Application dated 16 November 2015, comprising a statement of the claim and the grounds on which it is based (“**the Application**”), the Republic of Panama (“**Panama**”, or “**the Applicant**”) instituted proceedings against the Republic of Italy (“**Italy**”, or “**the Respondent**”) before the International Tribunal for the Law of the Sea (“**the Tribunal**”, or “**ITLOS**”). A certified copy of the Application is attached as an Appendix to this Written Preliminary Objections as **Annex A**.

2. The Application¹ concerns a claim for damages deriving from the seizure of the *M/V Norstar*, an oil tanker flying Panama’s flag (“**M/V Norstar**”, or “**the Vessel**”), which was carried out by the Spanish Authorities in the Bay of Palma de Mallorca in 1998. The compensation claimed has been provisionally estimated by the Applicant in Ten Millions US Dollars (\$10.000.000).

3. Through this written submission, Italy respectfully challenges the jurisdiction of this Tribunal, as well as the admissibility of Panama’s claim, pursuant to Article 294, paragraph 3, of the United Nations Convention on the Law of the Sea (“**UNCLOS**”) and Article 97, paragraph 1, of the Rules of the Tribunal.

4. In particular, Italy contends that this Tribunal has no jurisdiction over the instant case for the following reasons:

- (a) **There is no dispute between Panama and Italy** pertaining to the facts complained of in the Application.
- (b) **Italy is not the proper respondent in this case and, in any event, Panama’s claim would inevitably involve the ascertainment of rights and obligations of a third State in its absence from the present proceedings and without its consent.**
- (c) **Panama has failed to appropriately pursue the settlement of the dispute by negotiation or other peaceful means** under Article 283, paragraph 1, UNCLOS.

5. Were the Tribunal to find, nonetheless, that it has jurisdiction over the instant case, the Applicant’s claim is inadmissible for the following reasons:

- (a) **The natural and legal persons affected by the alleged internationally wrongful conduct do not possess Panamanian nationality and have not exhausted the local remedies available in Italy.** Panama is preponderantly – if

¹ Application of the Republic of Panama, 16 November 2015 (**Annex A**).

not exclusively – seeking to exercise diplomatic protection for the benefit of the above private persons. As such, the well-established requirements for the valid exercise of diplomatic protection apply, whereby the private victims of an internationally wrongful act should be nationals of the Applicant and should have exhausted the local remedies available in the Respondent State. Neither of the two requirements have been met.

- (b) **Panama is time-barred and estopped from validly bringing the present case before this Tribunal due to the lapse of eighteen years since the seizure of the Vessel and Panama’s contradictory attitude throughout that time.** The Applicant, while anticipating, between 2001 and 2004, its intention of filing an application for prompt release of the M/V Norstar, has not done so, nor has it meaningfully pursued compensation for damages in the following ten years in a legally appropriate manner.

6. For the above reasons, pursuant to Article 294, paragraph 3, UNCLOS, and Article 97, paragraph 1, of the Rules of the Tribunal, Italy requests the Tribunal to adjudge and declare that:

- (a) it lacks jurisdiction with regard to the claim submitted by Panama in its Application filed with ITLOS on 17 December 2015;

and/or that

- (b) the claim brought by Panama against Italy is inadmissible to the extent specified in the preliminary objections.

CHAPTER 2 STATEMENT OF FACTS

7. From 1994 to 1998, the M/V Norstar – a Panamanian flagged vessel owned by *Inter Marine&Co AS*, a Norwegian registered company, fitted out by *Borgheim Shipping*, another Norwegian registered company, and rented by *Nor Maritime Bunker*, a Maltese registered company – carried out bunkering activity off the coasts of France, Italy and Spain, through the brokering of *Rossmare International s.a.s.*, an Italian registered company owned by an Italian national.²

