

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2018

Public sitting

held on Tuesday, 11 September 2018, at 10 a.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:

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Attorney at Law, Panama,

as Agent;

and

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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:

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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 morning. I wish to welcome you to the second day of the
2 hearing of the Tribunal on the merits of the *M/V “Norstar”* case.

3
4 Yesterday Mr Carreyó was speaking before the sitting was closed. I therefore give
5 the floor to Mr Carreyó to continue the statement begun yesterday.

6
7 **MR CARREYO:** Good morning, Mr President, dear Members of the Tribunal,
8 Mr Registrar, dear delegates of Italy and members of the staff.

9
10 Yesterday, Mr President, we had an opportunity to go over the two main counter-
11 arguments of Italy, i.e. the location of activities for which the *M/V Norstar* was
12 arrested, the location of the arrest, and the influence on the breach of article 87, as
13 well as the witnesses to the Italian arguments.

14
15 We also revised the concept that an arresting State seizes at its own peril and how
16 improper it is to continue to refer to the *M/V “Norstar”* as a *corpus delicti*. We also
17 went over the other rules of the Convention that form part of the right to freedom of
18 navigation and how article 87, paragraph 2, was also binding on Italy.

19
20 The final issue to be analysed in the first part of our oral arguments is that of the *effet*
21 *utile*.

22
23 In its Rejoinder, Italy claims the disqualification of the entire argument on *effet utile*
24 that Panama has brought forward. Italy thereby relies on four points, which, when
25 looked at closely, are unsubstantiated:

- 26 a) using article 300 in order to substantiate the breach of article 87;
27 b) being confused about the meaning of good faith;
28 c) mistakenly identifying UNCLOS’s main purpose as freedom of
29 navigation; and
30 d) mistakenly believing that *effet utile* authorizes a broad interpretation of
31 article 87.

32
33 Panama is merely asking for an interpretation that gives effect to the object and
34 purpose of the treaty.

35
36 Panama wishes to respond only briefly to those allegations, simply stating, first of all,
37 that Italy once more mischaracterizes Panamas statements; and, second, that
38 Panama does not disagree with the citations that Italy has provided.

39
40 Panama does not misinterpret the Convention, as Italy claims. In fact, Italy
41 fundamentally mischaracterizes Panama’s statements and plays with words.
42 Panama claims that there is a violation of the freedom of navigation, that freedom is
43 one of the objects and purposes of the Convention and that this freedom has been
44 frustrated in this case.

45
46 Italy has deduced from this that Panama finds that the “Convention promotes the
47 freedom of navigation above any other value”, which Panama does not. Italy states
48 that

1 Establishing a link between article 87 and article 300 requires ascertaining first
2 that article 87 has been violated and then, if this violation has occurred in
3 breach of article 300. The proper approach is exactly the reverse of what
4 Panama tries to do.
5

6 However, this is not what Panama has been proposing. What Panama has proposed
7 is that article 300 does not differentiate between obligations under the Convention so
8 as to oppose good faith as a standard of hermeneutical importance, and as a
9 substantive standard of conduct.
10

11 Therefore, Panama does ask the Tribunal to interpret article 87 in a broad manner,
12 and in the light of *effet utile*. Italy believes that Panama is mistaken and, for this
13 purpose, provides a citation from the International Law Commission in paragraph 80,
14 which, however, does not make Panama's argument invalid; it rather strengthens it.
15

16 According to the textual statement of the ILC cited by Italy, an interpretation that
17 does enable the treaty to have appropriate effects should be adopted, which is
18 precisely what Panama has been arguing. It also points out that no "liberal"
19 interpretation is called for in the sense of an interpretation going beyond what is
20 expressed or necessary to be implied in the terms of the treaty.
21

22 However, Panama has never asked for an interpretation going beyond this. In fact,
23 Panama is merely asking for an interpretation that gives effect to the object and
24 purpose of the treaty. A broad interpretation is to be understood as not just looking at
25 the expressed terms of the treaty, but what is implied by it.
26

27 A narrow interpretation would render the provision on freedom of navigation
28 meaningless. In this part again, Italy mischaracterizes Panama's arguments and
29 again plays with words because Panama is not confusing articles 87 and 300 of the
30 Convention.
31

32 Italy spends a lot of sentences on reciting what Panama has stated before and
33 agrees in paragraph 73. Panama does not deem it necessary to rearticulate every
34 point of its position and will briefly touch upon another point.
35

36 Of course, Panama agrees that articles 87 and 300 are connected, and that good
37 faith is used as a substantive standard in article 300. That does not mean that
38 article 300 cannot be used as a substantive standard and *effet utile* as an
39 interpretative tool. To sum up, Panama is arguing that Italy has not acted in good
40 faith and, for that purpose, has availed itself of both the substantive standard and
41 *effet utile* as interpretative tools.
42

43 Mr President, this brings us to the end of the first part of our oral arguments in this
44 first round.
45

46 The second main issue that Panama would like to address is the violations of the
47 duty to act in good faith.
48

49 We have proved that Italy abrogated the right of Panama to enjoy the freedom of
50 navigation in the case of the *M/V "Norstar"*. However, after carefully analysing its

1 conduct in this case, we have concluded that Italy has also breached its duty to act
2 in good faith and, thus, has failed to meet its responsibilities as described by article
3 300 of the Convention.

