

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2018

Public sitting

held on Saturday, 15 September 2018, at 3 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Jin-Hyun Paik presiding

THE M/V “NORSTAR” CASE

(Panama v. Italy)

Verbatim Record

<i>Present:</i>	President	Jin-Hyun Paik
	Judges	Tafsir Malick Ndiaye José Luís Jesus Jean-Pierre Cot Anthony Amos Lucky Stanislaw Pawlak Shunji Yanai James L. Kateka Albert J. Hoffmann Zhiguo Gao Boualem Bouguetaia Elsa Kelly Markiyán Kulyk Alonso Gómez-Robledo Tomas Heidar Óscar Cabello Sarubbi Neeru Chadha Kriangsak Kittichaisaree Roman Kolodkin Liesbeth Lijnzaad
	Judges <i>ad hoc</i>	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

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

as Counsel;

Ms Mareike Klein, LL.M., Independent Legal Consultant, Cologne, Germany,
Dr Miriam Cohen, Assistant Professor of International Law, University of
Montreal, member of the Quebec Bar, Montreal, Canada,

as Advocates;

Ms Swantje Pilzecker, ALP Rechtsanwälte (Associate), Attorney at Law,
Hamburg, Germany,
Mr Jarle Erling Morch, Intermarine, Norway,
Mr Arve Einar Morch, Manager, Intermarine, Norway,

as Advisers.

Italy is represented by:

Mr Giacomo Aiello, State Attorney, Italy,

as Co-Agent;

and

Dr Attila Tanzi, Professor of International Law, University of Bologna, Italy,
Associate Member - 3VB Chambers, London, United Kingdom,

as Lead Counsel and Advocate;

Dr Ida Caracciolo, Professor of International Law, University of Campania "Luigi
Vanvitelli", Caserta/Naples, Member of the Rome Bar, Italy,

Dr Francesca Graziani, Associate Professor of International Law, University of
Campania "Luigi Vanvitelli", Caserta/Naples, Italy,

Mr Paolo Busco, Member of the Rome Bar, European Registered Lawyer with
the Bar of England and Wales, 20 Essex Street Chambers, London, United Kingdom,

as Counsel and Advocates;

Dr Gian Maria Farnelli, University of Bologna, Italy,
Dr Ryan Manton, Associate, Three Crowns LLP, London, United Kingdom,
Member of the New Zealand Bar,

as Counsel;

Mr Niccolò Lanzoni, University of Bologna, Italy,
Ms Angelica Pizzini, Roma Tre University, Italy,

as Legal Assistants.

1 **THE PRESIDENT:** Good afternoon. Today we will hear the second round of oral
2 pleadings by Italy in the hearing of the Tribunal on the merits of the *M/V "Norstar"*
3 case. I give the floor to the Co-Agent of Italy, Mr Aiello.
4

5 **MR AIELLO:** Mr President, distinguished Members of the Tribunal, it is once again
6 an honour for me to address this Tribunal and a pleasure to represent my country,
7 Italy, in this concluding argument. I would like to take the opportunity to congratulate
8 His Excellency Mr Paik for the impeccable stewardship of these hearings and for his
9 patience.
10

11 On Wednesday, I acknowledged, on behalf of the Italian Government, the authority
12 of this honourable Tribunal, and I have confirmed Italy's continuous support of the
13 Tribunal's role as a major adjudicative body in charge of inter-State dispute
14 settlement, as testified by Italy's declaration of acceptance of the Tribunal's
15 jurisdiction under article 287, paragraph 1, of the Convention. Italy's appreciation of
16 this Tribunal has only deepened throughout the course of these proceedings.
17

18 However, I must express my regret as Co-Agent of the Italian Government and as a
19 State Attorney, for certain behaviour and some of the assertions made by opposing
20 Counsel. These were neither pertinent nor adequate to the case, which is instead
21 characterized by extremely delicate and judicially important matters.
22

23 My colleagues will soon demonstrate the absolute inconsistency in the Applicant's
24 arguments, their lack of fulfilment of the burden of proof and the unsoundness of the
25 request.
26

27 Yesterday, the Agent of Panama stated that
28

29 In this case, this Tribunal has not been called upon to reinterpret Italian law,
30 but rather to judge whether or not, when applying its domestic statutes, Italy
31 has acted in conformity with its obligations under the International Convention
32 on the Law of the Sea as regards the *"Norstar"*.
33

34 On the contrary, Mr President, Members of the Tribunal, all the arguments made by
35 the Applicant consisted in a critical analysis of the judicial and administrative
36 proceedings adopted by various Italian authorities.
37

38 Even the correspondence between the Italian Ministry of Foreign Affairs and the
39 Public Prosecutor of Savona regarding a completely unrelated event to the one
40 discussed before this Tribunal has been analysed in depth by the counter-party.
41

42 Mr President, distinguished Members of the Tribunal, my question to both myself and
43 your Excellences is: are these matters your prestigious Tribunal deserves to
44 discuss?
45

46 Mr President, distinguished Members of the Tribunal, this concludes my
47 presentation, and I kindly ask you to call Professor Tanzi to the podium. Thank you
48 for your attention.
49

1 **THE PRESIDENT:** Thank you, Mr Aiello. I then give the floor to Mr Tanzi to make his
2 statement.

3
4 **MR TANZI:** Mr President, Members of the Tribunal, it is a privilege to be appearing,
5 once again, before you representing Italy, my country, in the last phase of the
6 present proceedings.

7
8 Opposing Counsel yesterday affirmed that this case was a clear one. If there is
9 anything on which the parties agree, it is this. It is clear, Mr President, that this case
10 is one about a temporary probationary decree; that the decree has been adopted for
11 the purpose of investigating alleged crimes; that the suspected crimes were allegedly
12 committed in Italian territory; that the decree was adopted in August 1998, at a time
13 when the “*Norstar*” was in Spain’s internal waters; that the “*Norstar*” did not leave
14 those internal waters until the decree was executed by Spain in September 1998;
15 that the decree was lifted, first conditionally in February 1999, and then finally March
16 2003; and that the accused have never been imprisoned and that they have all been
17 acquitted.

18
19 Mr President, distinguished Members of the Tribunal, the case that Panama has
20 advanced before you this week remains as misconceived as it was in Panama’s
21 written pleadings. Italy has already provided comprehensive responses to Panama’s
22 confused submissions, both in its written pleadings and this week. I will therefore
23 confine my rebuttal speech to highlighting just the most fundamental failures in
24 Panama’s case.

25
26 My speech is organized in four main parts: in the first part I will address five main
27 flaws which characterize Panama’s case. They are the following: (a) Panama
28 continues to enlarge the scope of the dispute, as defined by this Tribunal in its
29 Judgment of 4 November 2016; (b) Panama characterizes article 87 as a provision
30 without geographical limits; (c) Panama attempts to plead a breach of article 87
31 without demonstrating any interference which could impinge on the freedom of
32 navigation; (d) Panama misunderstands the relevance of the acquittals of the
33 accused; (e) Panama baselessly accuses the Italian Public Prosecutor of
34 arbitrariness.

35
36 The second part deals with Panama’s improper approach to the present
37 proceedings. To that end, I will consider: (a) Panama’s false allegations of
38 imprisonment; (b) the boldness of Panama’s claim; (c) Panama’s delays in
39 commencing this case; and (d) Panama’s gross and repeated inflation of its
40 damages claim.

41
42 The third part of my speech will rebut to Panama’s allegations concerning the
43 Prosecutor’s conduct. In particular, I will address: (a) the reasonableness of the
44 Prosecutor’s actions; (b) the limitations on the Prosecutor’s responsibility for the
45 execution of the Decree of Seizure.

46
47 In the fourth part, Mr President, I will consider briefly the valuation of the “*Norstar*”.
48 I will then end with the conclusions that Italy draws from Panama’s approach to the
49 case and its conduct as Applicant throughout the proceedings.

1 Mr President, distinguished Members of the Tribunal, you have already heard
2 Counsel for Italy, including myself, criticize Panama's attempts to exceed the
3 boundaries of the current dispute on a number of occasions this week. I will therefore
4 be brief on this but I must emphasize this point here again because it is foundational
5 to the scope of the judgment you will deliver on the merits, and because Panama
6 continues to ignore those boundaries.