8. Following the investigations conducted by the Italian Guardia di Finanza since 1997, the Public Prosecutor at the Tribunal of Savona was prosecuting four Italian nationals, three Norwegian nationals and one Maltese national, for the offences of criminal association aimed at smuggling mineral oils and tax fraud. These offences were alleged to be committed through foreign tanker vessels, among them the M/V Norstar. In the summer of 1998, the M/V Norstar was localised near the Balearic Islands, between Palma de Mallorca and Ibiza. On 11 August, the Public Prosecutor at the Tribunal of Savona ordered the seizure of M/V

² Judgment by the Tribunal of Savona, 13 March 2003 (**Annex B (Confidential Annex)**), at p. 4.

Norstar as *corpus delicti* – i.e., the means through which the crime was perpetrated – of the above mentioned offences.³

9. On the same date (11 August 1998), the order was sent by way of international letters rogatory⁴ to the Spanish Authorities who carried out the seizure on 25 September 1998 while the Vessel was moored in the Bay of Palma de Mallorca.⁵

10. On 15 August 2001, Mr Carreyò sent a letter to the Italian Government stating that he was acting on behalf of the Panamanian Government, and asking Italy to lift the seizure of the M/V Norstar “within a reasonable time” and to compensate the damages thereto. Mr Carreyò also asserted that Panama would apply to ITLOS.⁶ Mr Carreyò reiterated similar communications on 7 January 2002⁷ and on 6 June 2002.⁸

11. On 13 March 2003, the Tribunal of Savona acquitted all accused of all charges.⁹ Therefore the Tribunal also ordered the lifting of the seizure of the M/V Norstar, transmitting this decision to the Spanish Authorities on 18 March 2003.¹⁰

12. The Public Prosecutor at the Tribunal of Savona appealed the judgement on 18 August 2003,¹¹ which was nevertheless upheld by the Court of Appeal of Genoa on 25 October 2005.¹² Pursuant to Article 585 of the Italian Code of Criminal Procedure, the latter decision became *res iudicata* on 9 December 2005. Pursuant to Article 2043 of the Italian Civil Code, the owner of the vessel had a five-year time-limit to lodge a claim for the damages allegedly caused by the order of seizure before Italian domestic courts. Such time-limit expired on 9 December 2010.

13. Meanwhile, on 31 August 2004, Mr Carreyò forwarded to the Italian Embassy in Panama a document of full powers sent by the Panamanian Government to ITLOS on 2 December 2000. Such a document merely authorised Mr Carreyò to represent Panama exclusively for purposes of activating a prompt release procedure before ITLOS pursuant to Article 292 UNCLOS.¹³ On the same date (31 August 2004), the Ministry of Foreign Affairs of Panama sent to Italy Note Verbale A.J. No. 2227 in which it reiterated the mandate of Mr Carreyò.¹⁴

³ Seizure order by the Public Prosecutor of the Tribunal of Savona, 11 August 1998 (**Annex C (Confidential Annex)**).

⁴ International Letters Rogatory of the Tribunal of Savona to the Spanish Authorities, 11 August 1998 (**Annex D (Confidential Annex)**).

⁵ Report of the seizure by the Spanish Authorities, 25 September 1998 (**Annex E**).

⁶ Letter sent by Mr Carreyò to the Italian Minister of Foreign Affairs, 15 August 2001 (**Annex F**).

⁷ Letter sent by Mr Carreyò to the Italian Minister of Foreign Affairs, 7 January 2002 (**Annex G**).

⁸ Letter sent by Mr Carreyò to the Italian Embassy in Panama, 6 June 2002 (**Annex H**).

⁹ Judgment by the Tribunal of Savona, 13 March 2003 (**Annex B (Confidential Annex)**).

¹⁰ Communication to the Spanish Authorities of the judgment of 13 March 2003, 18 March 2003 (**Annex I (Confidential Annex)**).

¹¹ Appeal by the Public Prosecutor against the judgment of 13 March 2003, 18 August 2003 (**Annex J (Confidential Annex)**).

¹² Judgment by the Court of Appeal of Genoa, 25 October 2005 (**Annex K (Confidential Annex)**).

¹³ Document of full powers issued by the Republic of Panama in favour of Mr Carreyò with regard to a prompt release procedure before ITLOS, 2 December 2000 (**Annex L**).

¹⁴ Note Verbale A.J. No. 2227 sent by the Ministry of Foreign Affairs of Panama to Italy, 31 August 2004 (**Annex M**).

14. On 7 January 2005, the Panamanian Ministry of Foreign Affairs sent to Italy a new communication, Note Verbale A.J. No. 97, urging Italy to lift the seizure of the M/V Norstar and reaffirming Mr Carreyó’s mandate as “Representante legal del Estado panameño y de los intereses de los propietarios de la Nave NONSTAR [*sic*]”.¹⁵

15. On 6 September 2006, the Spanish Authorities requested the Court of Appeal of Genoa instructions with regard to the possibility to demolish the M/V Norstar.¹⁶ The Court of Appeal of Genoa replied on 13 November 2006 stating that it was not entitled to decide on the matter.¹⁷

16. On 17 April 2010, Mr Carreyó wrote to the Italian Minister of Foreign Affairs in order to claim the damages putatively caused to the M/V Norstar because of her seizure in Spain.¹⁸

CHAPTER 3 OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

I. The Tribunal has no jurisdiction to entertain the present case

17. Italy submits that the Tribunal lacks jurisdiction in the instant case based on three main grounds:

- (a) **There is no dispute between Panama and Italy** pertaining to the facts complained of in the Application;
- (b) **Italy is not the proper respondent in this case and, in any event, the entertainment by this Tribunal of its jurisdiction over the merits of the case submitted in the Application would imply adjudicating on rights and duties of a State absent from the present proceedings, without its consent.**
- (c) **Panama has failed to appropriately pursue the settlement of the dispute by negotiation** under Article 283, paragraph 1, UNCLOS.

A. The inexistence of a dispute between Panama and Italy

18. The jurisdictional requirement of the existence of a dispute is based on Article 288 UNCLOS and it underlines the whole Part XV of the Convention. The unilateral assertion of one’s own claims does not, as such, fulfill the basic jurisdictional requirement of the existence of a dispute between the Parties. In fact, no complaint, or protest, bearing on the facts complained of in the Application, has been raised in any legally appropriate manner by

¹⁵ Note Verbale A.J. No. 97 sent by the Ministry of Foreign Affairs of Panama to Italy, 7 January 2005 (**Annex N**).

¹⁶ Response by the Court of Appeal of Genoa to the request of the Spanish Authorities to demolish the M/V Norstar, 13 November 2006 (**Annex O**).

¹⁷ *Ibidem*.

¹⁸ Letter of Mr Carreyó to the Italian Minister of Foreign Affairs, 17 April 2010 (**Annex P**).

the Government of Panama with the Government of Italy, which the latter would resist, or contest.

19. Apart from the manifest irrelevance of the UNCLOS provisions invoked by the Applicant to sustain its claim, the non-existence of a dispute between Panama and Italy at the time of the Application is corroborated by the fact that no meaningful attempts at negotiated settlement were made by the Applicant over any putative difference between the two States on the points of law or fact concerning the present proceedings.

20. Indeed, the communications received from Mr Carreyó and the Government of Panama concerning the seizure of the M/V Norstar fall short of the requirement under Article 283, paragraph 1, UNCLOS. Such communications, either concerned requests for release of the vessel in combination with the anticipation that a prompt release procedure would be triggered - which has not been done -, or consisted in advancing isolated requests for damages in a not legally appropriate manner, without pursuing a genuine attempt at negotiated settlement of the dispute.