4
5 Panama has duly articulated all of Italy's violations in its past filings with the Tribunal
6 and has linked these to the principle of freedom of navigation by enumerating the
7 obligations contained in article 87 to show how Italy did not fulfil these in good faith.
8 What follows is an enumeration of Italy's actions that failed to meet good faith
9 standards:

- 10
11 1. Delaying the arrest , thus involving both acquiescence and
12 estoppel.
- 13 2. Waiting until the M/V "*Norstar*" had left the high seas and
14 entering the territory of a third State, before executing the arrest.
- 15 3. Executing a premature order for the arrest as a precautionary
16 measure.
- 17 4. Intentionally refusing to reply to the numerous communications
18 from Panama concerning this case.
- 19 5. Continuously withholding relevant information.
- 20 6. Mischaracterizing the locus of the activities for which the vessel
21 was arrested, thereby violating the rule that no one may set
22 himself in contradiction to his own previous conduct.
- 23 7. Blaming others, including the shipowner and Spain, for its own
24 negligent actions such as
25 7.1. keeping the M/V "*Norstar*" under its absolute jurisdiction and
26 control for an excessive period, rather than promptly taking
27 positive steps to return it; and
28 7.2. concerning its maintenance; and, finally,
- 29 8. Maintaining that article 87(2) is only binding on Panama violating
30 the rule that no one can derive an advantage from his own
31 wrong.

32
33 The links between article 87 and article 300:

34
35 We will next show how Panama has linked the above list of conducts to the principle
36 of freedom of navigation by reminding the Tribunal that in Section III of its Rejoinder,
37 titled "III. Conduct related to article 87", Italy confirmed that in its Counter-Memorial it
38 had explained that

39
40 out of all the conducts that Panama claims are evidence of Italy's bad faith in
41 breach of article 300, only two bear a possible connection with article 87.

42
43 These two conducts, recognized by Italy as having a link with article 87, were
44 described as follows:

45
46 First, that even if Italy had long known that the M/V "*Norstar*" was active in the
47 bunkering activities, Italy waited until 1998 to arrest the vessel; and

48
49 second, that Italy waited until the M/V "*Norstar*" was in the port of Palma to
50 arrest the vessel, so as to make the arrest easier.

1 Since Italy has only admitted that the above two conducts have a connection with
2 article 87, let us deal with them first.

3
4 Delaying the arrest, thus involving both acquiescence and estoppel.

5
6 Italy arrested the *M/V "Norstar"* without raising even the slightest suspicion that they
7 constituted a crime in spite of the fact that the activities for which this vessel was
8 suspected of had been known to the Italian authorities for several years.

9
10 Witness Mr Rossi has confirmed that the Italian police officers who carried out the
11 arrest of the *M/V "Norstar"* had been conducting inspections of the *M/V "Norstar"*
12 during the three years prior to the arrest without finding anything amiss.
13 Nevertheless, the *M/V "Norstar"*'s operations were suddenly stopped in spite of its
14 understanding that its activities had been completely permissible.

15
16 Italy has agreed that the bunkering activities carried out in the high seas had not
17 been raising any suspicion for several years, when at paragraph 151 of its Counter-
18 Memorial it stated that

19
20 If anything, Panama's argument only demonstrates that the bunkering
21 activities of the *"Norstar"* were not as such of concern to the Italian authorities
22 and proves the diligent attitude of its investigative authorities.

23
24 When Panama argued in paragraph 252 of its Reply that Italy had not offered any
25 explanation for this, Italy responded in paragraph 82 of its Rejoinder that it had, and
26 that in the interest of brevity it would refer the Tribunal to the relevant parts of the
27 Counter-Memorial, except to stress that

28
29 the fact that Italy was not concerned by the bunkering activities of the
30 *M/V "Norstar"* confirms that the *M/V "Norstar"* was not arrested for the
31 bunkering, but only when the prosecuting authorities started to suspect that
32 the activities carried out were quite different from actual being bunkering and
33 they consisted in criminal activities under the Italian Criminal Code, and that
34 they occurred in Italy.

35
36 Panama would like to draw attention to two aspects of this passage.

37
38 First, contrary to what the documentary evidence has indicated, namely that the
39 *M/V "Norstar"* operated only on the high seas and that Italy was not any more
40 concerned with the bunkering activities, Italy has now stated that the reason for the
41 arrest of the *M/V "Norstar"* was the alleged crimes of smuggling and tax fraud inside
42 of Italian territory.

43
44 As we have already demonstrated, it is obvious that Italy has intended to
45 substantially modify the facts of this case concerning the *locus* of the *M/V "Norstar"*'s
46 activities and their relationship with the arrest order.

47
48 The second aspect worthy of attention concerns the moment "when the prosecuting
49 authorities started to suspect", as Italy now states, that the *M/V "Norstar"* was not
50 merely bunkering but was engaging in criminal activities under the Italian Criminal
51 Code within Italy.

1
2 However, the *M/V "Norstar"* operated only on the high seas.

3
4 Naturally, Panama has to wonder when and why the Prosecutor started to suspect
5 that the transactions conducted for three years in international waters were actually
6 crimes of smuggling and tax evasion in Italy. However, Italy has never given us a
7 clue, nor even an approximate date for this decision, thus failing to account for its
8 delay in bringing charges against the *M/V "Norstar"* without any objective evidence.
9 Italy's absence of objections to Panama's description of events in this regard
10 represents acquiescence in circumstances which generally call for an overt reaction
11 as a formal claim.

12
13 This delay may have lasted as early as 1994 to 1998. Panama has discussed this
14 matter at length before this Tribunal and has elucidated that the activities of the
15 *M/V "Norstar"* only involved the legitimate acts of buying bunkers in Italy, transporting
16 them to the high seas, and selling them to pleasure boats there. These acts were the
17 only conduct for which the *M/V "Norstar"* could have been investigated, and
18 ultimately arrested. Again, this demonstrates Italy's misconception of zonal
19 management.

20
21 Panama would also like to know why Italy continued to allow the *"Norstar"* to sell
22 bunkers on the high seas, as well as why there was a sudden change in Italy's
23 stance, redefining the *M/V "Norstar"*'s actions as criminal behaviour. In short, why did
24 Italy wait such a long time to arrest the *M/V "Norstar"*?

25
26 The tacit recognition of the legality manifested by the previous conduct of Italy was
27 interpreted as consent, which led the *M/V "Norstar"* and all the persons therein
28 interested to believe that all its bunkering operations were perfectly legal.

29
30 Acquiescence materially follows from the fundamental principles of good faith and
31 equity. The delay in considering the bunkering activities of the *M/V "Norstar"* as
32 crimes is equivalent to tacit recognition that such conduct was licit. Thus, the sudden
33 change of policy of the Italian authorities concerning the *M/V "Norstar"* certainly
34 reflects lack of good faith.

35
36 Having allowed the bunkering operations without interference confirms Italy's
37 application of estoppel as already accepted by international law in the *Shufeldt* case,
38 where it was stated that

39
40 The Government never having taken any steps to put a stop to a practice which
41 they must have known existed ... thus making themselves *particeps criminis*
42 in such breach (if any) of the law cannot now in my opinion avail themselves
43 of this contention.

44
45 Italy diverted attention from the bunkering operations of the *M/V "Norstar"* on the
46 high seas the moment the Prosecutor started to suspect the occurrence of
47 smuggling and tax fraud. By doing so, Italy's conduct deviated significantly from that
48 applied in good faith.

1 The second Italian act constituting a lack of good faith that Italy has accepted as
2 having a connection with article 87 is its decision to wait until the *M/V “Norstar”* was
3 in a foreign port to arrest her.

4
5 In paragraph 152 of its Counter-Memorial, Italy said that its decision to arrest the
6 *M/V “Norstar”* in Spain was to avoid breaching article 87, which it has confirmed in
7 paragraph 83 of its Rejoinder by saying that this “was necessary precisely in order to
8 be sure not to breach article 87”.

9
10 However, this stated intention has not been supported by the evidence. The Decree
11 of Seizure itself proved the real intention of Italy by saying:

12
13 Having noted that the seizure ... must be performed also in international
14 seas, and hence beyond the territorial sea and the contiguous vigilance zone.

15
16 No document could more clearly show the reasons why Italy ordered the arrest of
17 the *M/V “Norstar”* in another country’s jurisdiction.

18
19 It is difficult to understand how Italy felt it would not breach article 87 when the arrest
20 was still based on the activities the *M/V “Norstar”* was carrying out on the high seas.
21 More importantly, as Captain Husefest of the *M/V “Norstar”* has stated, Italian
22 gunships threatened the *M/V “Norstar”* in international waters. Such an action clearly
23 exhibited bad faith.

24
25 Since Italy has admitted that arresting the *M/V “Norstar”* on the high seas would
26 have constituted a violation of its freedom of navigation, Panama would then like to
27 ask: is it good faith on the part of a coastal State to avoid arresting a vessel when
28 traversing its own territorial waters or international waters, for acts carried out there,
29 but rather wait until it sailed into the port of another State to do so? Clearly, the
30 answer is no, since such behaviour is deceptive in nature.

31
32 Italy has been unable to answer those questions because there is no good faith
33 explanation for its actions.

34
35 The Italian Prosecutor knew that the activities carried out by the *“Norstar”* were on
36 the high seas, so that arresting it there would clearly amount to a breach of
37 article 87. Consequently, the decision to detain this vessel in the internal waters of a
38 third foreign State was a clear intentional attempt to circumvent both the letter and
39 the spirit of this provision of the Convention.

40
41 Panama’s argument is that the *locus* where the *M/V “Norstar”* was arrested does not
42 have any bearing on the lawfulness of the order because what matters is where the
43 vessel’s business operations were actually performed, in this case on the high seas.

44
45 In addition to the above discussed two acts that Italy has acknowledged as lacking
46 good faith and having a link to article 87, