

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2018

Public sitting

held on Monday, 10 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, Université de
Montréal, 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.
2
3 The Tribunal will now continue its hearing on the merits of the *M/V "Norstar"* Case.
4
5 In this morning's sitting, Panama finished its examination of the witness Mr Morch.
6
7 Pursuant to article 80 of the Rules of the Tribunal, a witness called by one Party may
8 also be examined by the other Party. Therefore, I ask the Co-Agent of Italy whether
9 Italy wishes to cross-examine the witness.
10
11 **MR AIELLO:** Yes, Mr President.
12
13 **THE PRESIDENT:** You will be conducting cross-examination?
14
15 **MR AIELLO:** Yes, Mr President; I will begin and then, with your permission,
16 Paolo Busco will take the floor.
17
18 **THE PRESIDENT:** I first give the floor to Mr Aiello to cross-examine the witness.
19
20 **Cross-examination by MR AIELLO**
21
22 **MR AIELLO:** Good afternoon, Mr Morch. First of all, I would like to know something
23 about you. You are a member of Panama's delegation and a witness. Can you
24 confirm the double capacity in which you operate in this case?
25
26 **MR MORCH:** Yes, I am a member of the delegation and a witness.
27
28 **MR AIELLO:** To what extent, if any, did you contribute to the preparation of
29 Panama's pleadings?
30
31 **MR MORCH:** No. I have given the decent information because I know the history.
32
33 **MR AIELLO:** So which is your answer? I would like to know if you contributed to the
34 preparation of Panama's pleadings.
35
36 **MR MORCH:** No, I did not contribute. I have informed about the history.
37
38 **MR AIELLO:** Did you see the pleadings of Panama in this case, given the double hat
39 you wear?
40
41 **MR MORCH:** I knew everything about double hats. It is depending on where you are
42 working and what you are doing. You have to change the hat depending on where
43 you are.
44
45 **MR AIELLO:** Have you ever seen the pleadings of Panama before your witness?
46
47 **MR MORCH:** I have seen the pleadings of Panama.
48
49 **MR AIELLO:** Thank you. Today you were reading a text in replying to counsel's
50 questions. Who wrote those answers?

1 **MR MORCH:** I wrote the answers if I have given any answers to these questions.
2 I am the only person who knows the answer.

3

4 **MR AIELLO:** When did you write these answers?

5

6 **MR MORCH:** I have done it during, let me say, the last days, because we also had a
7 request from the Tribunal to present these answers and reply today at 9 o'clock. This
8 Tribunal had a request to present these today.

9

10 **MR AIELLO:** Have you ever been imprisoned, detained or subject of any other
11 compression of your freedom for these criminal proceedings?

12

13 **MR MORCH:** Once again?

14

15 **MR AIELLO:** In the criminal proceedings about the "Norstar" activity have you ever
16 been imprisoned, detained or subject of any other compression?

17

18 **MR MORCH:** No, I have never been in prison, and that is good; we know we did not
19 do anything wrong.

20

21 **MR AIELLO:** Before the execution of the arrest of the vessel, was the "Norstar"
22 activity ever compressed by Italian authorities?

23

24 **MR MORCH:** No, as far as I know, we never heard from Italian authorities. We heard
25 about the harassment in international waters from the patrol boats but we never
26 heard anything else, never, during the years from 1994 to 1998.

27

28 **MR AIELLO:** Do you remember when the decree of arrest or seizure was enforced?

29

30 **MR MORCH:** It was enforced in September 1998.

31

32 **MR AIELLO:** Can you confirm that at the moment of the arrest the vessel was
33 perfectly efficient?

34

35 **MR MORCH:** Yes, I can.

36

37 **MR AIELLO:** I have to show you again the document that is Annex K of the Counter-
38 Memorial at page 3. (*Same handed*) This document for the Tribunal...

39

40 **MR MORCH:** I can. I think we have presented this document before. It says:

41

42 Dear Sirs, as you are aware, last Saturday 5th current month, current year, we
43 restrained the motor vessel above specified. We informed the JA, *Juzgado de*
44 *Instancia* thanks to the support of the patrol of the maritime police.

45

46 However, the said circumstance does not elude the situation which occurred
47 later and is the reason of the said fax.

48

49 We were informed by the captain of the vessel that due to the bad conditions
50 of the chains aboard, and the sea and wind worsening conditions, the anchor
51 of the starboard broke the chain and the one of the portside, now moored, is

1 in very bad state. This circumstance together with the breakdown of one of the
2 main generator as well as the need to stock the boat urge us to request to the
3 port authority and maritime authority the authorisation to get into the port and
4 moor the vessel to the quay.
5

6 Without adding any other detail, and thanking in advance for your cooperation,
7 we take this opportunity to send you the expression of my highest
8 consideration. Regards, Transcoma Baleares SA, Enrique Oliver.
9

10 This is the company's agent in Mallorca.
11

12 **MR AIELLO:** After these indications, have you given any operation of maintenance
13 on your vessel between 5 September 1998 and 25 September of the same year?
14

15 **MR MORCH:** This letter from the owner's agent is related to my declaration. We
16 informed the agent to make a letter to get the ship alongside. As I told in my
17 declaration, the ship was refused to enter the port because the port authorities said it
18 had dangerous cargo on board. It was gasoil and it was very difficult for the ship to
19 stay outside. I think also they take this fax, or maybe it was a telex – I do not know -
20 the anchor chain he is talking about was the one they cut, the new chain bought in
21 China the year before.
22

23 **MR AIELLO:** Do you remember how many yachts did you supply during the year
24 1998?
25

26 **MR MORCH:** That has been presented before. I think Silvio also sent the three logs
27 from Italy in the position, designated position, between Ibiza and Mallorca, in a
28 position 24 nm south-west of Ibiza.
29

30 **MR AIELLO:** Three?
31

32 **MR MORCH:** No, no, no, no. I do not remember. Maybe it was up to 20. We have
33 presented this list here before.
34

35 **MR AIELLO:** Okay. Thank you. With your permission, I leave the floor to Mr Busco.
36

37 **Cross-examination by MR BUSCO** 38

39 **MR BUSCO:** Mr President, Members of the Tribunal, it is an honour to appear before
40 you today, and to do so on behalf of my country, Italy. Good afternoon, Mr Morch.
41 Good afternoon, delegation of Panama.
42

43 Mr Morch, on what date did you learn about the existence – and I stress the
44 existence – of the decree of seizure against the “*Norstar*”?
45

46 **MR MORCH:** I think I learned first this when the captain sent the telex and that was
47 probably 25 September. I think that telex was dated 24 September 1998, and I think I
48 received a copy of that telex the day after.
49

1 **MR BUSCO:** So you were, if I understand correctly, informed about the existence of
2 the decree of seizure on the same date as the date when the decree of seizure was
3 enforced?
4

5 **MR MORCH:** Sorry. I did not have a copy of the decree of seizure. It was given later.
6 I was informed on the 25th about the arrest.
7

8 **MR BUSCO:** You were informed on the 25th?
9

10 **MR MORCH:** I was informed from the ship on the 25th.
11

12 **MR BUSCO:** Do you know the date when the decree of seizure was enforced?
13

14 **MR MORCH:** No, I cannot remember any more. In fact, I think it took some time
15 before we got that document. I just remember that it was dated on 11 August 1998
16 but it definitely took some time before we received that document. The first thing I
17 received was the telex from the ship on 25 September.
18

19 **MR BUSCO:** Let us stick to my question. When did you learn about the existence of
20 the decree for the first time? I understand correctly that you learned about it on
21 25 September.
22

23 **MR MORCH:** I learned about the arrest. I did not see the decree.
24

25 **MR BUSCO:** Yes, but with the arrest I am sure you were told that a decree of
26 seizure existed, a decree of arrest.
27

28 **MR MORCH:** If the contents say something about the decree, that was the date.
29

30 **MR BUSCO:** So can we say that you learned about the existence of an order of
31 arrest against the “*Norstar*” on the 25th?
32

33 **MR MORCH:** On the 25th, yes.
34

35 **MR BUSCO:** And you do not remember when the order was enforced?
36

37 **MR MORCH:** No, I do not remember. I do not remember the date.
38

39 **MR BUSCO:** I will remind you. It was enforced on the 25th, the same day. Mr Morch,
40 can you tell me exactly where the “*Norstar*” was on 11 August 1998?
41

42 **MR MORCH:** No, I cannot. This is in the logbooks, which were kept on board the
43 ship on the bridge. I do not have any records at that time. It might have been in
44 Palma.
45

46 **MR BUSCO:** It may have been in Palma.
47

48 **MR MORCH:** It may have been in Palma – I am not sure. It could have been in the
49 position, even by the port authority, for bunkering operation because it had recently –
50 I think – it was not sure – it came back from Algeria.

1 **MR BUSCO:** In other words, on 11 August 1998 you do not recall exactly where the
2 ship was.

3
4 **MR MORCH:** No.

5
6 **MR BUSCO:** But it may have been in Palma, according to what you said.

7
8 **MR MORCH:** It may have been in Palma – it may have been in the destination
9 position for bunkering.

10
11 **MR BUSCO:** Do you know on which date the decree of seizure against the “*Norstar*”
12 was issued by the prosecutor?

13
14 **MR MORCH:** I think it was issued on 11 August 1998, and after that we also realized
15 that the same decree was issued for the “*Spiro F*” because we got a copy. It was
16 exactly the same contents.

17
18 **MR BUSCO:** So on the basis of what you have just said, would you agree that on
19 11 August 1998 you cannot tell for sure where the “*Norstar*” was?

20
21 **MR MORCH:** No, I cannot. I cannot.

22
23 **MR BUSCO:** You cannot say where the “*Norstar*” was.

24
25 **MR MORCH:** No, I cannot say. It could have been in the designated position or it
26 could have been in Palma Bay.

27
28 **MR BUSCO:** Thank you very much. Mr Morch, I realize that 11 August 1998 is a
29 very specific date, so I did not expect you to recall exactly where the ship was, but
30 do you recall where the ship was between, let us say, 1 August 1998 and
31 25 September 1998 – that is the date of the execution of the decree?

32
33 **MR MORCH:** No, I do not. I do not. We had the continuous operation and we had
34 changed the captain, so I am not sure.

35
36 **MR BUSCO:** I will rephrase the question slightly. Between 10 August, or let us say
37 1 August 1998 and 25 September 1998, could you tell that the “*Norstar*” was on the
38 high seas?

39
40 **MR MORCH:** We had this bunkering operation and Mr Rossi sent down ships from
41 Italy. He had definitely also a certain problem due to the illegal arrest of the “*Spiro F*”.
42 I think he has – I think at that time, maybe it was a commitment for delivering a
43 bunker, and the ships went to the designated position – maybe south of Ibiza. So I
44 am – that is probably the situation.

45
46 **MR BUSCO:** Right. I am afraid I have not quite understood, so I will go with this
47 question once again. You said first that you do not know exactly where the
48 *M/V “Norstar”* was between 1 August and 25 September 1998 – is that correct?

49
50 **MR MORCH:** No. That is correct.

1 **MR BUSCO:** Right. So what I am asking you is: can you tell for sure that at any
2 given time between 1 August and 25 September the ship was on the high seas? I am
3 asking you, can you tell for sure?
4

5 **MR MORCH:** No, I can't tell for sure – it is depending on the bunkering operation.
6

7 **MR BUSCO:** That's okay. Mr Morch, I would like, with the permission of the Tribunal,
8 to hand over a document to you (*handed*) and I would like to read from this
9 document. I am sorry that the paragraphs are not numbered, but we have not altered
10 the text. For your benefit, I am reading at the first stage ---
11

12 **THE PRESIDENT:** Mr Busco, what document is this?
13

14 **MR BUSCO:** I beg your pardon, Mr President. It is annex 16 to Panama's Memorial.
15 It is a document that Panama has submitted to these proceedings.
16

17 **THE PRESIDENT:** Thank you.
18

19 **MR BUSCO:** You are welcome, Mr President.
20

21 The first page at around paragraph 5, the document reads:
22

23 The ship of Panamanian flag entered Palma in March 1998. The rust, the
24 excrement of the gulls and the dust have been taking possession of the ship,
25 contributing thus to the bad state, proof of the passage of the years.
26

27 I would like you to focus on one point. "The ship of Panamanian flag entered Palma
28 in March 1998."
29

30 **MR MORCH:** That is probably correct.
31

32 **MR BUSCO:** That is probably correct. I would like you now to go to the last but one
33 paragraph at the end of the document. It says:
34

35 The withdrawal [of the vessel] after 17 years in the dock of the port of Palma
36 comes after years of judicial disputes.
37

38 The document from which I am reading, and that you are reading, is dated August
39 2015. The document says that from March 1998 to the date of the article, so August
40 2015, the "*Norstar*" never left once the port of Palma da Mallorca.
41

42 **MR MORCH:** That is a very interesting issue. How is it then possible to call the port
43 of Algeria to load the cargo and supply the vessels?
44

45 **MR BUSCO:** But this document says "The withdrawal after 17 years in the dock of
46 the Port of Palma".
47

48 **MR MORCH:** Yes.
49

1 **MR BUSCO:** So it is giving a specific location. So what this document is saying is
2 that the “*Norstar*” never went to the high seas from March 1998 until August. Now,
3 we know that at some point it was seized, in September 1998; but what I am asking
4 you is: do you agree that in March 1998 the ship was in the port of Palma?
5
6 **MR MORCH:** I think it is right, yes, because we had rebuilding of the cooling room
7 for the transport from Algeria, before the ship left for Algeria.
8
9 **MR BUSCO:** Clear. What do you think of the document that then says “After 17
10 years in the dock of the port of Palma”. Do you agree that the ship never left for 17
11 years?
12
13 **MR MORCH:** No. I do not even know who wrote this document. It is not signed and
14 there is no date here.
15
16 **MR BUSCO:** Yes, it is signed and it is dated.
17
18 **MR MORCH:** It is produced by somebody.
19
20 **MR BUSCO:** This is a document that Panama has submitted to the proceedings,
21 and it is dated and it is signed. It is signed by Miriam Barchilón. It is dated 8 August
22 2015, and it is a record from a newspaper, the Panama Gazette or the *Diario de*
23 *Palma*, something like that.
24
25 **MR MORCH:** That is right.
26
27 **MR BUSCO:** So what do you think ultimately about this document? Do you consider
28 it a reputable –
29
30 **MR MORCH:** This is an article from a newspaper.
31
32 **MR BUSCO:** It is an article from the *Diario de Palma* which Panama has submitted –
33
34 **MR MORCH:** It is definitely wrong.
35
36 **MR BUSCO:** It is definitely wrong?
37
38 **MR MORCH:** Definitely.
39
40 **MR BUSCO:** About what?
41
42 **MR MORCH:** Both the situation that if you tell me that the ship never left the port of
43 Palma, I would say it is impossible to load something in Algeria, and is definitely
44 impossible to go to the high seas. It is definitely impossible for Silvio Rossi to send
45 the ships from Italy and then to the position –
46
47 **MR BUSCO:** I do not understand.
48

1 **MR CARREYÓ:** I am sorry to interrupt but (*off microphone*) so I would pray that the
2 dear delegate of Italy does not interrupt the testimony of Mr Morch. Let him finish,
3 please.
4
5 **THE PRESIDENT:** Thank you, Mr Carreyó. Mr Busco, you may proceed.
6
7 **MR BUSCO:** Thank you, Mr President.
8
9 (*To the witness*) Mr Morch, I have not understood something. You said that you
10 agree with this document, which says that the ship entered the port of Palma de
11 Mallorca in March 1998.
12
13 **MR MORCH:** That is correct. That is correct, yes.
14
15 **MR BUSCO:** But then you said that you do not agree with the other part of the
16 document, when it says that the ship never left for 17 years.
17
18 **MR MORCH:** I do not even believe; I know this is not the truth, and I think that has
19 been written by some journalist.
20
21 **MR BUSCO:** Yes, sure.
22
23 **MR MORCH:** Maybe it is fake news. I don't know, but it is definitely not correct.
24
25 **MR BUSCO:** We know that part of this article is certain, that after the decree of
26 seizure in September 1998, 25 September, certainly the ship has not left – right?
27
28 **MR MORCH:** After 25 September?
29
30 **MR BUSCO:** Yes.
31
32 **MR MORCH:** No.
33
34 **MR BUSCO:** Right – so we know that that part is true.
35
36 **MR MORCH:** That is true.
37
38 **MR BUSCO:** And we also know that it is true that the ship was in port in March 1998.
39
40 **MR MORCH:** That is also true, arriving from Malta.
41
42 **MR BUSCO:** Right. So what part of the document you do not believe in?
43
44 **MR MORCH:** I don't believe. I know the truth, and the ship left definitely during this
45 period the port of Mallorca to load the fuel or the diesel in Algeria; and this shipment
46 was taken back to Mallorca and given to the mega yachts on the high seas. The sad
47 story – I think it had been important for this Tribunal to hear the testimony of the
48 captain, but he is unfortunately dead three years ago, and I couldn't bring him here.
49

1 **MR BUSCO:** Right, okay. Well, I am done with regard to this document. You
2 mentioned a moment ago that the ship went to Algeria.
3
4 **MR MORCH:** Yes, Algeria.
5
6 **MR BUSCO:** Can you tell me exactly when it went to Algeria?
7
8 **MR MORCH:** I can't give you the exact date, but it was definitely in July 1998.
9
10 **MR BUSCO:** In July 1998, right.
11
12 **MR MORCH:** It is a journey of about 20 hours, or something like that, each way.
13
14 **MR BUSCO:** The witness that was heard before you here, Mr Rossi, said a little
15 while ago that for the most part of 1998 the "Norstar" was in the port of Palma and
16 that he only resupplied two or three ships.
17
18 **MR MORCH:** From Mr Rossi, it was correct. They were sent by him. The other ships
19 came directly through the agent in Palma.
20
21 **MR BUSCO:** Right, but what we understand from Mr Rossi's testimony is that for the
22 most part the ship was in Palma, and that it only resupplied two or three boats – and
23 I take it on the high seas.
24
25 **MR MORCH:** Yes.
26
27 **MR BUSCO:** That is correct? That is what he said.
28
29 **MR MORCH:** He sent two or three boats to the high seas for bunkering –
30
31 **MR BUSCO:** Well –
32
33 **MR MORCH:** And the rest of the ships came from the local agent in Palma de
34 Mallorca.
35
36 **MR BUSCO:** Right, but am I correct in understanding that those two or three ships
37 would have been on the high seas?
38
39 **MR MORCH:** They were on the high seas.
40
41 **MR BUSCO:** Right, so according to Mr Rossi, at least from what we have
42 understood, the ship probably at some point in 1998 went to the high seas to
43 resupply two or three ships?
44
45 **MR MORCH:** From him, yes.
46
47 **MR BUSCO:** Yes, from him.
48
49 **MR MORCH:** The other come from the local agent.
50

1 **MR BUSCO:** Right, from him – two or three times. Okay. Mr Morch, you said that the
2 ship went to Algeria at some point in July.
3
4 **MR MORCH:** Mm.
5
6 **MR BUSCO:** But that is before the decree of seizure was issued. Do you recall if it
7 went anywhere after 11 August?
8
9 **MR MORCH:** High seas.
10
11 **MR BUSCO:** After 11 August?
12
13 **MR MORCH:** After – you mean after the 11th?
14
15 **MR BUSCO:** After 11 August.
16
17 **MR MORCH:** No, I don't remember the dates any more. I don't even remember
18 when Silvio sent these two or three vessels, and I don't remember the dates for the
19 other vessels coming from the local agents.
20
21 **MR BUSCO:** Understood. So your testimony here about Algeria in any event
22 pre-dates August 1998. You just said that it went in July.
23
24 **MR MORCH:** I think it was before 10 August.
25
26 **MR BUSCO:** Before 10 August?
27
28 **MR MORCH:** Yes.
29
30 **MR BUSCO:** It went to Algeria before 10 August?
31
32 **MR MORCH:** Yes, I think so.
33
34 **MR BUSCO:** Thank you. Mr Morch, before 10 August did the ship suffer any
35 interference with its freedom of movement? Did it navigate normally? Did it go to
36 places?
37
38 **MR MORCH:** Except for these supplies on the high seas, and then the trade – I
39 mean the cargo taken from Algeria, I would say it was quite normal.
40
41 **MR BUSCO:** It was quite normal. I understand. Please tell me if I am wrong: we
42 know that in March 1998, you agreed, the ship was likely in the port of Palma.
43
44 **MR MORCH:** Yes.
45
46 **MR BUSCO:** That it went to Algeria probably in July.
47
48 **MR MORCH:** Yes.
49

1 **MR BUSCO:** Then we know for a fact that the decree of seizure was issued on
2 11 August 1998. Then, your recollection as to the whereabouts of the “*Norstar*” are
3 not precise – is that correct?
4

5 **MR MORCH:** Yes, that’s correct.
6

7 **MR BUSCO:** Mr Morch, I will just go back to one last point, here to the diary from
8 Palma de Mallorca, the document that I gave you earlier. It reads that the ship was
9 abandoned from 14 April 1998, and that its state of abandon was such that the port
10 police found on several occasions people sleeping inside – even some of those
11 occasional overnight showers have been found in the boat – and in addition the
12 doors of some cabins were shattered and the bridge was full of documents. This is
13 supposed to have happened in April 1998.
14

15 Mr Morch, how could a ship in this stage go to Algeria in July, if it was in a state of
16 abandonment in April?
17

18 **MR MORCH:** I think this journal is writing about the situation in 2015 – then the ship
19 already had been detained by Italy for many, many, many years. But we had in fact
20 an inspector or a guide down there in 2014, who was talking to the people involved
21 locally, and he didn’t have access to the ship; but we knew there was cracks in the
22 window. We knew of course that during the detention nobody took care of the ship,
23 because we did not even have access for this. It was impossible to come in there.
24

25 But what I would like to say and confirm is that when the arrest order was presented
26 to the captain, the telex or the report from the police, having been given to this
27 Tribunal, said that it was handed over to the captain in September. How could the
28 ship, then, be abandoned in March? It is impossible. The crew was still on board
29 when the ship was arrested – and why should the crew stay there during the period
30 from March to September? The ship was never abandoned before the arrest.
31

32 **MR BUSCO:** I take your answer. That is not what I asked but –
33

34 **THE PRESIDENT:** Mr Carreyó?
35

36 **MR CARREYÓ:** Sorry, this is the fourth time that –
37

38 **THE PRESIDENT:** Mr Carreyó, this examination is under my control and I do not
39 think counsel for Italy is excessively intervening with the witness.
40

41 Witness, are you uncomfortable with this examination?
42

43 **MR MORCH:** I have no objection.
44

45 **THE PRESIDENT:** Thank you. Mr Busco, you may continue.
46

47 **MR BUSCO:** Thank you, Mr President. In fact, I will release Mr Morch and
48 Mr Carreyó especially from the hook because I am done with my examination. Thank
49 you very much.
50

1 **THE PRESIDENT:** A witness who was cross-examined by the other Party may be
2 re-examined by the Party who had called the witness. Therefore, I ask the Agent of
3 Panama whether Panama wishes to re-examine the witness, and, if yes, who will be
4 conducting the re-examination?

5
6 **MR CARREYÓ:** I will, sir.

7
8 **THE PRESIDENT:** Then I give the floor to Mr Carreyó to re-examine the witness.
9 Once again, I wish to emphasize that re-examination shall not raise new issues, but
10 limit itself to the issues dealt with in cross-examination.

11
12 **MR CARREYÓ:** Thank you, Mr President.

13
14 *(To the witness)* Out of the 20 ships that you were referring to in your previous
15 answers, who was the person helping you to obtain those clients? Was it Silvio
16 Rossi?

17
18 **MR MORCH:** Yes, Silvio Rossi obtained some of them, and he also sent some of
19 them to the designated position directly, maybe two or three; the rest came through
20 the local agent in Palma de Mallorca.

21
22 **MR CARREYÓ:** Do you know what happened to the books that you just referred to
23 in one of the answers that you gave to the questions of Italy, the books of the ship?

24
25 **MR MORCH:** The books ...?

26
27 **MR CARREYÓ:** The logbooks.

28
29 **MR MORCH:** The logbooks were still on board in 2015 under Italian detention, so we
30 do not know anything. Everything was stored there. I think that even Captain Tore
31 Husefest later can explain what happened on the high seas in Italy. He had the same
32 system. Everything was stored in crew lists, sales, whatever, all final certificates,
33 documents, everything.

34
35 **MR CARREYÓ:** Do you think that we would have any doubt about the position of the
36 vessel or the dates that you have just been asked about by the Italian delegate if the
37 books of the ship would have been available?

38
39 **MR MORCH:** No, definitely not. We would have any kind of information.

40
41 **MR CARREYÓ:** In the document that you just read, there are some references to
42 the condition of the vessel. Is there anything that you do not agree about that
43 particular document?

44
45 **MR MORCH:** No. I am actually surprised that the condition could be like this after 17
46 years' detention. It should be much worse. I have seen new ships not looking like
47 this one; and even after 15 years the condition was not too bad.

48
49 **MR CARREYÓ:** Do you know the source of information of the journalist who wrote
50 that news?

1
2 **MR MORCH:** No, I do not know anything. I just saw it on the Internet, so I do not
3 know anything. He is in Mallorca but I do not know the journalist and I do not know
4 anything about the sources.

5
6 **MR CARREYÓ:** Thank you, Mr Morch. Thank you, Mr President.
7

8 **THE PRESIDENT:** Thank you, Mr Carreyó. Pursuant to article 80 of the Rules of the
9 Tribunal, the President and Judges of the Tribunal may also put questions to the
10 witness. I was informed that Judges Lucky, Kittichaisaree and Heidar wish to put
11 questions to Mr Morch. I therefore give the floor first to Judge Lucky to put his
12 question.
13

14 **JUDGE LUCKY:** Thank you, Mr President. Good afternoon, Mr Morch. For the
15 purpose of my question, I would like to read what you said from the transcript this
16 morning. In answer to learned counsel, you said: "The owners were working hard to
17 retrieve the vessel after the detention in September 1998. I believe that it was for
18 Italy to deliver the vessel and to allow us to confirm its condition as well as the
19 existence of the effects and ship's papers that were there at the moment of arrest."
20 Mr Morch, are you aware that the "*Norstar*" was a *corpus delicti* in criminal
21 proceedings?
22

23 **MR MORCH:** Yes, I was.
24

25 **JUDGE LUCKY:** Did you or the other owners make any effort to visit the vessel and
26 inspect it during that period while it was a *corpus delicti*?
27

28 **MR MORCH:** No. The area was completely closed after the detention in Palma de
29 Mallorca. We had no access to anything; it was denied. We could not pass the gate
30 because it was closed, so when the ship was brought alongside by the port authority
31 to the mega-yacht yard it was impossible to go on board the ship. Everything was
32 closed. The keys were taken and everything was closed. I know that it was closed.
33

34 **JUDGE LUCKY:** Finally, do you know that a custodian was appointed to oversee the
35 ship during that period? Do you know that there was a custodian and who appointed
36 the custodian?
37

38 **MR MORCH:** No, it was never told. We had no communication later. Nobody
39 informed us about anything.
40

41 **JUDGE LUCKY:** Thank you very much.
42

43 **THE PRESIDENT:** Thank you, Judge Lucky. Now I give the floor to Judge
44 Kittichaisaree to put his questions.
45

46 **JUDGE KITTICHAISAREE:** Mr Morch, in answer to Ms Cohen's question 12 this
47 morning, you said that representatives of the flag State Panama should have been
48 included during the proceedings before Italian courts; and in answer to Ms Cohen's
49 question 15 you mentioned that Panama was involved in the year 2000, but I did not
50 hear any answer regarding the role of Panama before or after that. My first question

1 to you is: since when did you find a need to seek help from Panama as the flag
2 State, and since when was Panama actually involved in helping you in this case?

3
4 **MR MORCH:** I contacted the Panamanian Consulate in Venice; Ms Neslin Arce was
5 the consul. We discussed the possibility to get support from the Panamanian State
6 due to the fact that the Italians used the Montego Bay Convention.

7
8 **JUDGE KITTICHAISAREE:** When was that?

9
10 **MR MORCH:** That was probably or could have been in October/November 1998, just
11 a few months after the detention. I had continuous communication with the
12 Panamanian Consulate in Venice.

13
14 **JUDGE KITTICHAISAREE:** Yes, but was Panama ever informed by Italy regarding
15 the arrest of this vessel?

16
17 **MR MORCH:** No, never.

18
19 **JUDGE KITTICHAISAREE:** Thank you.

20
21 **THE PRESIDENT:** Now I give the floor to Judge Heidar to put his questions.

22
23 **JUDGE HEIDAR:** Thank you, Mr President. Mr Morch, I refer to your testimony this
24 morning. The second part of question 26 from counsel Ms Miriam Cohen was: "More
25 specifically, why was the vessel not retrieved after the Italian court issued the
26 release order in 2003?" Here there is reference to the unconditional release of the
27 vessel, but in your answer you referred to the conditional release in 1999 and did not
28 really answer the question put to you. I therefore seek your answer to the question
29 that was put to you regarding why the vessel was not retrieved after it was released
30 in 2003.

31
32 **MR MORCH:** I would say that my opinion was that of course I then knew about the
33 order from the Italian court, but I also thought that they had a responsibility to
34 execute that order. I mean that order could be anything, but who knew that the
35 release had been executed? I think that even Mr Carreyó later had been asking for
36 this letter from the Spanish authorities. The Italian delegation never presented this
37 letter, because I do not think they ever got it. Nobody told us about the release. They
38 told us about the order for release. I got that document twice, first in a registered
39 letter in April or May – I do not remember – and later presented by the police at the
40 beginning of July, but then I think even at that time in July the ship had not been
41 released; it has not been executed. How should we know, and who should tell us?
42 Who was responsible for this detention?

43
44 **JUDGE HEIDAR:** Thank you very much.

45
46 **THE PRESIDENT:** Thank you very much for your testimony, Mr Morch. Your
47 examination is now finished and you may withdraw.

48
49 *(The witness withdrew)*
50

1 Mr Carreyó, I understand that Panama wishes to examine the third witness now.
2 Could you please confirm that?

3
4 **MR CARREYÓ:** Yes, Mr President.

5
6 **THE PRESIDENT:** Thank you, Mr Carreyó. The Tribunal will then proceed to hear
7 the witness Mr Tore Husefest. He may now be brought into the courtroom. I call on
8 the Registrar to administer the solemn declaration to be made by the witness.

9
10 **THE REGISTRAR:** Thank you, Mr President. Good afternoon, Mr Husefest.
11 Mr Husefest, a witness has to make a solemn declaration under article 79 of the
12 Rules of the Tribunal before making any statement before the Tribunal. You have
13 received a text of the declaration. May I invite you to make the solemn declaration?

14
15 *(The witness made the solemn declaration)*

16
17 **THE REGISTRAR:** Thank you, Mr Husefest. You may now be seated.

18
19 **THE PRESIDENT:** Thank you, Mr Registrar. I understand that the examination of the
20 witness will be conducted by Ms Mareike Klein. I therefore give the floor to Ms Klein.

21
22 **MS KLEIN:** Distinguished President, Members of the Tribunal, it is an honour for me
23 to appear before you today, representing the Republic of Panama in the
24 *M/V "Norstar" Case*.

25
26 With your permission, Mr President, I will now examine Panama's next witness, the
27 former captain of the "*Norstar*", Mr Tore Husefest.

28
29 Mr Husefest, please introduce yourself and explain your role in relation to the
30 *M/V "Norstar"*.

31
32 **MR HUSEFEST:** My name is Tore Husefest. I was born on 12 January 1949. My job
33 on the "*Norstar*" was captain. I had been captain on this ship during bunkering
34 operations in Libya for Brega Petroleum and offshore bunkering in international
35 waters off Italy and France in 1994-1995 and 1996-1997 and onwards, also during
36 bunkering service in Gibraltar for Texaco Oil.

37
38 **MS KLEIN:** Can you tell us the approximate dates you were in command of the
39 *M/V "Norstar"*?

40
41 **MR HUSEFEST:** I was in command of the "*Norstar*", formerly named "*Norsupply*",
42 from spring 1993 on a four-months-on-and-off agreement with Mr Morch.

43
44 **MS KLEIN:** On which dates did you disembark the ship and why?

45
46 **MR HUSEFEST:** I got sick and unfortunately I cannot remember the date, but I was
47 taken by an ambulance boat into Imperia in Italy and hospitalized there. Maybe
48 Mr Rossi can help with this as he was visiting me at the hospital several times.

49

1 **MS KLEIN:** Can you describe in more detail your role as a captain on the
2 *M/V “Norstar”* – for example, your responsibilities, tasks and daily routine?
3

4 **MR HUSEFEST:** The captain’s duty and responsibilities are first of all to see that the
5 vessel is operated in a safe manner, and of course the crew’s safety is a mandatory
6 issue. Personally, I was on watch duty from 6 a.m. until 12 noon and from
7 1800 hours until midnight. If any operations were going on in my off time, I had to
8 oversee these operations as well.
9

10 **MS KLEIN:** Before your position as captain with the *M/V “Norstar”*, did you occupy
11 similar roles in other vessels?
12

13 **MR HUSEFEST:** Yes. I was captain on board the *M/T “Nortrader”* from 16 February
14 1992 with continuous employments in the capacity of captain on other ships
15 managed by Mr Morch.
16

17 **MS KLEIN:** Have you been in contact with the other crew members or Mr Morch
18 since the relevant incidents?
19

20 **MR HUSEFEST:** Only with Mr Morch via email over the last few months.
21

22 **MS KLEIN:** I will ask you some questions about the activities of the “*Norstar*” prior to
23 the arrest and your experience also with the Italian authorities. What activities was
24 the *M/V “Norstar”* involved with during the period you were in command, and can you
25 describe in your own words the nature of these activities?
26

27 **MR HUSEFEST:** The activities were bunkering yachts in international waters. When
28 we were empty, we had to sail to Malta to load more diesel oil and return to our
29 position 20 nautical miles off the Italian coast.
30

31 **MS KLEIN:** How would you describe the conduct of Italy’s authorities?
32

33 **MR HUSEFEST:** Prior to the arrest, I observed that Italian gunships were visually
34 scrutinizing our operation and on several occasions harassing us by moving in tight
35 circles around the “*Norstar*” and the customer alongside at high speed in order to
36 create high waves. These actions forced us to abort ongoing bunkering operations in
37 order to prevent hose breakage and subsequent oil spills into the sea.
38

39 **MS KLEIN:** Can you tell us when exactly prior to the arrest you observed that, as
40 you said, the Italian gunships were visually scrutinizing your operation and the
41 occasions of harassment?
42

43 **MR HUSEFEST:** I cannot give –
44

45 **THE PRESIDENT:** Excuse me. I am sorry to interrupt you, Ms Klein. Would you
46 confine your examination to the dispute before the Tribunal? You may now proceed.
47

48 **MS KLEIN:** Those questions were related to the activities of the “*Norstar*” and his
49 experience with the Italian authorities, Mr President.
50

1 **THE PRESIDENT:** You may proceed.
2
3 **MS KLEIN:** Thank you, Mr President.
4
5 Can you tell us where exactly you were conducting the bunkering operations when
6 the Italian gunships harassed you by moving in those tight circles around the
7 “*Norstar*” and the customer?
8
9 **MR HUSEFEST:** We were located at our usual position 20 nautical miles off the
10 Italian coast.
11
12 **MS KLEIN:** So you were located on the high seas, in international waters?
13
14 **MR HUSEFEST:** Yes, that is correct.
15
16 **MS KLEIN:** Did you receive any communication from the Italian gunships?
17
18 **MR HUSEFEST:** No, I never had any communication with them.
19
20 **MS KLEIN:** How did you know it was an Italian gunship? Can you describe it?
21
22 **MR HUSEFEST:** Yes. The vessel was flying the Italian flag and the vessel was
23 painted white. It looked to me like a ship from the *Guardia di Finanza* – that means
24 the fiscal police of Italy. But they never showed up unless there were customers
25 around so I think they were listening to our communication.
26
27 **MS KLEIN:** Did you report these incidents?
28
29 **MR HUSEFEST:** No, I never did, because I did not want to interfere with the Italians’
30 games.
31
32 **MS KLEIN:** Who else witnessed these actions?
33
34 **MR HUSEFEST:** All the crew of the “*Norstar*” was watching this. The name of the
35 customers I have forgotten. Sorry.
36
37 **THE PRESIDENT:** Ms Klein, I am sorry to interrupt you. You said this incident is
38 related to the dispute before the Tribunal.
39
40 **MS KLEIN:** Yes.
41
42 **THE PRESIDENT:** Can you explain to me how this incident is related to the dispute
43 before the Tribunal?
44
45 **MS KLEIN:** Yes, Mr President. Thank you for your question. These incidents
46 Mr Husefest refers to happened prior to the arrest of the “*Norstar*” when he was in
47 command, and since Mr Husefest was also one of the wrongfully accused and this
48 addressed the time in which these incidents were happening, they were relevant to
49 this examination.
50

1 **THE PRESIDENT:** Is this incident referred to in the written pleadings submitted by
2 Panama?

3

4 **MS KLEIN:** No. This is just Mr Husefest's statement.

5

6 **THE PRESIDENT:** Ms Klein, would you refrain from referring to this incident in this
7 examination. I do not find it relevant to the dispute before the Tribunal.

8

9 **MS KLEIN:** Okay, so I will proceed with the questions related to the arrest and after
10 the arrest. Were you present during the court proceedings that took place after the
11 arrest in Italy?

12

13 **MR HUSEFEST:** No, I was not, but I was interrogated by Norwegian police on behalf
14 of the Italian authorities.

15

16 **MS KLEIN:** When and how often were you interrogated?

17

18 **MR HUSEFEST:** I was only interrogated once, and I believe that was in the early
19 months of 1999. My memory – I am not 100 per cent sure of that.

20

21 **MS KLEIN:** Did you suffer material damage as a result of the accusations and the
22 long criminal proceedings that took place after the arrest in Italy?

23

24 **MR HUSEFEST:** Well, I lost my job, so there was a hard time after that to find
25 money to support my daily life, because it took several months to find new, suitable
26 employment.

27

28 **MS KLEIN:** Have you received any type of compensation?

29

30 **MR HUSEFEST:** Not at all.

31

32 **MS KLEIN:** Thank you. I would now like to move on to ask you questions about the
33 condition of the vessel at the period preceding the arrest. As former captain of the
34 vessel "*Norstar*", what can you tell us about the physical condition of the ship at the
35 time preceding or prior to the arrest?

36

37 **MR HUSEFEST:** Prior to the arrest, the "*Norstar*" was always kept in a very good
38 physical condition.

39

40 **MS KLEIN:** In your experience as captain, would the *M/V "Norstar"* be carrying out
41 its commercial activities in the state it was at the time? In other words, was it
42 seaworthy?

43

44 **MR HUSEFEST:** Yes. I always found the "*Norstar*" in a very good, seaworthy
45 condition.

46

47 **MS KLEIN:** Italy contended that the "*Norstar*" was not seaworthy. In your opinion,
48 was the vessel seaworthy at the time preceding the arrest, and, more specifically,
49 how would you make such assessment?

50

1 **MR HUSEFEST:** Well, we did always carry out all necessary maintenance in co-
2 operation with the class society. I took during the years responsibility and was
3 attending the work on the shipyard in co-operation with the class society named *Det*
4 *norske Veritas*, which the vessel had all certificates required by class society in
5 Panama, otherwise we would have problems with port authorities. But this was never
6 the case. I had always kept on board the vessel the logbooks, charts, the records of
7 customers, how much each received and how much they paid on behalf of the
8 charterer. I also gave a copy of these documents to the charterer's Maltese agent.

9
10 **MS KLEIN:** Can you provide more details on the maintenance work required by the
11 class society and the seaworthiness of the vessel?

12
13 **MR HUSEFEST:** We had to keep machinery and nautical equipment and to see the
14 stability was adequate at all times. The class society performed inspections at
15 intervals but the only recommendation we ever got was to change the anchor chains.
16 This was done at the Malta dry docks.

17
18 **MS KLEIN:** In describing its seaworthiness, how would you compare the
19 *M/V "Norstar"* to other, similar vessels at the time of the arrest?

20
21 **MR HUSEFEST:** The seaworthiness of the *"Norstar"* was as good or better than
22 other ships of similar age and type. This was towards the end of 1997.

23
24 **MS KLEIN:** Thank you very much, Mr Husefest. I have no further questions,
25 Mr President.

26
27 **THE PRESIDENT:** Thank you, Ms Klein.

28
29 Pursuant to article 80 of the Rules of the Tribunal, a witness called by one Party may
30 also be examined by the other Party. Therefore, I ask the Co-Agent of Italy whether
31 Italy wishes to cross-examine the witness.

32
33 **MR AIELLO:** Yes, Mr President.

34
35 **THE PRESIDENT:** Who will be conducting the cross-examination? Yes, Mr Aiello. I
36 give the floor to Mr Aiello to cross-examine the witness.

37
38 **Cross-examined by MR AIELLO**

39
40 **MR AIELLO:** Good evening, Mr Husefest. Also you were reading a text in replying to
41 counsel.

42
43 **MR HUSEFEST:** Yes.

44
45 **MR AIELLO:** Who wrote your answers?

46
47 **MR HUSEFEST:** What answers?

48
49 **MR AIELLO:** To the question of your counsel.

50

1 **MR HUSEFEST:** I did.
2
3 **MR AIELLO:** You did? By yourself?
4
5 **MR HUSEFEST:** Yes.
6
7 **MR AIELLO:** When?
8
9 **MR HUSEFEST:** I have done this three times over the last two weeks.
10
11 **MR AIELLO:** Do you remember where the “Norstar” was on 11 August 1998?
12
13 **MR HUSEFEST:** No, I cannot, because I was not on board.
14
15 **MR AIELLO:** You asserted that you had suffered damage out of the arrest, referring
16 to the fact that you were never compensated by Italy.
17
18 **MR HUSEFEST:** That is correct.
19
20 **MR AIELLO:** Did you ever start a case to get compensation against Italy?
21
22 **MR HUSEFEST:** No, I did not.
23
24 **MR AIELLO:** Why?
25
26 **MR HUSEFEST:** Why? Because I did not even know the ship was arrested till long
27 after.
28
29 **MR AIELLO:** Thank you. I have no more questions.
30
31 **THE PRESIDENT:** Thank you, Mr Aiello. A witness who was cross-examined by the
32 other Party may be re-examined by the Party who had called the witness. Therefore,
33 I ask the Agent of Panama whether Panama wishes to re-examine the witness.
34
35 **MR CARREYÓ:** No, sir, Panama does not, thank you.
36
37 **THE PRESIDENT:** Thank you, Mr Carreyó. I understand no Judge wishes to put
38 questions to the witness, therefore Mr Husefest, thank you for your testimony. Your
39 examination is now finished. You may withdraw.
40
41 **MR HUSEFEST:** Thank you very much, sir.
42
43 *(The witness withdrew)*
44
45 **THE PRESIDENT:** Thank you. I now give the floor to the Agent of Panama,
46 Mr Carreyó, to make his statement.
47
48 **MR CARREYÓ:** Thank you, Mr President.
49

1 I will start by approaching the first main issue of our first round, main part, which is
2 the breaches of article 87 and the distortion of Panama's arguments.

3
4 Panama has submitted that by arresting and confiscating the "*Norstar*" in Spanish
5 waters, as a result of applying its customs laws and its jurisdictional powers for
6 activities performed on the high seas, Italy breached the "*Norstar*"'s right to navigate
7 freely, without justification, therefore breaching article 87 of the Convention.

8
9 That the "*Norstar*" was confiscated has been proved by the decree of seizure, where
10 Italy referred to the "*Norstar*" as "subject to mandatory confiscation".

11
12 As a result, the *Norstar* was appropriated and forfeited.

13
14 Italy confirmed its intention in its Decree refusing the release of the "*Norstar*" issued
15 by the Savona Court on 18 January 1999 which described this vessel as a
16 "confiscated good".

17
18 In that document, the prosecutor again referred to the "*Norstar*" as follows:

19
20 The ship-owner is one of the persons under investigation: his full knowledge
21 that the *confiscated* vessel was used for contraband ...

22
23 Panama contends that the confiscation of the "*Norstar*" confirms the violation of its
24 freedom of navigation protected by article 87.

25
26 Panama's description of the events as they occurred and its subsequent legal task to
27 gain restitution for the Italian international unlawful conduct are both undoubtedly
28 and inextricably related to the location where the activities for which the "*Norstar*"
29 was arrested were performed. This is the first of the two main arguments of Panama
30 concerning the breach of article 87.

31
32 The locus of activities for which the "*Norstar*" was arrested and confiscated:

33
34 Italy has argued in paragraph 48 of its Rejoinder that Panama has not explained

35
36 "in any way to the point of not even engaging with this issue at all" how the
37 arrest order and the request for execution breached freedom of navigation.

38
39 Therefore, all the Italian references – and there were many – to the difference
40 between issuance, request, and enforcement of the arrest, including those that have
41 intended to portray the idea that article 87 was not breached because the "*Norstar*"
42 was not on the high seas when the arrest was executed, are of no relevance to the
43 present discussion.

44
45 Panama would like to address this issue immediately, even though Italy has
46 characterized it as a "secondary or subordinate" argument in its Counter-Memorial.

47
48 Italy has misleadingly described in paragraph 8 of its Counter-Memorial the locus of
49 the "*Norstar*"'s activities by saying

50

1 8. Secondly, and subordinately, Italy will also demonstrate that the Decree of
2 Seizure did not entail an extraterritorial application of Italy's territorial
3 jurisdiction, since it did not target the activities carried out by the *M/V "Norstar"*
4 on the high seas, but rather crimes that the "*Norstar*" was alleged to have been
5 instrumental in committing within the Italian territory.
6

7 One of the primary lines of defence against Panama's charge that Italy breached
8 article 87, paragraph 1, has been to change the location of the activities for which the
9 "*Norstar*" was arrested.
10

11 On the other hand, Panama's position is that the arrest was carried out based on
12 activities performed by the *M/V "Norstar"* on the high seas, and not for any conduct
13 carried out within Italy.
14

15 Although Italy has stated that Panama has relied exclusively on the argument that
16 Italy applied its legal system extraterritorially, the truth is that the claim of Panama is
17 based on the impact that one, the Italian arrest, two, the exercise of its jurisdiction,
18 and, three, the application of its criminal legal system all had on the free movement
19 of the "*Norstar*".
20

21 In paragraph 13 of its Rejoinder Italy has stated that the "*Norstar*" was arrested
22

23 within the framework of criminal investigations for the alleged offences of
24 smuggling and tax evasion in Italy.
25

26 Panama does not have any objections to Italy conducting investigations.
27

28 What Panama strongly objects to is to describing the actions of the "*Norstar*" in this
29 way, because, firstly, it operated in international waters, not within Italian territory,
30 and, secondly, because all of its operations had been conducted within the
31 framework of legality.
32

33 In fact, this Italian characterization only serves to confirm the extraterritorial
34 application of Italy's jurisdiction.
35

36 Italy contends that it arrested the "*Norstar*" to use the vessel as evidence that
37 bunkers were being bought in Italy, taken to the high seas, and sold and transferred
38 to smaller vessels which came back to Italy, thereby implying that the "*Norstar*"s
39 activities were illicit. This distorts both the facts of the case and Panama's argument.
40

41 What Panama has always proclaimed is that bunkering on the high seas has never
42 constituted smuggling or tax fraud.
43

44 Panama has proved that the respective Italian authorities ruled that no crimes were
45 ever committed by the "*Norstar*" because it operated on the high seas, the arrest
46 being ordered only under the basis of the suspicion of the existence of such crimes.
47 It is obvious that there was an error of judgment when the arrest of the "*Norstar*" was
48 ordered, something that Italy has not yet seemed to accept.
49

50 Therefore, the basis for Panama's invocation of article 87's application is that the
51 arrest of the "*Norstar*" for the alleged offences of smuggling and tax evasion was

1 enforced in spite of the fact that it was transacting business solely in international
2 waters.

3
4 The evidence presented by Italy confirms that all of its representatives involved in
5 this case, including four different judges, and even the public prosecutor himself, not
6 only knew the *locus* of the “*Norstar*”’s operation, but also knew that this indicated that
7 no crime had been committed. Nevertheless, Italy has been continuing to press its
8 non-existent case even now, as if it could be valid to reopen before this Tribunal the
9 criminal case proceedings in Italy.

10
11 Throughout these hearings, Italy has decided to ignore the reason for the acquittal of
12 all accused and for the revocation of the arrest, namely that no offence had been
13 committed by the “*Norstar*” either on the high seas or in Italy.

14
15 Instead, Italy has continued to insist, as it did in paragraph 128 of its Counter-
16 Memorial that

17
18 the crimes considered by the Prosecutor, were crimes committed within the
19 territory of Italy.

20
21 With this proposition, Italy is confirming its violation of article 87 because despite
22 previously allowing the “*Norstar*” to conduct its activities on the high seas, it is
23 persisting in claiming the right to suddenly detain a vessel outside its territory.

24
25 If the prosecutor had respected the Convention, he would have not rashly arrested
26 the “*Norstar*”. Moreover, if Italy had respected this international agreement, it would
27 not be contesting Panama’s action in this case after it has been proved that the
28 arrest order was invalid.

29
30 It is then very important to note that throughout its pleadings Italy has been forced to
31 base its arguments on, in Italy’s words,

32
33 Potentially¹ suspected, alleged crimes, or to “crimes that it was thought to be
34 instrumental on committing.”

35
36 The fact that the “*Norstar*” and the persons therein connected were not charged with
37 these crimes, much less convicted of them, requires the Italian delegation to avoid all
38 such references to the “*Norstar*” in terms of criminal behaviour with which Italy has
39 been grounding its arguments such as that of paragraph 128 of its Counter-
40 Memorial.

41
42 To suggest otherwise is to distort the facts of this case and misrepresent the
43 evidence before this Tribunal, because it has been proved that the competent
44 authorities of Italy have decided that the Prosecutor was wrong in arresting the
45 “*Norstar*” and that for this reason the judges of Savona and Genoa ordered its
46 release and return.

47

¹ “potentially in breach of Italian criminal law”, para. 37, Counter-Memorial; “alleged” was used around 15 times.

1 Panama insists that it is illicit for Italy to have continued to deprive the vessel, and
2 thereby Panama, of its freedom of navigation, after its order to do so had been held
3 illegal as we have proved its own courts held.

4
5 It is clearly unlawful to use, in this proceedings, the same arguments with which Italy
6 grounded its original order, because, according to the standards of international
7 conduct, no one can take advantage of their own wrong.

8
9 Panama's position is that the prosecutor knew, or should have known, that no
10 offence occurred because Italy did not have a contiguous zone, as the Italian
11 Ministry of Foreign Affairs had warned, but he arrested the "*Norstar*" anyway.

12
13 If the bunkering activities of the "*Norstar*" had been actual crimes, as Italy has been
14 alleging, Panama would not have had anything to say before this Tribunal. Yet, this
15 is not the case. Panama has proved that the crimes for which the "*Norstar*" was
16 arrested have been left unsubstantiated to this day.

17
18 In paragraph 24 of its Rejoinder, Italy has tried to counter the Panamanian argument
19 that the lifting of the arrest was a consequence of the finding that the "*Norstar*" only
20 operated on the high seas, by raising the presumption that the lifting was ordered
21 because there was no need to hold the vessel any longer for probative purposes.

22
23 However, Panama notes that it has not been possible for Italy to locate the order of
24 conditional lifting, so the Italian position regarding this aspect of the case remains
25 unsupported.

26
27 On the contrary, this line of reasoning directly contradicts the actual reasons for
28 revoking the order of arrest given in paragraph 6 of the Tribunal of Savona judgment
29 about the *locus* of the activities on the high seas, and that no duties were to be paid.

30
31 In other words, Italy itself ruled that the provisions of supplies, i.e., bunkering, was
32 conducted outside the Italian territorial sea, and for that reason the arrest was
33 revoked.

34
35 In the interim, the right of the "*Norstar*" to freely navigate was breached in violation of
36 article 87; and this shall no longer be in doubt particularly when we analyse two
37 documents to which Italy has not referred at all.

38
39 That Italy lacks a contiguous zone is an issue that we will deal with immediately.

40
41 However, Panama has been surprised that Italy has failed to refer to the letter
42 (*telespresso*) dated 4 September 1998 issued by the Service of Diplomatic Litigation,
43 Treaties and Legislative Affairs of the Ministry of Foreign Affairs of Italy and filed as
44 Annex 7 to the Memorial, because it has been proved that this letter was addressed
45 to and received by the office of the same prosecutor that issued the arrest order in
46 the present case.

47
48 In this letter such foreign affairs office head stated that the "*Spiro F*" had been
49 arrested "21 miles away from the Italian coast" and cited the prosecutor's grounds for
50 arrest as follows:

1
2 The arrest of the boat has been done in the contiguous zone subject to the
3 full jurisdiction of the State regarding fiscal and customs crimes.
4

5 Regardless, the prosecutor did not take this into consideration, allowing the
6 enforcement of the arrest order of the “*Norstar*” on 25 September 1998 to continue,
7 and keeping it under arrest *sine die*.
8

9 Therefore, it would also be wrong to assume that bunkering operations within such
10 non-existent contiguous zone were subject to the full jurisdiction of Italy regarding
11 fiscal and customs crimes; Italy completely treated the bunkering operations as
12 carried out within the contiguous zone subject to the full jurisdiction of the State
13 regarding fiscal and customs crimes.
14

15 In the last part of paragraph 127 of the “*Saiga*” Judgment, this Tribunal has stated
16 that
17

18 in its exclusive economic zone, a coastal State has jurisdiction to apply its
19 customs laws and regulations in respect of “artificial islands, installations and
20 structures” but that the Convention does not empower a coastal State to apply
21 its customs laws in respect of any other parts of the exclusive economic zone.
22

23 If that was the case concerning the exclusive economic zone, this is even more true
24 concerning the high seas.
25

26 If we examine the grounds for the decree of seizure, it is easy to confirm that Italy
27 grounded this decision in the doctrines of constructive or presumptive presence and
28 genuine link, determining that the seizure had to be performed beyond the territorial
29 sea and the contiguous vigilance zone.
30

31 Yet the actual arrest took place in Spain.
32

33 As this decree has shown, the prosecutor grounded his order of arrest on the
34 understanding that the “*Norstar*” was operating “inside the contiguous zone”,
35 something which Italy did not have, and because it was “affecting Italy’s financial
36 interests”.
37

38 This is contrary to the case law that this Tribunal has used to hold that the
39 Convention does not empower a coastal State to apply its customs laws to the high
40 seas.
41

42 It demonstrates Italy’s misconception of zonal management. By referring to “actual
43 contacts” and the “genuine link” Italy is relying on presumptive presence, on the idea
44 that the activities of the “*Norstar*” on the high seas were affecting those maritime
45 zones over which it indeed had jurisdiction.
46

47 The scholar Tanaka Yoshifumi defines zonal management as the law of the sea
48 regulating human activities in the ocean according to the legal category of ocean
49 spaces. Italy’s misconception of zonal management, as demonstrated in its decree
50 of seizure, can be illustrated by comparing it to the “*Virginia G*” Case.
51

1 In the “*Virginia G*” Case, the vessel was also carrying out bunkering activities.
2 However, it was supplying oil to fishing vessels in the exclusive economic zone. As
3 the tribunal found, a coastal State has the right to regulate bunkering of foreign
4 vessels fishing in the exclusive economic zone.

5
6 The “*Norstar*”, on the other side, was bunkering leisure boats on the high seas,
7 which would then continue to the Italian coast. Despite these cases having the
8 parallel of both the vessels involved in bunkering activities, and by having bunkered
9 vessels return to waters under jurisdiction of the coastal State, and through this
10 affecting or coming in contact in one way or another with a maritime zone regulated
11 by the coastal State – they are distinct matters.

12
13 In the “*Virginia G*” Case, the Tribunal specifically emphasized the difference between
14 the general right to bunker, which is inherent in the freedom of navigation, and the
15 right to bunker vessels fishing in the EEZ.

16
17 This is without prejudice to the finding in the “*Saiga*” Case mentioned before. Italy
18 grounded its decree of seizure on the suspicion that the activities of the “*Norstar*” on
19 the high seas are affecting the maritime zones which are under its jurisdiction or
20 affecting other interests.

21
22 However, that mere suspicion, even if it were true, as a reason for the arrest and
23 detention, is by far not in conformity with UNCLOS, and a clear misconception of
24 zonal management as foreseen by the Convention and the Tribunal’s jurisprudence.

25
26 **THE PRESIDENT:** Mr Carreyó, I apologise for interrupting you. It may not be the
27 most convenient place for you to stop, but we have reached four thirty five, so the
28 Tribunal will withdraw for a break of 25 minutes. We will continue the hearing at
29 5 p.m.

30
31 **MR CARREYÓ:** Thank you, Sir.

32
33 **THE PRESIDENT:** Thank you.

34
35 (Break)

36
37 **THE PRESIDENT:** The Tribunal will now resume its hearing. Mr Carreyó you may
38 continue your statement.

39
40 **MR CARREYÓ:** Thank you, Mr President, dear Members of the Tribunal. As we
41 were examining the location of the activities for which the “*Norstar*” was arrested,
42 and after revisiting some case law at this Tribunal and the Italian misconception of
43 zonal management and its lack of contiguous zone, we only have to add on that
44 subject that Italy cannot rely on its ignorance of the law. The law itself imputes the
45 fact of having knowledge as a *presumption juris et de jure*. However, if there is still
46 any doubt about the fact that Italy grounded the arrest on an erroneous assumption
47 that the “*Norstar*” committed criminal offences within its territory, let us reconsider the
48 following documentary evidence in chronological order:
49

1 First, on 24 September 1998 the Fiscal Police of Savona (as stated in the Counter-
2 Memorial when citing page 1 of the Criminal Offence Report Communication, at
3 Annex A), this report referred to the offshore bunkering activities conducted by the
4 “*Norstar*”, saying

5
6 that positions itself in international waters... that traded in international waters
7 ... and that its product was ... transported in international waters off the coast
8 of San Remo.
9

10 Second, on 11 August 1998 the decree of seizure reiterated this by saying that

11
12 the *M/V “Norstar”* positions itself beyond the Italian ... territorial seas ... inside
13 the contiguous ... zone and supplies with fuel (so-called “offshore bunkering”)
14 mega yachts.
15

16 In this piece of evidence, Italy also referred to “the repeated use of adjacent high
17 seas by the foreign ship”.

18
19 Third, in the decree refusing the release of confiscated goods on 18 January 1998,
20 Italy stated that the

21
22 “*Norstar*” was stationed outside the territorial waters, refueling yachts ... the
23 mother ship was stationed in international waters.
24

25 Fourth, in the letter rogatory dated 11 August 1998, Italy stated that “[the “*Norstar*”]
26 exclusively conducted ... offshore bunkering activity”.

27
28 Fifth, in a particularly important piece of evidence, the Tribunal of Savona concluded
29 on 13 March 2003 that the *locus* where bunkering activities were carried out by the
30 “*Norstar*” was of the essence in arriving at its judgment and specifically stated at its
31 second paragraph 5 (there are two paragraphs numbered 5) that

32
33 the purchase of fuel intended to be stored on board by leisure boats outside
34 the territorial sea ... shall not be subject to payment of import duties.
35

36 The “*elements of the conduct*” of the “*Norstar*” acknowledged by this Italian tribunal
37 were that whoever “... organizes the supply of fuel offshore ... for its subsequent
38 introduction into the Italian territory ... does not commit any offence, nor is there any
39 offence when fuel sold or transshipped offshore has been purchased on Italian
40 territory.”

41
42 Sixth, at page 3 of the Public Prosecutor’s Appeal dated 18 August 2003, he
43 accepted that

44
45 tankers ... placed themselves beyond the Italian territorial waters ... This
46 appeal is also of particular importance because Italy’s counsel in this Tribunal
47 has agreed that the activity of the “*Norstar*” was ... bunkering ... fuel which was
48 sold in international waters [free] from ... custom taxes and duties.
49

50 Although counsel for Italy has acknowledged the existence of the judgment of the
51 Court of Appeal of Genoa issued on 25 October 2005, it has not addressed its
52 substance, suggesting that it would prefer to ignore its conclusions. What Panama

1 underlines is that this ruling accepted evidence that the “*Norstar*” was “anchored
2 beyond the Italian territorial sea ... supplying recreational vessels ...”, and in its last
3 page it clearly affirmed that the Italian rules made a distinction according to the place
4 where the vessel is located, i.e., within the customs borderline or in the territorial
5 sea; that

6
7 the purchase by recreational vessels intended to be used as ship’s stores
8 outside the limit of territorial sea and its subsequent introduction inside it;

9
10 that

11
12 no offence is committed by anyone who provides bunkering on the high seas,
13 even in full knowledge that the gasoil will be used by leisure boats bound for
14 Italian coast;

15
16 and that

17
18 when the gasoil ... has been transhipped on the high seas, such goods are
19 to be considered foreign goods once the vessel ... has gone beyond the limit
20 of territorial waters.

21
22 This final and definitive judgment by the Italian Judiciary confirmed that the activity
23 for which the prosecutor investigated the “*Norstar*” was merely “bunkering on the
24 high seas”, as Panama has repeatedly characterized them, and for which it has been
25 insistently criticized by Italy over the course of these proceedings.

26
27 In other words, all of the Italian judges that have ruled on this case have confirmed
28 that the arrest of the “*Norstar*” was based on the *suspicion* of having been involved in
29 the crimes of smuggling and tax evasion for supplying bunkers to other vessels, but
30 that this suspicion was unfounded.

31
32 This certainly explains why Italy chose not to rely on their decisions as evidence but
33 instead on the prosecutor’s erroneous thesis. However, the upshot of this piece of
34 evidence is that it negates the value of the other several documents that Italy is
35 continuing to rely on during these proceedings.

36
37 An analysis of the evidence listed above shows that Italy has been unable to
38 demonstrate how article 87 has been complied with. The so-called criminal acts were
39 not carried out *within* Italian territory but, on the contrary, on the high seas. This is
40 confirmed by the final Italian judgments themselves. If the acts had been carried out
41 within Italy, Italy would not have revoked the arrest nor ordered the return of the
42 “*Norstar*” to its owners.

43
44 In its Letter Rogatory of 11 August 1998, Italy even graphically explained the
45 bunkering operations as follows.

46
47 This is in Annex J. I do not have the page number but it will be quite easy to find
48 because it is a graphic that was filed by Italy in its Counter-Memorial. It is probably
49 not a very good graphic because I scanned it and presented it as a slide, but it is
50 easy to see that Italy itself placed the “*Norstar*” in the middle and referred to and

1 identified the areas as international waters and mega-yachts in the European Union,
2 and, outside of that, European ports.

3
4 Panama has proved that the acts for which the arrest was ordered were not
5 performed within Italy but on the high seas, and that the arrest of the “*Norstar*” and
6 subsequent criminal proceedings for the alleged offences of criminal association
7 aimed at smuggling and tax fraud were established to be unfounded.

8
9 Although Italy originally could have honestly believed – and I might also agree with
10 this – that it had the right to exercise its jurisdiction and apply its internal legal
11 system over the “*Norstar*” for acts performed within its territory, it would still have to
12 explain why it maintained jurisdiction over the “*Norstar*” *sine die* (for ever), even after
13 finding that such an arrest had been revoked by its courts and the vessel had been
14 ordered to be returned to its owner.

15
16 By continuing to pursue the argument that the arrest of the “*Norstar*” was justified
17 before this Tribunal, Italy is going against its own internal decisions in violation of the
18 doctrine of *venire contra factum proprium non valet*.

19
20 It is also to be noted in this respect that when a party has created a legitimate
21 expectation on the part of another party about certain facts, it may not be able to
22 further raise contrary facts in evidence.

23
24 This rule, known as estoppel, concerns matters of evidence here and states that if
25 certain points are wrongly presented as facts, the party liable for this misinformation
26 is debarred from presenting an otherwise divergent state of affairs to the judges,
27 even if materially true, because it will be bound by the principle of procedural
28 estoppel. If it chooses to do so, the judge will ignore the evidence presented on
29 account of estoppel.

30
31 Panama has shown that Italy had been maintaining that the *M/V “Norstar”* bunkering
32 operations were carried out on the high seas and now it has been wrongly
33 presenting as a fact that the activities for which the “*Norstar*” was arrested had been
34 performed within its territorial waters.

35
36 Italy shall then be held liable for this misinformation and debarred from presenting an
37 otherwise divergent state of affairs because it is bound by the principle of procedural
38 estoppel.

39
40 Mr President, we will now turn to the second main argument that Italy has been
41 using, namely the locus of the arrest.

42
43 The Italian argument in paragraph 7 of its Counter-Memorial was:

44
45 Since the “*M/V Norstar*” was within Spanish internal waters at the time when
46 the Decree of Seizure was issued and executed, article 87 of the Convention
47 would not even be engaged, let alone breached, by Italy’s conduct.
48

1 This other argument put forward by Italy is, in short, that since the “*Norstar*” was in
2 Spain, rather than on the high seas, when it was arrested, there has been no breach
3 of article 87.

4
5 In paragraph 74 of its Reply, Panama responded to such argument that

6
7 Freedom of navigation means not only the right to traverse the high seas but
8 also the right to gain access to it, and that this freedom would mean little to the
9 international community if the vessels in port could not enjoy the same
10 protections as those already on the high seas, and that similarly, this freedom
11 would be meaningless if States could indiscriminately arrest vessels in port
12 without justification.

13
14 Before getting into the details of this argument, it is important to refer to a couple of
15 aspects of the Italian Rejoinder.

16
17 The first is closely related to the Italian argument stating that article 87 was not
18 breached because the arrest was a “prejudgment measure” and that its nature did
19 not allow Panama to have knowledge of it before its enforcement.

20
21 According to Italy, the evidence that it filed through the judgment of its Cassation
22 Court in Annex P confirms the *fumus* as “the mere possibility of a relationship
23 between the good and the offence.”

24
25 However, we should then ask if issuing such an order was necessary to prove,
26 without any doubt, that an offence actually existed. The answer is no, and the Italian
27 high tribunal itself agreed that the existence of the offence needed to have been
28 proved beforehand.

29
30 The second aspect is that it should be noted that an arrest, as a precautionary
31 measure, can only be adopted if there is the serious likelihood that the defendant
32 has committed a crime, and if it is necessary in order to prevent that defendant from
33 fleeing, because no one attempted to flee or was ordered to stop and did not obey
34 such order, or from committing another crime, or from destroying or creating false
35 evidence. In fact, none of these were the case.

36
37 Italy seems to have ignored the fact that while claiming that it did not breach
38 article 87, because the “*Norstar*” was in Spain, it is simultaneously admitting the
39 extraterritorial exercise of its jurisdiction.

40
41 Italy has expressly accepted that it knew that arresting the “*Norstar*” on the high seas
42 would be a clear and open infraction of article 87, as has been held across a very
43 wide spectrum of the case law presented to this Tribunal as evidence. Italy, thus,
44 decided to order the arrest in another location, i.e., in the territorial waters of a third
45 State, though still for the activities performed by the “*Norstar*” on the high seas.

46
47 This decision was probably adopted under the dangerous misconception that such a
48 forceful action would be interpreted in accordance with the law of the sea. However,
49 Italy was then and is still wrong. The right to freedom of navigation governed by
50 article 87 does not only involve the sailing through, but also the sailing towards the
51 high seas.

1
2 Panama's position is that if a vessel is not allowed to sail towards the high seas,
3 without justification, the right to freedom of navigation is seriously compromised. No
4 State is allowed to hinder the movements of foreign vessels without justification,
5 even when they are in port.
6

7 Panama accepts that a State has the right to enforce its decisions to seize a vessel;
8 but not if those decisions are contrary to international law. The forceful measures
9 used when arresting the "*Norstar*" clearly breached the right to freely navigate on the
10 open seas. This has been proved in the present case, particularly by the revocation
11 of the arrest order by the arresting State itself, as we have clearly learned from the
12 judgments of the Italian courts presented as evidence.
13

14 In short, there is no question as to whether the arrest order breached that vessel's
15 right to freedom of navigation protected by article 87 of the Convention for not
16 allowing it to proceed to the high seas.
17

18 In the *Oscar Chinn* case, the PCIJ ruled that
19

20 According to the conception universally accepted, the freedom of navigation
21 referred to by the Convention comprises freedom of movement for vessels,
22 freedom to enter ports, and to make use of plants and docks, to load and
23 unload goods, and to transport goods and passengers. Series A/B No 63
24 (1934), p. 65 et seq., at 85.
25

26 As we have already shown, in paragraph 60 of its Rejoinder, Italy stated that
27 Wendel, who Panama quotes,
28

29 acknowledges that the right to gain access to the oceans can be limited subject
30 to regulations supported by a general consensus among states.
31

32 Yet, in the present case Italy does not give a single example of any such limiting
33 regulations supported by a general consensus to support its reference to this source.
34 We have already considered the other indirect Italian reference to this issue in
35 paragraph 7 of its Counter-Memorial stating that
36

37 an extraterritorial exercise of jurisdiction that does not determine any physical
38 interference with the movements of a ship on the high seas
39

40 does not breach article 87.
41

42 And, as we have also demonstrated, while claiming that it did not breach article 87,
43 because the "*Norstar*" was in Spain, Italy is simultaneously admitting the
44 extraterritorial exercise of its jurisdiction.
45

46 On paragraph 61 of its Rejoinder, Italy cited Kohen, who explains that states cannot
47

48 impede the freedom of navigation of foreign vessels by arbitrarily preventing
49 them from leaving their internal waters. An arbitrary detention of a foreign
50 vessel by a coastal State, after having allowed it to enter its internal waters
51 and/or call a port, cannot but be a blatant breach of the freedom of navigation
52 in other maritime areas.

1
2 This supports Panama's arguments.

3
4 However, Panama humbly believes that this passage supports its argument rather
5 than Italy's because the facts of this case show precisely that Italy as the coastal
6 State arbitrarily hindered the "*Norstar*"'s freedom of navigation after this vessel had
7 entered the internal waters of Spain at the port of Palma de Mallorca.

8
9 Panama contends that any arrest of a vessel is arbitrary, and therefore without
10 justification, if it is not supported by the law of the sea, and this is precisely so under
11 the circumstances of the present case, because the arrest was executed in a foreign
12 State for bunkering operations on the high seas in the context of criminal
13 proceedings that revoked the arrest and ended in the acquittal of the persons
14 charged.

15
16 Panama's position is that article 87 preserves the right to freedom of navigation not
17 only of vessels that are already on the high seas but also of those, such as the
18 "*Norstar*", that are in the port of a third State. The right to freedom of navigation not
19 only refers to the possibility of sailing through the high seas but also to having
20 access to them from the internal waters of any State.

21
22 If this were not the case, then any State could unlawfully, and without any
23 consequence, arrest foreign vessels in port, thereby compromising one of the main
24 principles of the law of the sea as it pertains to the freedom of navigation, and
25 allowing damages to be caused without any possibility of recovery.

26
27 The other Italian argument to support the arrest in Spain was given in para. 63 of its
28 Rejoinder as follows:

29
30 The *M/V "Norstar"* was not prevented from gaining access to the high seas
31 arbitrarily, but in the context of proceedings governed by law that required its
32 arrest and detention. Therefore, no breach of article 87 has occurred due to
33 the *M/V "Norstar"*'s inability to take to the high seas.

34
35 This argument conflicts with international law since it approves an arrest that
36 transgresses the right to the freedom of navigation protected by the Convention.

37
38 Furthermore, it is completely irrelevant because, as Italy itself has argued, the facts
39 of this case have to be analyzed through the prism of the Convention and not the
40 Italian criminal law system.

41
42 Whereas Italy proposes that any detention of a ship to prevent it from leaving the
43 internal waters of a third State would be lawful because it would be in the context of
44 its criminal law proceedings, Panama answers that according to the international law
45 of the sea, any such detention without legal justification is unsupported and,
46 therefore, arbitrary.

47
48 Italy may have suspected the commission of a crime. However, how long had Italy
49 been holding such a suspicion? Did the suspicion exist at the time of the arrest?
50 After the investigation, it should have been clear that there was no reason to arrest,

1 much less to keep the order of arrest in force. How long was it necessary to keep the
2 “*Norstar*” under arrest as *corpus delicti*? Panama will come back to this question.

3
4 For the time being, let us only say that Italy has not provided a single shred of truth,
5 or even a basis for its argument, apart from the decree of seizure, the document at
6 the source of this very conflict, and one at odds with the international law of the sea,
7 to justify its actions as lawful. To put it bluntly, Panama finds this strategy to be
8 wanting.

9
10 In its Rejoinder, Italy has again argued that the “*Wanderer*”, the “*Arctic Sunrise*”, the
11 “*Volga*”, and the “*Saiga*” cases are comparable to this one. However, none of those
12 ships were in port at the time of their detainment. If those vessels were on the high
13 seas, rather than in port, when seized, Panama does not understand how such
14 cases can support Italy’s thesis.

15
16 Italy has also insisted on citing the “*Louisa*” Case in its Rejoinder in spite of the fact
17 that, contrary to the “*Norstar*” Case, the “*Louisa*” was arrested in the port of the
18 coastal arresting State for activities performed within the territorial waters of the
19 same coastal State. In the present case, the vessel was arrested in the port of a
20 foreign State for activities carried out beyond the territorial waters of the coastal
21 State.

22
23 Referencing Judge Cot’s comment regarding the “*Louisa*” Case in its Rejoinder, Italy
24 has assumed that the exercise of its jurisdiction over the “*Norstar*” within the territory
25 of Spain was a right permissible for it as a coastal State. However, this does not
26 apply to the case of the “*Norstar*” because the “*Norstar*” was not within Italy’s coastal
27 jurisdiction when it was in a foreign port.

28
29 Panama has considered the *locus* of the acts for which the arrest was ordered, those
30 acts being the bunkering operations of the *M/V “Norstar”* while on the high seas, in
31 the context of criminal proceedings for the alleged offences of criminal association
32 aimed at smuggling and tax fraud. These operations have been the primary source
33 of conflict which led Italy to investigate and order the arrest of the “*Norstar*”, thereby
34 breaching article 87.

35
36 If in the exercise of its jurisdiction, Italy denies the right of a foreign flag vessel to its
37 freedom of navigation by an arrest, so that such vessel can no longer gain access to
38 the high seas, the State whose vessel has been arrested has the right to claim and
39 be accorded a fair compensation for the damages caused by such order, because
40 such arrest order targeting the activities on the high seas has breached article 87.

41
42 Panama wants to reassure this learned Tribunal that it does not question the right of
43 any coastal State to arrest foreign vessels as long as the vessels are within its
44 territorial waters. In fact, this is currently done in Panama by its Admiralty codes that
45 govern private international law provisions and levy bonds for possible damages
46 inflicted on arrested vessels.

47
48 However, when we refer to the criminal law provisions applied by any State, such
49 arrest orders have to pertain to vessels under the direct jurisdiction of that State, and

1 for acts carried out inside the territorial waters of such State, unless duly authorized
2 by the international law of the sea.

3
4 However, the “*Norstar*” was not operating in the territorial waters of Italy, as we have
5 seen, nor were the alleged criminal acts for which Italy arrested it presumed to be
6 carried out within its territorial waters.

7
8 The international law of the sea does not authorize arrests by coastal states of
9 foreign vessels in foreign ports for lawful acts performed on the high seas. This
10 prohibition has been verified by the judges of the coastal State itself.

11
12 We move on now to the third theme, titled an arresting State seizes at its own peril.

13
14 Italy has arrested the “*Norstar*” within the territorial waters of a third State, and has
15 done so at its own risk. As was long ago decided by the US. Supreme Court,

16
17 the party seizes at his peril, and is liable to costs and damages if he fails to
18 establish the forfeiture....The party in such case seizes at his peril. ...if
19 condemnation follows, he is justified; if an acquittal, then he must make
20 compensation. If he establishes the forfeiture, he is justified. If he fails, he must
21 make full compensation in damages.

22
23 This was a case tried in 1826 called “*The Marianna Flora*”, which I am sure you all
24 know.

25
26 The decision to arrest was made on 11 August 1998, and on the same date it was
27 sent to Spain for its enforcement. This should not be taken lightly. Why did Italy
28 decide to execute the arrest in a foreign country? Panama does not want to believe
29 that Italy’s intention was to cause damage, but damages have indeed accrued.
30 Furthermore, it is clear that these damages could have been diminished and
31 completely prevented if Italy had adopted another course of action.

32
33 All of the evidence presented by Italy merely confirms the international invalidity of
34 the decree of seizure precisely because the arrest of the “*Norstar*” was ordered for
35 activities carried out on the high seas. This raises the issue of Italy’s responsibility.

36
37 In the case *Lauritzen v. Larsen* (1953), the US Supreme Court observed that

38
39 Perhaps the most venerable and universal rule of maritime law relevant to our
40 problem is that which gives cardinal importance to the law of the flag. ...This
41 Court has said that the law of the flag supersedes the territorial principle, even
42 for purposes of criminal jurisdiction of personnel of a merchant ship, because
43 it “is deemed to be a part of the territory of that sovereignty [whose flag it flies],
44 and not to lose that character when in navigable waters within the territorial
45 limits of another sovereignty.”

46
47 On this principle, we concede a territorial government involved only concurrent
48 jurisdiction of offenses aboard our ships. Some authorities reject, as a rather
49 mischievous fiction, the doctrine that a ship is constructively a floating part of
50 the flag state, but apply the law of the flag on the pragmatic basis that there
51 must be some law on shipboard, that it cannot change at every change of

1 waters, and no experience shows a better rule than that of the state that owns
2 her.

3
4 It is significant to us here that the weight given to the ensign overbears most
5 other connecting events in determining applicable law.
6

7 I am sorry for such a long quotation, Mr President.

8
9 This was also held in *United States v. Flores*, and reiterated in *Cunard S.S. Co.*
10 *v. Mellon*:

11
12 Moving on, Mr President, we will touch now upon the theme *corpus delicti: until*
13 *when?*

14
15 The other platform that Italy has used in the present case is that the *M/V "Norstar"*
16 was seized "as *corpus delicti*" for its alleged criminal offences. The Latin term, which
17 comes from Roman law, *corpus delicti*, refers either to the proof that a crime has
18 been committed before a person can be convicted of having committed that crime, or
19 to the object upon which the crime was committed, which itself proves the existence
20 of that crime.

21
22 Panama would like to respectfully ask Italy to abstain from referring to or alleging
23 that the "*Norstar*"s activity has been criminal. This allegation is no more valid now
24 than it was in 2003, when the arrest order was revoked. Fully 15 years ago, Italy first
25 acknowledged that there was no crime. How, then, can Italy continue to pretend that
26 the material acts of the "*Norstar*" could still be considered as alleged criminal
27 conduct by describing it as a *corpus delicti*?

28
29 The contrary has been expressed by the documents containing the judgments
30 issued by four different judges representing two different Italian courts, all of whom
31 decided that no criminal offence had been committed either by the "*Norstar*" or by
32 any person interested therein, precisely because its bunkering activities were on the
33 high seas.

34
35 The Genoa Appeal Court judgment could have been subject to a Cassation recourse
36 before the Supreme Court of Italy, but the Italian Prosecutor chose not to use this
37 available procedural instrument, thus making the acquittal and lifting of the arrest
38 order final.

39
40 Therefore, any attribution of crimes, even alleged ones, to the "*Norstar*", or to any of
41 the persons connected to it, is inappropriate because this would lead to
42 revictimization and aggravation of the damages already caused and this,
43 Mr President, should be prevented.

44
45 It is deeply disturbing to continue seeing Italy referring to the "*Norstar*" as a *corpus*
46 *delicti*, because it continues not only to disregard its own judicial authorities, but
47 rather relies on the Public Prosecutor who issued the order of seizure in the first
48 place. By doing so, Italy has adopted a line of reasoning that does not hold up when
49 viewed through the lens of the Convention.
50

1 It is important to bear in mind that the totality of the evidence produced in the
2 proceedings against the “*Norstar*” and the persons therein connected had been
3 obtained before the arrest of this vessel, thereby putting in doubt the existence,
4 before that time, of sufficient information to decide to arrest, as we will discuss when
5 approaching the issue of *fumus commissi delicti*, *fumus boni iuris*.

6
7 There are other rules of the Convention, part of the right of freedom of navigation.
8 This is our fifth main issue.

9
10 Panama recalls that while this Tribunal only considered articles 87 and 300 of the
11 Convention relevant to these proceedings, this does not preclude the Parties from
12 addressing other provisions of international law that are closely related to the issue
13 at hand. Article 92, paragraph 1, article 97, paragraph 1, and article 97, paragraph 3
14 of the Convention fall under this description. I will not cite those articles verbatim.

15
16 Article 87 governs the right to freedom of the high seas, stating that not only shall
17 such freedom be “exercised under the conditions laid down by this Convention”, but
18 also under “other rules of international law”.

19
20 Panama contends that since articles 92 and 97 are also under Part VII of the
21 Convention, they also govern the activities on the high seas and their relevance
22 should not be treated so dismissively. By requesting their consideration, Panama is
23 neither enlarging the dispute, nor making new claims, because the references to
24 them still pertain to the Italian infringements of article 87, complementing the
25 interpretation of this provision.

26
27 That ships on the high seas are subject to the exclusive jurisdiction of the flag State,
28 and that any criminal proceedings on the high seas can only be initiated by the flag
29 State, or the State granting nationality to the person charged, are principles of the
30 law of the sea so enshrined to ensure the right to freedom of navigation.

31
32 The Italian exercise of its jurisdiction against the “*Norstar*”, its master, and other
33 persons in its service on the high seas is contrary to the limitation of such authority to
34 the flag State, the only State having control over matters of criminal responsibility
35 under these circumstances.

36
37 If, in the process of applying its jurisdiction, Italy arrested the “*Norstar*” while the
38 vessel was in the internal waters of a foreign State, rather than active on the high
39 seas, it is still certain that Italy failed to respect the authority of the flag State over
40 any investigation into its conduct.

41
42 Furthermore, according to the principle of *iura novit curia*, courts are presumed to
43 know the law, and agents are supposed to contribute to the right of adjudication of
44 the Tribunal when examining provisions inextricably related to articles 87 and 300.
45 There is no question, then, that, while on the high seas, the “*Norstar*” was under the
46 exclusive jurisdiction of Panama, the nature of the claim not having been changed at
47 all by Panama’s request to the Tribunal to consider this right.

48
49 The links of the other provisions analyzed here to article 87 are so strong that
50 together they contribute to the regulatory protection of the right to freedom of

1 navigation on the high seas. Articles 92 and 97 are integral parts of this protection.
2 Thus, it would be remiss for Panama to neglect these norms when constructing its
3 argument.

4
5 Panama makes a contextual reading of provisions such as article 293 where the
6 Convention and other rules of international law not incompatible with it are
7 applicable. In this regard, articles 92 and 97 should be considered in light of the
8 purpose and object of the Convention as a whole.

9
10 On the other hand, Italy has not offered any concrete reason why these provisions
11 concerning criminal jurisdiction should not be considered germane, apart from
12 referring to the preliminary judgment in which the Tribunal declared that only
13 articles 87 and 300 may be viewed as breached by Italy.

14
15 Panama argues that the relevance of these additional provisions is implicit in the
16 Tribunal's ruling because they are directly related to the subject-matter of this case
17 arising straight out of the extraterritorial criminal jurisdiction exercised by Italy over a
18 foreign vessel by means of the enforcement of an arrest in the territory of a foreign
19 state, based on activities carried out on the high seas.

20
21 Panama contends that the character of the dispute is not transformed in any way by
22 the consideration of these provisions, and does not expect that Italy will be judged on
23 the basis of these additional provisions, but rather that they will complement the
24 application and interpretation of articles 87 and 300 of the Convention, hence
25 contributing to the sound administration of justice.

26
27 Is article 87, paragraph 2, only binding on Panama?

28
29 Italy has stated that the obligation to have due regard to the rights of other States
30 under article 87, paragraph 2, only binds States that exercise their freedom of
31 navigation under article 87, paragraph 1, and that only the flag States as Panama
32 are bound by this norm, not coastal States as Italy.

33
34 However, article 87, paragraph 2, states that

35
36 Freedom of navigation shall be exercised by all States with due regard for the
37 interests of other States.

38
39 In the Fisheries Jurisdiction Case (*UK v. Iceland*), the Court found that

40
41 The principle of reasonable regard for the interests of other States enshrined
42 in article 2 of the Geneva Convention on the High Seas of 1958 requires
43 Iceland and the United Kingdom to have due regard to each other's interests,
44 and to the interests of other States in those resources.

45
46 In other words, this provision and the Court's finding do not distinguish between flag
47 and coastal States. Instead, such freedoms are to be implemented and upheld by all
48 States with respect to the interests of other States, regardless of their status.

49
50 Italy is certainly not exempt from this provision. Consequently, both its reasoning and
51 its interpretation of article 87, paragraph 2, are without merit.

1
2 Italy's suggestion that article 87, paragraph 2, is only binding on Panama is evidence
3 that Italy has only been considering its own interest. However, the obligations of the
4 Convention demand a high degree of cooperation from all State Parties, not only
5 some of them, as Italy proposes. This Italian proposition that legal positions should
6 be adopted only when they suit its own ends, once more shows little concern for its
7 co-signatories and further evidence of its lack of good faith.

8
9 The last issue to be analyzed in this first part of our oral arguments, Mr President, is
10 that of *effet utile*.

11
12 Mr President, due to the time I would rather you allowed me to stop here and
13 continue tomorrow.

14
15 **THE PRESIDENT:** Thank you, Mr Carreyó. We have reached almost six o'clock.
16 This brings us to the end of this afternoon's sitting.

17
18 Your statement will have to be continued tomorrow morning when the hearing will be
19 resumed at ten o'clock. The sitting is now closed.

20
21 *(The sitting closed at 5.56 p.m.)*