B. Lack of jurisdiction *ratione personae* and the question of the involvement of a third State, not a Party to the proceedings

21. Italy contends that, even though the order for seizure of the M/V Norstar has been issued by an Italian Public Prosecutor, the actual arrest and detention of the vessel has not been executed by Italian enforcement Officials, but by the Spanish Authorities. The Applicant acknowledged this matter of fact in its letter dated 17 April 2010 to the Italian Ministry of Foreign Affairs, in which it stressed that the vessel was still being kept in Palma de Mallorca.¹⁹

22. According to the above, Italy is the improper respondent for Panama's claim. In any event, the Tribunal would have to refrain from exercising its jurisdiction over the instant case because, if it did entertain its jurisdiction over the Application this would necessarily involve the ascertainment of the legality of the conduct of a State which is not a Party to the proceedings. This would be at variance with one of the most basic principles of international procedural law.

23. As clearly stated by the International Court of Justice in the *Monetary Gold* case,

“Where [...] the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it”.²⁰

24. Since Spain is not a Party to the present proceedings, Italy respectfully contends that this Tribunal should dismiss the claim advanced by Panama in the Application for lack of jurisdiction.

¹⁹ *Ibidem*.

²⁰ *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, 15 June 1954, *ICJ Reports* (1954), p. 19 *et seq.*, at p. 33.

C. Non-compliance with the obligation to exchange views

25. The facts illustrated above²¹ show that no “exchange of views” with Italy has been pursued by Panama in any meaningful and legally appropriate manner with a view to reaching the settlement of the putative dispute by negotiation, or through other means of dispute resolution, under Article 283, paragraph 1, UNCLOS. While Italy contends that failure to meet this requirement adds to the factors demonstrating the non-existence of a dispute over instant case,²² if a dispute between the two States would, nonetheless, be found to exist at the time of the filing of the Application, such a failure results in the Tribunal having to decline its jurisdiction over the case.

26. As already indicated,²³ the communications from Panama to Italy on the circumstances pertaining the M/V Norstar have failed to meet the requirement of jurisdiction under Article 283, paragraph 1, UNCLOS, of a genuine attempt at a negotiated settlement of a dispute before resorting to international adjudication. Such communications, either consisted of requests for release of the vessel at the time when the latter was under seizure in Spain, or of isolated requests for damages in a not legally appropriate manner. In fact, Panama, next to anticipating that it would start a prompt release procedure, also announced few times its intention to have recourse to litigation without ever advancing any genuine proposal for the peaceful settlement of the putative dispute. Accordingly, Italy respectfully requests the Tribunal to declare Panama’s claim as inadmissible.

II. The Applicant’s claim is inadmissible

27. Were, nonetheless, the Tribunal to assert its jurisdiction over the instant case, Italy contends that this claim should be rejected as inadmissible, on two main grounds:

- (a) While such a claim is preponderantly, if not exclusively, of a diplomatic protection character, the requirements for its exercise – *i.e.*, that of the nationality of the alleged victims and that of the exhaustion of local remedies – have not been met;
- (b) Panama is time-barred and estopped from validly bringing this case before this Tribunal due to the lapse of eighteen years since the seizure of the Vessel and Panama’s contradictory attitude throughout that time.

A. The claim is one of diplomatic protection

28. Italy contends that the facts in the present case demonstrate that the latter is manifestly one of diplomatic protection. Accordingly, under the well established rules of international law on diplomatic protection, Panama could validly bring the present claim only if the alleged internationally wrongful act complained of in the Application had affected its own

²¹ *Supra*, paras. 10-16.

²² *Supra*, paras. 18-20.

²³ *Supra*, para. 20.

nationals, and if they had exhausted the local remedies available in the legal order of the alleged wrongdoing State. The facts of the case plainly show that neither of the two requirements has been met.

29. In fact, considering that neither the M/V Norstar was owned, fitted out, or rented, by a natural or legal person of Panamanian nationality, nor the accused in the Italian criminal proceedings were Panamanian nationals, and since the victims of the alleged Italian internationally wrongful conduct have not exhausted the local remedies available under the Italian legal system with regard to the claim for compensation, Italy respectfully maintains that this Tribunal should declare the claim by Panama inadmissible.

B. Time Bar and Estoppel

30. Eighteen years have lapsed from the date of the seizure by Spanish Authorities of the M/V Norstar and Panama is therefore time-barred from bringing a claim for damages before this Tribunal. Extinctive prescription is common to virtually all jurisdictions and the principle serves the fundamental purpose of guaranteeing the certainty of rights and the predictability of their exercise.²⁴ A debtor cannot be held liable indefinitely, and creditors have to claim their rights within a reasonable time. In the present case, even if Italy were to be found to be a debtor towards the M/V Norstar, the principle of extinctive prescription would apply to render the claim by Panama inadmissible.

31. In addition, Italy contends that the inconsistent attitude by Panama over the facts now complained of over a significant lapse of time estops the Applicant from validly applying to this Tribunal in the instant case.

32. Between 2001 and 2004, Mr Carreyó, had expressed his intention to apply for the prompt release of M/V Norstar under Article 292 UNCLOS.²⁵ However, **no procedural action was eventually taken by Panama to that effect, while the M/V Norstar had remained seized in Spain.** Most importantly, as already indicated, in the following years Panama has not raised the matter with Italy in any legally appropriate manner, nor has it significantly pursued a negotiated settlement of the claim now submitted in the Application through a genuine attempt at an exchange of views with Italy.

33. For the above reasons, Italy contends that Panama is estopped from submitting before this Tribunal the claim contained in the Application.

CHAPTER 4 CONCLUSIONS AND SUBMISSIONS

34. Italy summarises its preliminary objections to the jurisdiction of the Tribunal as follows:

²⁴ Hóber K., *Extinctive Prescription and Applicable Law in Interstate Arbitration*, Uppsala, 2001, at pp. 253-263.

²⁵ *Supra*, paras. 10-13.

- (a) the case falls outside the jurisdiction of the Tribunal since there is no dispute between Panama and Italy;
- (b) the case falls outside the jurisdiction of the Tribunal since Italy is the wrong respondent in the present case and, in any event, adjudication over the claim advanced by Panama would require the Tribunal to ascertain rights and obligations pertaining to Spain, in its absence.
- (c) the case falls outside the jurisdiction of the Tribunal since Panama has failed to appropriately pursue the settlement of the dispute by negotiation or other peaceful means under Article 283, paragraph 1, UNCLOS.

35. Furthermore, Italy summarises its preliminary objections on the admissibility of Panama's claim as follows:

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

36. For the above reasons, Italy respectfully requests that the Tribunal adjudge and declare that:

- (a) it lacks jurisdiction with regard to the claim submitted by Panama in its Application filed with the Tribunal on 17 December 2015;

and/or that

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

Rome, 10 March 2016

A handwritten signature in black ink, reading "Gabriella Palmieri". The signature is written in a cursive, flowing style.

Ms. Gabriella Palmieri, State Attorney
Agent of the Italian Republic

CERTIFICATION

Pursuant to Articles 63(1), 64(3) and 89(4) of the Rules of the Tribunal, I hereby certify that the copies of the present written preliminary objection and of the documents annexed to it are true copies and conform to the original documents, and that the translations into English made by the Italian Republic are accurate translations.



Ms. Gabriella Palmieri, State Attorney
Agent of the Italian Republic

10 March 2016

LIST OF ANNEXES**Annex A**

Application of the Republic of Panama, 16 November 2015

Annex B (Confidential Annex)

Judgment by the Tribunal of Savona, 13 March 2003

Annex C (Confidential Annex)

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Annex D (Confidential Annex)

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Annex L

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Annex M

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Annex O

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Annex P

Letter of Mr Carreyó to the Italian Minister of Foreign Affairs, 17 April 2010