7
8 Panama had launched this case on the basis that the subject of the dispute, as
9 Panama described in its Application, "concerns a claim for damages against the
10 Republic of Italy caused by an illegal arrest of the *M/V 'Norstar'*".¹ That claim is no
11 longer before the Tribunal. As you made clear in your November 2016 Judgment, in
12 paragraphs 122 and 132, as I recalled earlier this week, the Tribunal's jurisdiction is
13 limited to determining the legality of Italy's Decree of Seizure and request for its
14 execution under articles 87 and 300 of the Convention in relation to article 87. What
15 that means in short, Mr President, and recalling the further detail in my speech on
16 Wednesday, is the following.

17
18 Panama's continued attempts to make this case about the arrest of the "*Norstar*"
19 must fail; it is the Decree of Seizure, together with the request for its execution,
20 which are relevant acts to the present dispute. Meanwhile, the execution was carried
21 out far from the high seas in Spain's internal waters and such acts cannot be
22 attributed to Italy. In other words, the key event upon which Panama brought this
23 claim in the first place is no longer relevant to this dispute.

24
25 Panama's continued attempts to plead breaches of articles 92 and 97 of the
26 Convention must also fail; these articles lie beyond the scope of the Tribunal's
27 jurisdiction as defined in its November Judgment. Panama has failed to prove the
28 contrary.

29
30 Panama's attempts to plead breaches of various human rights obligations, which it
31 maintained in its written pleadings and somehow in its oral pleadings, must again
32 fail; the Tribunal has no jurisdiction to determine breaches of such obligations, which
33 are contained in separate treaties that have their own enforcement regimes.
34 However, Italy is pleased to have had the opportunity and the privilege to illustrate
35 before this Tribunal the full conformity with the basic principles of fair trial and due
36 process of law by its judiciary.

37
38 Mr President, Members of the Tribunal, I will now address how Panama
39 characterizes article 87 as an obligation with no geographical limits. In so doing,
40 Panama carries out its attempt to enlarge the obligation under this article to an
41 extent which is not tenable. On Monday, Mr Morch vaguely asserted, without any
42 substantiation, that the "*Norstar*" had made a voyage to Algeria in July 1998, but
43 neither Mr Morch nor anyone else on the Panama side has substantiated that the
44 "*Norstar*" was anywhere but in Palma de Mallorca from the time of the Decree of
45 Seizure, namely 11 August 1998, to the time of the "*Norstar*"'s arrest, 25 September
46 1998. That is the only time period that can be relevant in light of the jurisdictional
47 boundaries of this dispute.

48

¹ *Application of the Republic of Panama*, 16 November 2015, para. 3.

1 Yet, Mr President, Panama's case revolves around the claim that Italy's Decree of
2 Seizure and request for its execution somehow breached Panama's right to freedom
3 of navigation on the high seas. My colleague, Professor Caracciolo, extensively
4 demonstrated on Wednesday why Panama has failed to establish a breach of
5 article 87. It suffices to recall as a general matter that Panama's attempts to ignore
6 the actual location of the "Norstar" at the time of the conduct that it challenges is
7 gravely misconceived.

8
9 Mr President, this amounts to a fully-fledged attempt at re-writing article 87 of the
10 Convention, as if it applied anywhere and everywhere that a ship may be – even in
11 internal waters – so long as the ship sometimes traverses the high seas. That is
12 clearly wrong, and Panama has failed to set down any way in which this
13 extraordinary enlargement of article 87 may be reasonably confined, nor has
14 Panama paid any attention to the dramatic consequences its new interpretation of
15 the law would have for a State's sovereignty, including its enforcement powers to
16 investigate and adjudicate crime in its internal or territorial waters. Panama's failure
17 to recognize the geographic limits of article 87 is fatal to its claim.

18
19 As is well known, the law of the sea is characterized by a fragile balance between
20 the powers of the coastal State and jurisdiction of the flag State, a product of
21 centuries of State practice and difficult negotiations. This is why the Convention and
22 freedom of navigation should be handled with care. Commentators on UNCLOS in
23 the literature agree that the Convention strikes a carefully considered balance:

24
25 One of the enduring characteristics of the Law of the Sea Convention is the
26 manner in which it skillfully balances rights and duties in an equitable manner
27 and advances global interests for the benefit of the common good. This
28 balance is very much evident in the key provisions of the Convention,
29 [including] the many ambulatory references to the freedom of navigation in the
30 Exclusive Economic Zone and on the high seas that permeate the entire text
31 of the Convention.

32
33 Mr President, Members of the Tribunal, I should further add that Panama claims that
34 article 87 should be intended as entitling a ship to gain access to the high seas, even
35 when the ship is legally detained in port. Panama attempts to distinguish the
36 "Norstar" case from the "Louisa" case, in which the Tribunal has already rejected the
37 claim that Panama is now attempting. According to Panama, the difference lies in the
38 fact that the in the "Louisa" case the relevant conduct occurred in territorial waters,
39 whereas in this case the conduct occurred on the high seas. Let me answer this
40 argument by Panama by quoting the opinion of a distinguished Member of this
41 Tribunal:

42
43 Article 87 covers freedom of the high seas and, in particular, freedom of
44 navigation. But the existence of a basic freedom does not prohibit the coastal
45 State from exercising the powers of its police and judiciary in its own
46 territory. ... The Parties argued about the location of the alleged criminal
47 activities. Internal waters? Territorial sea? Exclusive Economic Zone? The
48 Applicant maintained that its scientific research activities had been conducted
49 within the area covered by the Spanish permit, i.e., the internal waters and the
50 territorial sea. The Respondent did not dispute this. But is the issue truly
51 relevant?

1 No less remarkable, Mr President, is Panama's further attempt to enlarge article 87
2 by bringing a claim based on no actual interference with freedom of navigation. The
3 simple reality of Panama's claim is that the only relevant conduct of Italy before this
4 Tribunal – the Decree of Seizure and the request for execution – had no effect
5 whatsoever on the "Norstar"'s navigation on the high seas. Panama is so well aware
6 that no interference at all occurred that it tried yesterday to propose a concept of
7 indirect interference which de facto re-asserts Panama's claim that to investigate
8 conduct on the high seas or extend to the high seas the legislation of a coastal State,
9 amounts per se to an interference with the freedom of navigation. Mr President, this
10 is plainly wrong.

11
12 In order to make up for its inability to prove any interference, the Panamanian
13 narrative went on so far as to submit, for the first time in this proceeding, and after
14 having seen how Italy pleaded this point in its written pleadings, that the "Norstar"
15 was harassed. On this point, the witness statement of Mr Husefest is vague and
16 unreliable about time and circumstances. For the record, the question is not whether
17 the "Norstar" experienced any interference on the high seas at any point in its life,
18 but whether the Decree of Seizure and the request for its execution determined any
19 interference.

20
21 Interference did not occur even in the tenuous form of a "chilling effect". I recall that
22 Mr Esposito confirmed on Thursday that a probatory seizure of an object, such as
23 a ship, is secret until it is carried out. This necessarily means that no one involved
24 with the "Norstar" knew, or could have known, of the Decree before it was actually
25 enforced in port – no way that the Decree could display any chilling effect.

26
27 A further point concerning extraterritoriality. The Tribunal asked whether the Decree
28 of Seizure and its request for execution with regard to activities carried out by the
29 "Norstar" on the high seas amount to a breach of article 87. Italy wishes to stress
30 once more that extraterritorial exercise of jurisdiction, which Italy has not exercised in
31 this case, does not in any event amount to automatic interference with freedom of
32 navigation. While there may be conduct by a State that breaches at the same time
33 article 87 and those distinct provisions of the UNCLOS prohibiting extraterritoriality,
34 such as articles 89, 92 and others, no breach of article 87 can occur unless there is
35 some sort of interference with navigation. Thinking otherwise, Mr President, is
36 contrary to ordinary principles of interpretation of the UNCLOS such as *effet utile* and
37 interpretation in good faith, inasmuch as it deprives article 87 of its characterizing
38 purpose.

39
40 Mr President, Members of the Tribunal, I will now address Panama's
41 misunderstanding of the relevance of the acquittals by the Savona and Genoa courts
42 in 2003 and 2005 respectively. Agent and Counsel for Panama have repeatedly
43 invoked the acquittals of those involved with the "Norstar" by the Tribunal of Savona
44 as somehow proving Panama's case, but I have already illustrated on Wednesday
45 and repeated on Thursday, this is wrong for at least two reasons.

46
47 First, it is the Tribunal of Savona's decision to acquit the accused that is relevant for
48 our purposes, because it was on the same judicial occasion that the Decree of
49 Seizure was definitely lifted. That decision was entirely separate from any
50 assessment of lawfulness or otherwise of the Decree of Seizure in question. Indeed,

1 the Tribunal of Savona did not say anything about the lawfulness of the Decree of
2 Seizure, and that is unsurprising. It is ordinary. It is the law. That is the due process
3 of law. The fact that an accused is ultimately acquitted does not mean that the
4 investigation of that individual that led to its acquittal was unlawful.

5
6 Mr President, let me repeat, once again, on Panama's view of the law, investigatory
7 measures, such as the probationary seizure of property, retrospectively become
8 unlawful every time the accused is acquitted. That would produce disastrous effects
9 on the investigation of suspected crime and must be wrong. Logically and legally
10 wrong.

11
12 Second, even if the acquittals of those involved with the "*Norstar*" did somehow, only
13 *arguendo*, mean that the probationary seizure was unlawful under Italian law, that
14 would obviously not mean that Italy had breached international law. It would serve to
15 demonstrate the very non-arbitrariness of Italy's conduct under international law. As
16 the ICJ put it in the *ELSI* Case, "[i]t would be absurd if measures later quashed by
17 higher authority or a superior court could, for that reason, be said to have been
18 arbitrary in the sense of international law".²

19
20 Mr President, that point ties in with one of the recurring themes of Panama's
21 submissions, both in its written submissions and this week, which has been
22 Panama's accusation that the conduct of the Italian Public Prosecutor was arbitrary.
23 Thus Mr Carreyó accused Italy, through that Public Prosecutor, of arbitrarily
24 preventing the "*Norstar*"s access to the high seas. Panama even accused the
25 Prosecutor of pursuing an investigation knowing that there was no lawful basis for it.

26
27 Mr President, distinguished Members of the Tribunal, these are serious allegations,
28 which Panama has fallen well short of establishing. To take just one of Panama's
29 gross failures to discharge its burden of proof, the Tribunal may recall Mr Carreyó's
30 attempts to cross-examine Italy's Italian law expert, Mr Esposito, about whether the
31 Public Prosecutor in this case gathered any evidence from the "*Norstar*" during its
32 probationary seizure. That was a strange line of questioning in the first place, given
33 that Mr Esposito served as an expert witness and not as a fact witness in this case. It
34 was therefore unsurprising that Mr Esposito could not comment on the matter.

35
36 But what is important is that Mr Carreyó's line of questioning underscored in crystal
37 clear terms the remarkable difficulty of Panama's efforts to find evidence to sustain
38 its bold assertions of prosecutorial arbitrariness in this case. In other words, having
39 advanced no evidence of its own, Panama tried to fish for such evidence from an
40 expert witness. The baselessness of Panama's attempts to criticize the conduct of
41 the Public Prosecutor should not go unnoticed by the Tribunal.

42
43 On the contrary, and as will be discussed in further detail shortly, the conduct of the
44 Italian authorities, including the Public Prosecutor, was not only in good faith, it was
45 at all times reasonable and proportionate, and was carried out in conformity with
46 Italian law, and the European and international due process of law and fair trial
47 obligations and standards.

48

² *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15 ff., para. 124.

1 As I illustrated on Thursday, Mr President, I must make one important clarification
2 here. The Agent for Panama has asserted that Italy is impermissibly seeking to set
3 up its own domestic law as a justification for its conduct under international law. But
4 that is not what Italy is doing. Italy is simply relying on its domestic laws as providing
5 critical facts for this Tribunal when assessing its conduct in light of international law.
6

7 Mr President, allow me to turn again to the *ELSI* Case, which I hold particularly dear,
8 and, in particular, its definition of arbitrariness under international law as “a wilful
9 disregard of due process of law, an act which shocks, or at least surprises, a sense
10 of judicial propriety”.³
11

12 That definition underscores the importance of looking at the seriousness with which
13 a State’s authorities take legal processes. Panama, as will be discussed shortly, has
14 no basis for alleging that the Italian Public Prosecutor, or any other public authority,
15 wilfully disregarded the relevant legal processes.
16

17 Mr President, Members of the Tribunal, having outlined those fundamental
18 misconceptions with Panama’s claims in this case, I now wish to make some
19 remarks about Panama’s improper approach to the procedure of this case. It is
20 important that I underscore these aspects because, if the five fundamental
21 misconceptions in Panama’s claim were not enough, Panama’s improper approach
22 to the procedure of this case reinforces the lack of seriousness of Panama’s claims
23

24 Mr President, Panama launched this case with the allegation under the rubric “legal
25 grounds” in its Application that: “[a]fter imprisoning members of the crew of the
26 *M/V ‘Norstar’*, the Italian Republic has (up until this date) evaded to account for this
27 event.”⁴ As I have already told the Tribunal, Panama has now conceded that no-one
28 involved with the “*Norstar*” was ever imprisoned in connection with the “*Norstar*”’s
29 arrest, or after.⁵ Panama must have known this, or should have known this, at the
30 time it made its Application. I know, Mr President, that I have already addressed this
31 point; but allow me to underline that, whether someone has been imprisoned or not
32 is not a point on which there can be any ambiguity. Yet Panama knowingly made
33 that false allegation and thereby attempted to aggravate the dispute before this
34 Tribunal. It is also to be emphasized that these false allegations were reiterated in
35 the Memorial, and it was only after Italy noticed the falseness of its contentions that,
36 in its Reply, Panama withdrew such allegations. That, Mr President, tells a lot about
37 Panama’s fast-and-loose approach to matters of evidence in this dispute, and about
38 the recognition by Panama of the weakness of its case without such an allegation, as
39 well as Panama’s fast-and-loose approach to matters of evidence in this dispute at
40 large.
41

42 Panama, as well as launching this case on the back of false assertions, also
43 more broadly launched this case without any evidential foundation.
44

45 Panama’s continued attempts to blame Italy for Panama’s inability to furnish
46 adequate evidence in this case, including this week, reveals that this case has been
47 knowingly built riskily and without foundation. You may recall that Panama’s

³ *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15, p. 76, para. 128.

⁴ Application (see footnote 1), para. 10.

⁵ Reply of the Republic of Panama, 28 February 2018, para. 21.

1 overbroad document requests were expressly premised on its lack of evidence. As
2 Panama explained in the Request for Evidence that it filed with its Memorial:

3
4 [t]aking into account the lapse from the date of the initiation of damages (nearly
5 20 years) and due to other different factors (time, distance, language and
6 economy) it has proved difficult to examine and provide the Tribunal with
7 documents concerning this case.⁶
8

9 I know about the difficulties that Italy had in order to find its documentation about a
10 very old case, but it was not our case, Mr President; it was Panama's case.
11

12 Italy has made significant efforts to cooperate with Panama and respond reasonably
13 to Panama's document requests, including those made in Panama's Memorial,
14 notwithstanding their lack of specificity. Italy even offered to provide a list of
15 documents it held so that Panama could provide proper, specific document requests.
16 Panama refused to take up that undue cooperative proposal.
17

18 Panama must now bear the consequences of that refusal. It is not for Italy to provide
19 Panama with all the evidence it needs to build its case. Numerous authorities confirm
20 that basic principle of litigation, including Professor Robert Kolb in his chapter on
21 *General Principles of Procedural Law*:
22

23 The principle [of cooperation] is limited by its aim, which is to allow the
24 fulfilment of the object and purpose of the proceedings, that is, a proper
25 administration of justice. It obviously does not extend as far as to ask the
26 parties to share information or to compromise their "egoistic" interests as
27 opposing parties. For this would again be incompatible with the object and
28 purpose of the proceedings, which is litigation from the standpoint of contrary
29 interests ("adversarial proceedings").⁷
30

31 The adversarial nature of these proceedings did not seem to have escaped opposite
32 Counsel, nonetheless.
33

34 The Tribunal recognized this principle by rightly rejecting Panama's over-broad
35 document requests. Panama still refuses to accept that decision, as shown by the
36 vague questions put this week by its Counsel to Mr Esposito about the
37 circumstances in which a criminal file could be requested in Italy. However, it
38 remains the case that Panama cannot shift the blame to Italy for its own failure to
39 provide adequate evidence in this case. It is worth mentioning that Mr Morch could
40 have asked the Tribunal to have access to all the files and documents pertaining to
41 the criminal proceeding, as the Italian Code of Criminal Procedure prescribes in
42 article 111. He and his lawyers, his attorney, for which we have evidence that there
43 was retention and fee, have not taken action to that effect but are asking Italy to
44 make up for that – if there was anything to make up for, Mr President. Nor can
45 Panama make up indeed for its evidential failures through the oral testimony of self-
46 interested witnesses.
47

⁶ *Memorial of the Republic of Panama*, 11 April 2017, Part IV.

⁷ R. Kolb, 'General Principles of Procedural Law', in A. Zimmermann, K. Oellers-Frahm, C. Tomuschat (eds.), *The Statute of the International Court of Justice. A Commentary* (OUP 2006, 1st ed.) 871, para. 60.

1 Mr President, Members of the Tribunal, we heard opposing Counsel insist yesterday
2 that Panama had met its burden of proof because

3
4 [t]he testimonies of the witnesses called by Panama in this case, Mr Morch,
5 Mr Rossi and Mr Husefest, were a particularly strong evidence because the
6 witnesses were directly involved in the events surrounding the “*Norstar*” and
7 had extensive knowledge of the facts concerning the vessel and its activities.⁸
8

9 We reject, Mr President, that the evidence of these witnesses provided was at all
10 compelling in respect of the key facts in dispute in this litigation, and we will discuss
11 at various points today why that is so. But I also want to challenge the strength of
12 that oral evidence as a general matter based on well-accepted principles in
13 international dispute settlement affirming that the evidence of individuals that have
14 an interest in a case – and especially a financial interest – has less value than the
15 evidence of those who do not have such an interest. I recall here the statement of
16 the ICJ in the Nicaragua case, as follows:
17

18 In the general practice of courts, two forms of testimony which are regarded
19 as prima facie of superior credibility are, first the evidence of a disinterested
20 witness – one who is not a party to the proceedings and stands to gain or lose
21 nothing from its outcome – and secondly so much of the evidence of a party
22 as is against its own interest.⁹
23

24 I should add, Mr President, that this case involves a State exclusively, if not
25 preponderantly, bringing a claim not for itself but for the financial benefit of Mr Morch,
26 a Norwegian national, and his associates, including Mr Rossi, an Italian national; and
27 those witnesses have given evidence not to vindicate the legal rights of their home
28 State – or perhaps not really even of the flag State – but in order to obtain financial
29 compensation for themselves. We ask the Tribunal to have close regard to this
30 feature of the case when assessing the credibility – or lack thereof – of these
31 witnesses.
32

33 Nor, Mr President, can Panama blame the lapse of time for its evidential difficulties
34 given these have followed from its own tardiness in commencing this case. This was
35 despite Mr Carreyó having powers of attorney since 2000 and threatening almost
36 immediately to file a prompt release claim or otherwise against Italy before
37 international adjudication while the case was pending before Italian courts. We also
38 know from Panama’s damages claim that Mr Morch, as I have alluded to, had
39 retained other legal counsel following the arrest of the “*Norstar*”.
40

41 In particular, it has become apparent in the course of the oral proceedings that
42 Panama’s case fails to meet the required standard of proof on certain critical
43 aspects, including, for instance, that the ship was actually on the high seas at the
44 time of the Decree of Seizure and the request for execution.
45

46 It was in this connection that, during re-direct examination, the Agent for Panama
47 asked Mr Morch whether the whereabouts of the “*Norstar*” would be known for

⁸ ITLOS/PV.18/C25/9, p. 31, lines 14-17.

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, p. 43, para. 69.

1 certain, had the logbook been available. Mr Carreyó's suggestion is perhaps that it is
2 due to Italy's fault that some crucial documents, such as the ship logbook, are no
3 longer available. It is important to stress, Mr President, that this is not the case.
4

5 In his re-direct examination of Mr Morch, Mr Carreyó asked: "Do you know what
6 happened to the books ...?"¹⁰ His answer was: "The logbooks were still on board in
7 2015 under Italian detention."¹¹ One part of Mr Morch's testimony is certainly wrong:
8 the ship in 2015 was not under Italian detention. In 2003 Italy lifted the seizure of the
9 vessel, unconditionally.

10
11 However, Mr President, let me focus on the other part of Mr Morch's testimony: "The
12 logbooks were still on board in 2015."¹² If Mr Morch, acting with Panama, intended to
13 bring a case against Italy concerning the arrest and detention of the "*Norstar*", why
14 did he not recover these documents, which he testified were on the bridge in 2017,
15 when the Application introducing this case was filed? More generally, it was not for
16 Italy, especially after 2003, to take care of the conservation of evidence concerning
17 the *M/V "Norstar"*, which, from the Italian perspective, was concluded in 2003,
18 15 years before.

19
20 Further still, why did Panama wait until November 2015 to bring a case against Italy,
21 namely three months after the "*Norstar*" was destroyed, and all related evidence
22 dispersed? Panama had 18 years to bring this case against Italy. During all this time,
23 the documents of the ship would have been available; the ship itself would have
24 been available. Certainly, any lack of evidence in this case is not of Italy's making,
25 and it should not be imputed to Italy.

26
27 I should add here that, in its November 2016 Judgment, the Tribunal recognized that
28 principles like extinctive prescription and acquiescence are general principles of
29 international law, and that the Tribunal is to take them into account in light of
30 article 293 of the Convention. While the Tribunal found that Panama's claim was not
31 time-barred due to the lack of a specific time limit for the operation of extinctive
32 prescription in international law, this does not mean that the Tribunal should not take
33 into account for other purposes the fact that a long time has elapsed since the facts
34 that are at the basis of the "*Norstar*" case in its merits stage.

35
36 This is especially the case in circumstances in which the unreasonable delay in
37 commencing this case is imputable to Panama, and not to Italy. Professor
38 Robert Kolb, in describing the rationale of extinctive prescription of a claimant's
39 claim, observed that:

40
41 There are many legal reasons for some limitation in the legal order [including]
42 "equitable considerations", since it may become difficult to defend a case after
43 a long time, the relevant pieces, evidence and proof not being available
44 anymore.

45
46 Those considerations apply equally when assessing the state of the evidential record
47 following a long lapse of time. As the Tribunal in the "*Gentini*" Case recalled, "great

¹⁰ ITLOS/PV.18/C25/2, p. 12, lines 23-24.

¹¹ *Ibid.*, line 30.

¹² *Ibid.*

1 lapse of time is known to produce certain inevitable results, among which are the
2 destruction or the obscuration of evidence”.¹³

3
4 Mr President, Members of the Tribunal, one of the most abusive features of this
5 case, which you have no doubt already noted, is the dramatic way in which Panama
6 has grossly and repeatedly inflated its damages claim. In its Application, Panama
7 quantified its damages at above US\$ 6 million plus interest.¹⁴ That became
8 US\$ 13,721,918.60 in Panama’s Memorial.¹⁵ By the time of Panama’s further
9 submission that it inappropriately filed outside of the procedural schedule and on the
10 same day as Italy filed its Rejoinder (on 13 June 2018), and in sums that it outlined
11 yesterday, Panama’s claim had risen to US\$ 27,009,266, plus almost US\$ 25 million
12 in interest, plus €170,368 in legal fees, plus €26,320 in further interest.¹⁶
13 Mr President, that is over US\$ 50 million in total – in other words, Panama’s
14 damages claim has increased over 800% during the course of this dispute.

15
16 Mr President, there is little that could undermine a claim more than the fact that the
17 party making that claim has no idea of what it has lost. That Panama’s damages
18 claim has just happened to have continuously skyrocketed upwards betrays
19 Panama’s claim as nothing short of opportunism and contradicts any suggestion that
20 Panama has ever been interested in the legitimate settlement of this dispute.

21
22 Mr President, Members of the Tribunal, I will now address Panama’s contentions
23 regarding the Public Prosecutor. I will first deal with allegations regarding the lack of
24 reasonableness of the Prosecutor’s action. I will then address the issue of the
25 limitation of responsibility of the Prosecutor was not responsible for the execution of
26 the Decree and the custody of the “*Norstar*”.

27
28 Counsel for Panama continued to make numerous assertions regarding the conduct
29 of the Public Prosecutor that are devoid of any evidential foundation and which are
30 contradicted by basic principles of criminal justice.

31
32 In particular, Panama yesterday elaborated at length on the Decree of Seizure
33 adopted by the Public Prosecutor of Savona. What Panama did was to provide a
34 misleading portrayal of selective fragments of the Decree. The result was a narrative
35 that does not correspond to the actual factual and legal circumstances grounding the
36 Decree.

37
38 Excerpts of the Decree are shown on the screen but it is unreadable to me, and
39 I suppose by the Judges as well – and I regret that, but I am sure that this being the
40 heart of the disputed facts, distinguished Members of the Tribunal and the President
41 will have no difficulty in retrieving this text. As far as the marked parts of the text are
42 concerned, if allowed we will be pleased to submit a version with marking.

43
44 Around this text, Mr President, Italy intends to respond point by point to Panama’s
45 misinterpretation.

46

¹³ *Gentini Case* (1903) X RIAA 551, p. 561.

¹⁴ *Application* (see footnote 1), para. 11.

¹⁵ *Memorial of the Republic of Panama*, 11 April 2017, para. 260.

¹⁶ “*Norstar*’ Damage Claim”, 13 June 2018, p. 11.

1 First, Panama reiterated its assertion that Italy aimed the Decree at targeting
2 bunkering activities on the high seas carried out by the “*Norstar*”. Italy once again is
3 obliged to recall that bunkering is lawful under Italian law and that none of the crimes
4 mentioned in the Decree consist of refuelling gasoil off-shore. As Italy has
5 maintained since the beginning of the merits phase of this proceeding, the Italian
6 fiscal police were instead investigating several suspected illegal offences, fiscal
7 offences under Italian law, on Italian territory.

8
9 In addition to Italy’s pleadings earlier this week, I may refer you specifically to
10 Annex A to Italy’s Counter-Memorial,¹⁷ which you will find on the screen, perhaps in
11 more readable conditions. You have there the fiscal police’s investigation report of
12 24 September 1998. In jargon, it is called under Italian law *notitia criminis*. This
13 document reports the outcome of the investigations as of 24 September 1998, and it
14 clearly demonstrates that bunkering was not the activity under investigation. On the
15 contrary, that report shows that the Italian fiscal police had reasonable grounds to
16 suspect that the alleged fiscal offences were part of a unitary composed criminal
17 plan, put together by an Italian national, Mr Silvio Rossi, and involving the
18 participation of the management of foreign companies, including Inter Marine, as well
19 as the master of the *M/V “Norstar”*.

20
21 In summary, Mr President, that suspected criminal plan included several phases:
22 (1) the loading of the “*Norstar*” with fuel in Livorno, Italy, in exemption of excise
23 duties and VAT, as ship’s stores; (2) the re-introduction of the fuel into Italian
24 territorial waters and/or internal waters; and (3) the sale and purchase of fuel in Italy,
25 avoiding the payment of the fiscal duties due under the Italian law.¹⁸

26
27 None of that conduct has anything to do with bunkering on the high seas.

28
29 Let me be clear, Mr President: if you search for the word “bunkering” in Annex A, the
30 report of the investigations, you will find it. However, the investigation of bunkering
31 per se was not the rationale of the investigation, as we heard yesterday. Rather, the
32 fiscal offences that occurred in the Italian customs territory, including internal waters
33 and/or territorial sea, were clearly the rationale of the investigations.

34
35 It is on the basis of these investigations that the Public Prosecutor adopted the
36 Decree, which is at the centre of your attention. Yes, the Decree was adopted shortly
37 before but, as I and Mr Esposito confirmed, there was close contact between the
38 Public Prosecutor and the investigating authorities who had been working back to
39 back for almost a year; and that is the rationale of the pertinent criminal procedural
40 rules on the issue.

41
42 Second, Mr President, Panama underlines that the Decree of Seizure refers explicitly
43 to the constructive presence doctrine and hot pursuit. There is no denying that,
44 Mr President. According to Panama, constructive presence and hot pursuit constitute
45 the “rationale behind the Decree of Seizure”. Panama also asserted that the
46 reference to this doctrine shows that “the use of this doctrine in the Decree of
47 Seizure in itself proves that the ‘*Norstar*’ was not seized for activities in the territorial

¹⁷ *Notification of notitia criminis against Silvia Rossi and Others by the fiscal police of Savona, 24 September 1998 (Counter-Memorial of the Italian Republic, 11 October 2017, Annex A).*

¹⁸ *Ibid.*, p. 7.

1 waters of Italy.” However, Panama’s assertion is wrong. Even if the Public
2 Prosecutor referred to constructive presence and hot pursuit, these did not form the
3 operative part of the Decree. Such references did not form the operative part of the
4 Decree, which was instead based on the prosecution of the alleged offences plainly
5 committed in Italian territory.
6

7 In addition, most importantly, Mr President, as we have repeated time and again, the
8 fact of the matter is that the “*Norstar*” was never arrested on the high seas. In
9 particular, as far as hot pursuit is concerned, which was never carried out, by the
10 way, this nonetheless indicates that any intention to arrest the “*Norstar*” on the high
11 seas involved doing so in compliance with the right to hot pursuit under article 111 of
12 UNCLOS. If there were to be any arrest on the high seas under this Decree, it would
13 have been carried out only under the requirements of article 111 of hot pursuit.
14

15 Third, Mr President, Members of the Tribunal, Panama recalled Annex 7 of the
16 Memorial, containing a letter from Telespresso, dated 4 September 1998, issued by
17 the Service of Diplomatic Litigation or Legal Directorate of the Ministry for Foreign
18 Affairs of Italy to the Prosecutor who signed the Decree of Seizure.¹⁹ As the Counsel
19 for Panama notes, the Decree of Seizure in question refers to the “*Spiro F*”, flying the
20 flag of Malta.
21

22 It is not the first time Panama attempts to introduce the “*Spiro F*” case into the
23 present case with the aim of blurring and confusing the facts and the legal context.
24 Panama suggests that Italy has somehow been evading the “*Spiro F*” case, but what
25 Italy and its Agent has objected to was that the “*Spiro F*” case is a fundamentally
26 different case; and I am pleased to have the opportunity, Mr President, to underline
27 that difference in light of Panama’s insistence on the “*Spiro F*”. This difference is
28 simply that, while the “*Spiro F*” was arrested on the high seas, this did not occur in
29 the “*Norstar*” case. This again underscores one of the core failures of Panama’s
30 claim for a breach of article 87 in this case.
31

32 Moving beyond the Decree itself, Mr President, Panama also continues to badly
33 understand how probatory seizure works. Counsel for Panama thus complained
34 yesterday that:
35

36 The Italian legal expert yesterday said that, since it was a probatory seizure,
37 for a Prosecutor to arrest a foreign ship, the existence of a crime did not have
38 to be proven. So our first question to Italy will be: in Italy, for a foreign vessel
39 to be arrested, even for probatory purposes, is it not necessary to have proven
40 the existence of a criminal offence?²⁰
41

42 Mr President, Members of the Tribunal, of course it is not necessary to have proven
43 the existence of a criminal offence before a probatory seizure. It is to investigate
44 the seized property precisely in order to determine whether there is evidence of the
45 existence of a criminal offence. As Counsel to Panama accepts, Mr Esposito
46 confirmed this in his testimony and Panama did not challenge it in cross-
47 examination. Thus, when Mr Carreyó asked Mr Esposito, “Is the guilt of the accused

¹⁹ *Seizure order by the public prosecutor of the Tribunal of Savona, 11 August 1998 (Counter-Memorial (see footnote 17), Annex I).*

²⁰ ITLOS/PV.18/C25/9, p. 8, lines 5-9.

1 person necessary for the adoption of a probative seizure?”,²¹ Mr Esposito answered,
2 “No, absolutely not”.²² Panama’s continued attempts to challenge this clear law is not
3 only nonsensical; it also flies in the face of the evidence.
4

5 Panama also contests the reasonableness of the Public Prosecutor’s Decree on the
6 basis that it was not justified by necessity. Panama refers to the passage of the
7 Decree, stating: “Having noted that the seizure of the mentioned goods must be
8 performed, as it has an intrinsic probationary nature, with no need to assess whether
9 the order is necessary.”²³

10
11 As explained by the expert in Italian law, Mr Esposito, on Thursday, probative
12 seizure is different from precautionary seizure, and so are the respective
13 requirements for legitimacy and lawfulness. While the precautionary seizure requires
14 “urgency”, the former only requires a reasonable suspicion that a crime has been
15 committed, that is the *fumus boni iuris*, on the ground of which you engage in
16 investigation or continue investigation in order to search for and obtain the truth,
17 which would lead to condemnation or acquittal. Therefore, *fumus boni iuris* is to
18 ground the investigative necessity to gather information and collect evidence. In this
19 sense, it is urgent and necessary inherently per se. Mr Busco, referring to the Italian
20 Court of Cassation, covered this point on Wednesday, and I may refer you to his
21 very clear speech. I may only add here that in any criminal justice system, decisions
22 on whether to move forward with investigations, and probationary seizures that are
23 part of those investigations, are not based on considerations of urgency, as may be
24 the case, for example, with preventative seizure taken to prevent the destruction of
25 property.
26

27 Mr President, Members of the Tribunal, let me address one point raised by Panama
28 yesterday concerning the fact that the probative seizure would be a measure
29 exclusively peculiar to the Italian legal order. This is patently wrong. The probative
30 seizure is an act well known in the legislation of other States. I refer, inter alia, to the
31 British, German, Spanish, and US legal systems.²⁴ It may come as a surprise to

²¹ ITLOS/PV.18/C25/7, p. 22, lines 21-22.

²² *Ibid.*, p. 22, line 24.

²³ *Seizure Order* (see footnote 19).

²⁴ **Germany**: Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette [*Bundesgesetzblatt*] Part I p. 1074, 1319) Section 94 [Objects Which May Be Seized](Par. 1): “Objects which may be of importance as evidence for the investigation shall be impounded or otherwise secured.”

Spain: *Ley de Enjuiciamiento Criminal* (R.D. de 14 de septiembre de 1882), Art. 334(1): “El Juez instructor ordenará recoger en los primeros momentos las armas, instrumentos o efectos de cualquiera clase que puedan tener relación con el delito y se hallen en el lugar en que éste se cometió, o en sus inmediaciones, o en poder del reo, o en otra parte conocida”. “The investigating judge will order to collect without delay the weapons, instruments or goods of any kind that may be related to the crime and are in the place where the latter was committed, or in its vicinity, or under disposition of the accused, or in another known place.”

United Kingdom: The Police and Criminal Evidence **Act** 1984 (**PACE**): article 19, General power of Seizure: The constable may seize anything which is on the premises if he has reasonable grounds for believing— a) that it has been obtained in consequence of the commission of an offence; and (b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed. (3) The constable may seize anything which is on the premises if he has reasonable grounds for believing (a) that it is evidence in relation to an offence which he is investigating or any other offence; an (b) that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.

1 Panama that article 252 of its Code of Criminal Procedure contains a similar
2 measure. Article 252 is akin to article 253 of the Italian Code of Criminal Procedure
3 in providing a measure aimed at the gathering of all evidence needed to substantiate
4 an allegation; and I suppose that Counsel for Panama are also familiar with the
5 difference between article 252 of the Code of Criminal Procedure and article 259 of
6 the Code of Criminal Procedure of Panama.

7
8 Mr President, Members of the Tribunal, the “*Norstar*” was put under probative
9 seizure on 25 September 1998 on the basis of the Decree of Seizure of 11 August
10 1998. Thus, urgency was not a requirement, whereas necessity followed inherently
11 from the finding of the *fumus* without having to be separately established.

12
13 As for *fumus*, Panama asked yesterday:

14
15 Has Italy provided evidence about how many of all those megayachts supplied
16 with bunkers on the high seas went back to Italy in order to affirm that there
17 was a suspicion of a crime of smuggling and tax evasion having been
18 committed?²⁵

19
20 Mr President, Members of the Tribunal, one would suppose that one of the main
21 reasons for conducting investigations complained of would precisely that of trying to
22 assess, ascertain, find out, these kinds of facts. But if we leave suppositions aside,
23 Mr President, it turns out from the investigation report, to which I referred a while ago
24 and that you find in Annex A of Italy’s Counter-Memorial, that the investigations led
25 to the assessment within a timespan of 10 days, namely between 3 August 1997 and
26 13 August 1997, that eight yachts that had been refuelled by the “*Norstar*” and
27 entered the Italian territorial waters. What is also of particular interest for us to know
28 from that document, which again you find in the same Annex A, is that we find out
29 that the fuel sold to those Italian buyers was invoiced to foreign fake buyers,
30 including Nor Maritime Bunker, for the purpose of avoiding the payment of VAT and
31 income taxes.

32
33 Panama also continues to make irresponsible assertions about the alleged motives
34 underlying the Public Prosecutor’s actions, including referring to Mr Rossi’s
35 accusation that this was done in bad faith for the purpose of carrying out
36 prosecutorial zeal, but it is not acceptable for Panama to rely on such accusations
37 without any supporting evidence; and, of course, the Tribunal well knows that bad
38 faith cannot be presumed. The Public Prosecutor set out the reasons for his Decree
39 in that Decree and the results of the complex investigations are described therein,

United States: Constitution: Fourth Amendment: “The right of the people to be secure in their persons, ..., against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, *but upon probable cause*, ..., and particularly describing the place to be searched, and the persons or things to be seized.” *Dumbra et al v. United States* (1925) “In determining what is probable cause ... [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit ... for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.” *Brinegar v. United States* (1949): “Probable cause exists where the facts and circumstances within the officers’ knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed”.

²⁵ ITLOS/PV.18/C25/9, p. 3, lines 45-47.

1 which go in the same direction. I should also add briefly that yesterday Counsel for
2 Panama criticized Mr Esposito for not knowing the motivations of the Public
3 Prosecutor, but such criticism is misguided. Mr Esposito, as you well know, is an
4 expert witness here to give testimony on the principles of Italian law; he is not a fact
5 witness who could possibly comment on the Public Prosecutor's motivations.
6

7 I can add, though, Mr President, that the rigorousness of the Public Prosecutor's
8 conduct is underscored by the speed with which he progressed his investigations of
9 the seized property. Recall that after the "Norstar" was seized in September 1998 the
10 shipowner applied for its release in January 1999. The Public Prosecutor turned
11 down that request because there were still investigative exigencies, investigative
12 needs, outstanding. Yet five weeks later, in February 1999, the Public Prosecutor
13 accepted the conditional release of the vessel. To put it another way, Mr President,
14 whereas the shipowner took about four months to even request the lifting of the
15 seizure, the Public Prosecutor was able to complete the investigation in only five
16 further weeks, and he had no personal interest in the "Norstar", as his owner was
17 supposed to have; and certainly, Mr President, that is not the mark of an
18 unreasonable Public Prosecutor looking to abuse his power. I note in this connection
19 that we heard nothing yesterday about the erroneous descriptions that Panama had
20 given earlier this week, describing this temporary seizure as a confiscation that was
21 *sine die*, because a confiscation that is not a seizure is *sine die*. As Panama now
22 appears to accept, there was clearly nothing confiscatory or *sine die* about the
23 seizure.
24

25 Yesterday Panama vehemently asserted that Italy is hiding behind Spain and
26 attempting to evade its responsibility behind Spain.
27

28 Mr President, it is important that I draw your attention to the applicable legal regime
29 under the 1959 European Convention on Mutual Assistance in Criminal Matters.
30 Panama does not dispute that this is the applicable legal regime to the request for
31 execution of the Decree. Let me recall article 3 of that Convention, which is the key
32 provision in the instant case. It provides:
33

34 The requested Party shall execute in the manner provided for by its law any
35 letters rogatory relating to a criminal matter and addressed to it by the judicial
36 authorities of the requesting Party for the purpose of procuring evidence or
37 transmitting articles to be produced in evidence, records or documents.
38

39 Thus, for the European Convention the fundamental principle governing the
40 execution of a letter rogatory is that of the *locus regit actum*. The meaning of the
41 maxim is that the law of the place governs the execution of the request for mutual
42 assistance, as opposed to the principle of the *forum regit actum*.
43

44 The principle of the *locus regit actum* is not peculiar only to the European
45 Convention that I have just mentioned and which applies in the instant case, but
46 rather is well established and widely utilized by States in cooperation in criminal
47 matters worldwide.
48

1 The International Court of Justice discussed this principle dealing with an agreement
2 between Djibouti and France in the case of *Certain Questions of Mutual Assistance*
3 *in Criminal Matters* of 4 June 2008.

4
5 More specifically, the Court stated that

6
7 the obligation to execute international letters rogatory laid down in article 3 of
8 the 1986 Convention is to be realized in accordance with the procedural law
9 of the requested State. Thus, the ultimate treatment of a request for mutual
10 assistance in criminal matters clearly depends on the decision by the
11 competent national authorities, following the procedure established in the law
12 of the requested State. While it must of course ensure that the procedure is
13 put in motion, the State does not thereby guarantee the outcome, in the sense
14 of the transmission of the file requested in the letter rogatory.²⁶

15
16 Mr President, I may note that article 3 of the Convention in hand basically reflects
17 article 3 of the Strasbourg Convention of 1959.

18
19 Mr President, Members of the Tribunal, coming back to the instant case, it clearly
20 emerges from article 3 of the 1959 European Convention that once Italy issued the
21 Decree of Seizure and requested the Spanish authorities to execute the Decree of
22 Seizure, the Italian letters rogatory were executed by Spain according to its internal
23 rules and procedure. In detail, from the arrest onwards, all measures adopted
24 towards the *M/V "Norstar"* were governed by the Spanish legislation, such as: all
25 modalities for the physical apprehension of the vessel; the appointment of the
26 custodian; the inventory of all goods on board the *M/V "Norstar"*, including fuel; and
27 the decision on the ordinary vessel's maintenance.

28
29 Thus, Mr President, it is not by chance that the custodian, as we know for sure from
30 the facts of the case, was the Spanish Port Authority of Palma de Mallorca. Equally,
31 it is not by chance that, contrary to the Panama's assertions, after the decision of the
32 Tribunal of Savona in 2003, which released the vessel finally and definitely, Italy
33 could not but rely on Spanish authorities for having executed the release and the
34 return of the *"Norstar"* to Inter Marine SPA.

35
36 In conclusion, Mr President, Panama's assertions that Italy manipulates Spain in
37 order to evade its responsibility is simply and patently unfounded.

38
39 To be sure, Italy does not dispute that, as the Tribunal found in its November 2016
40 Judgment, it was up to Italy to later request Spain to lift the seizure. However, that
41 does not change the fact that Spain was responsible for the execution of the seizure
42 and the custodianship of the vessel until the time that Italy requested the lifting of the
43 seizure. Indeed, that is why Italy had to request Spain to lift the seizure. That can
44 only be understood if Spain was in control of the ship until Italy requested Spain to lift
45 that seizure.

46
47 Mr President, I should briefly respond here to the mischaracterization of
48 Mr Esposito's evidence by opposing Counsel yesterday. Yes, in response to a

²⁶ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177, p. 222, para. 123.

1 question from Judge Pawlak, Mr Esposito said that “[t]he general rule is that whoever
2 has issued the seizure order ... is in charge of the whole situation” and that “[i]f Italy
3 arrests a ship, whoever has issued the seizure order is responsible for taking care of
4 the ship”. However, Mr President and Members of the Tribunal – and I cannot
5 emphasize this enough – Mr Esposito was clear that this was his opinion “[i]f Italy
6 arrests the ship”, which was not the case.
7

8 Indeed, Judge Pawlak’s question was: “If Italy arrests a ship, who is responsible for
9 taking care of the ship – the owner, the Italian authorities, other authorities?”²⁷

10 Opposing Counsel disappointingly misled the Tribunal by omitting that crucial
11 context, which changes everything. To be clear: Mr Esposito was opining on what
12 would happen within Italy if Italian authorities arrested a ship at the request of the
13 Italian Public Prosecutor. Mr Esposito was clearly not opining on which State bears
14 responsibility for executing a request for seizure from another State and the
15 modalities of custodianship thereafter under the Strasbourg Convention.
16

17 Mr President, Members of the Tribunal, Italy strongly opposes the argument made by
18 Panama since its Application, including yesterday, that the judgment of the Tribunal
19 of Savona of 2003 “was not full and final”²⁸. It would not have been full and final,
20 according to Panama, because
21

22 The Savona Prosecutor appealed the decision in front of the Court of Appeal
23 of Genova, despite having full knowledge of its illegal conduct when ordering
24 and requesting the arrest of the *M/V “Norstar”*, as well as of the aggravation of
25 the damages that would accrue for its unlawful decision over the passage of
26 time.
27

28 Mr President, this is simply not the case, and this is a matter of Italian law, which is a
29 clear-cut matter of fact before this Tribunal for which Italy has abundantly proved
30 evidence, but Panama keeps ignoring Italy’s evidence, keeps ignoring Italian law,
31 keeps complaining about Italy pleading Italian law while Panama wrongfully pleads
32 Italian law when we are supposed to be pleading international law, and the facts
33 speak for themselves. The revocation of the Decree became final on 20 March 2003.
34 The appeal lodged by the Public Prosecutor did not concern the release of the *M/V*
35 “*Norstar*”. Indeed, the Public Prosecutor did not request the Court of Appeal of
36 Genoa to suspend the order to return the vessel.
37

38 The judgment by the Genoa Appellate Court of 2005 concerned only the acquittal of
39 the accused, which was plainly upheld.
40

41 In sum, Mr President, once the Tribunal of Savona had decided on the unconditional
42 release of the vessel and once that decision had been transmitted to Spain, the
43 Italian judicial authorities no longer had jurisdiction regarding the “*Norstar*”.
44

45 It is for this reason, Mr President, that on 31 October 2006 the Genoa Appellate
46 Court answered to the Spanish authorities that it was not for it to decide on the
47 demolition of the vessel.
48

²⁷ ITLOS/PV.18/C25/8, p. 10, lines 30-31.

²⁸ *Application* (see footnote 1), para. 8.

1 Mr President, I see that it is approaching 4.30. I need to stay on my feet for about 10
2 to 15 more minutes. May I continue or allow you to decide to take a break?

3
4 **THE PRESIDENT:** Mr Tanzi, indeed you are approaching the end of your statement.
5 Therefore, I will allow you to continue your statement.

6
7 **MR TANZI:** Thank you very much, Mr President. That is what I will do.

8
9 Mr President, Members of the Tribunal, opposing Counsel referred yesterday to the
10 Italian naval expert as follows:

11
12 First, the expert, Mr Matteini, has assumed false assumptions regarding the
13 ship's condition. Second, the expert, Mr Matteini, has assumed false legal and
14 technical requirements with regard to the operational capability of the ship.²⁹

15
16 I may note, Mr President, the pictures presented by Panama in yesterday's hearing
17 have been extracted, as indicated by opposing Counsel, from private rather than
18 official websites. I may recall that Captain Matteini had stated during his testimony
19 that his information was acquired from official websites recognized by the IMO.

20
21 The statement given by Captain Matteini is in line with the article of "Diario de
22 Mallorca", produced by Panama.³⁰ The article attests that the vessel had entered the
23 port of Mallorca in March 1998, and was in a state of abandonment in April of the
24 same year.

25
26 The photographs presented by Panama portray close-ups of the decks of the vessel
27 and the engine room. However, there is no record of the source and dates of these
28 photographs. The captions of the photographs appear to have been added at a
29 different time.

30
31 Yesterday, Panama reported a part of Captain Matteini's testimony, omitting a crucial
32 part of it. Opposing Counsel quoted Captain Matteini as stating that "For sure, had
33 the vessel looked like that, then my evaluation would have been different".³¹ Yet
34 opposing Counsel omitted the rest of the sentence; in that sentence Captain Matteini
35 clarified: "but again we would need to consider the necessary technical update that it
36 had to comply with".³²

37
38 Opposing Counsel also referred to a series of photographs taken between 2010 and
39 2015 in which the status of the ship was defined as "active", which opposing Counsel
40 considered "rather surprising unless you believe in the resurrection of ships".³³
41 However, there is nothing surprising in that statement, as the ship is defined as
42 "active" because it is no longer under the effect of the seizure.

43

²⁹ ITLOS/PV.18/C25/9, p. 35, lines 5-9.

³⁰ *Memorial of Panama*, 11 April 2017, Annex 16.

³¹ ITLOS/PV.18/C25/8, p. 22, lines 16-17.

³² *Ibid.*, p. 22, lines 17-18.

³³ ITLOS/PV.18/C25/9, p. 33, lines 48-49.

1 Panama claimed that “*Norstar*” did not need to conform to the new technical
2 requisites imposed by the 73/78 MARPOL Convention because its deadweight was
3 below 500 metric tonnes.

4
5 However, the threshold set by MARPOL is of 400 metric tonnes, and includes the
6 “*Norstar*”. Moreover, it is necessary to keep in due regard, next to the weight, the
7 category of cargo, which is to be combined with the relevance of the determinant of
8 the weight of the ship, especially if it is gasoil, due to its inflammatory nature and its
9 related flashpoint. This is why “*Norstar*” had to comply with double-hull legal
10 requirements set by MARPOL.

11
12 At the time of the events we know for sure that at least opposing Counsel and
13 witnesses claim the use of the “*Norstar*” was to transport gasoil, not fresh water. If it
14 had intended to change its business, it had to incur major renovation works, costly
15 works.

16
17 Captain Matteini’s declarations are valid also in respect of the valuation of the ship.
18 For example, the expert could not have realistically considered a different use for the
19 vessel as this was not an available option at the time of the Decree of Seizure, as I
20 just alluded to, Mr President.

21
22 For the transport of bio-products or fishing industry waste, the vessel would have to
23 undergo a remodelling of its structure. Mr President, Members of the Tribunal, it
24 would be unthinkable to load the tankers with waste flowing through tubes designed
25 for gasoil.

26
27 Mr President, in my final remark I will be addressing an issue which not meant to be
28 procedural, and it has a highly substantive importance in nature.

29
30 In March 2016 Italy filed Preliminary Objections under article 294, paragraph 3,
31 UNCLOS and article 97 of its Rules of Procedure, and it consciously did so to avoid
32 starting preliminary proceedings under article 294, paragraph 1, UNCLOS and
33 article 96 of its Rules of Procedure. Italy did so on the assumption that a State Party
34 to the Convention would not file an unfounded claim. That assumption was also
35 based on the fact that Panama had almost 18 years to prepare the case before filing
36 it. However, by the end of the merits phase, including what we heard this week,
37 Panama has remarkably failed to substantiate its claims, while handling issues of
38 evidence and documentation in the most appalling way.

39
40 In particular, as illustrated on Wednesday by Professor Caracciolo, Mr Busco and
41 myself, the evidence and arguments produced by Panama against the higher
42 evidentiary and argumentative thresholds required at merits stage with respect to the
43 prima facie ones show that nothing in the conduct complained of by Panama which
44 is attributable to Italy can possibly constitute a breach of article 87 of the Convention
45 and of article 300. Much more than that, Mr President, now, in the light of the full
46 record, those provisions appear not to be even relevant to the present case.

47
48 Furthermore, Mr President, my considerations regarding Panama’s repeated failures
49 concerning the burden of proof that I illustrated on Wednesday, and that my
50 colleagues have corroborated in their speeches, remain unaltered in the light of what

1 we heard Panama say in its Second Round. Most importantly, I must emphasize the
2 last-minute reliance shown yesterday by opposing Counsel on self-serving pieces of
3 evidence coming from self-interested witnesses in an attempt to paper over the
4 obvious gaps in its documentary evidence. Such poor evidentiary background,
5 Mr President, Members of the Tribunal, together with the lack of substantiation of its
6 legal arguments, renders Panama's claim manifestly unfounded.

7
8 Mr President, distinguished Members of the Tribunal, this concludes my presentation
9 and I kindly ask you to call the Agent for Italy, Mr Aiello, to present Italy's
10 submissions. I thank you very much for your attention.

11
12 **THE PRESIDENT:** Thank you, Mr Tanzi. I understand that this was the last
13 statement made by Italy during this hearing. Article 75, paragraph 2, of the Rules of
14 the Tribunal provides that, at the conclusion of the last statement made by a Party at
15 the hearing, its Agent, without recapitulation of the arguments, shall read that Party's
16 final submissions. A copy of the written text of these submissions, signed by the
17 Agent, shall be communicated to the Tribunal and transmitted to the other Party.

18
19 I now invite the Co-Agent of Italy to take the floor to present the final submissions of
20 Italy.

21
22 **MR AIELLO:** Mr President, distinguished Members of the Tribunal, with your
23 permission and pursuant to article 75 of the Rules of Procedure of this Tribunal, I will
24 now read the final submissions by Italy.

25
26 Italy requests the Tribunal to dismiss all of Panama's claims, either because they fall
27 outside the jurisdiction of the Tribunal, or because they are not admissible, or
28 because they fail on their merits, according to arguments that have been articulated
29 during this proceeding.

30
31 Panama is also liable to pay the legal costs derived from this case.

32
33 Mr President, Members of the Tribunal, this concludes my presentation and Italy's
34 statements.

35
36 Dear Mr President, at the very end of this hearing, let me thank you and the
37 Members of the Tribunal, but also the Registrar, the staff and the interpreters for
38 their kind cooperation for the success of this hearing.

39
40 **THE PRESIDENT:** Thank you, Mr Aiello.

41
42 This brings us to the end of this hearing. On behalf of the Tribunal, I would like to
43 take this opportunity to express our appreciation for the high quality of the
44 presentations of the representatives of both Panama and Italy. I would also like to
45 take this opportunity to thank both the Agent of Panama and the Co-Agent of Italy for
46 their cooperation.

47
48 The Registrar will now address a few matters related to documentation.

49
50 **THE REGISTRAR:** Thank you, Mr President.

1 Pursuant to article 86, paragraph 4, of the Rules of the Tribunal, the Parties may,
2 under the supervision of the Tribunal, correct the transcripts of speeches and
3 statements made on their behalf, but in no case may such corrections affect the
4 meaning and scope thereof. These corrections relate to the transcripts in the official
5 language used by the Party in question. In the case of statements made in the Italian
6 language by experts, a correction could be marked in the English or French version
7 of the transcript. The Parties are requested to use for their corrections the verified
8 versions of the transcripts and not those marked as “unchecked”. The corrections
9 should be submitted to the Registry as soon as possible and by Tuesday,
10 25 September 2018 at 5.00 p.m. Hamburg time, at the latest.

11
12 The Parties will also receive today a letter concerning the certification of documents
13 they have submitted as copies.

14
15 Finally, I wish to remind the Parties that the President has transmitted to them
16 questions that the Tribunal would like them to answer. The Parties are requested to
17 submit their answers, if any, to these questions at the latest by Friday, 21 September
18 2018 at 5.00 p.m. Hamburg time.

19
20 **THE PRESIDENT:** Thank you, Mr Registrar. The Tribunal will now withdraw to
21 deliberate. The Judgment will be read on a date to be notified to the Agents. The
22 Tribunal currently plans to deliver the Judgment in spring 2019. The Agents of the
23 Parties will be informed reasonably in advance of the precise date of the reading of
24 the Judgment.

25
26 In accordance with the usual practice, I request the Agents to kindly remain at the
27 disposal of the Tribunal in order to provide any further assistance and information
28 that it may need in its deliberations prior to the delivery of the Judgment.

29
30 The hearing is now closed.

31

32

(The sitting closed at 5.45 p.m.)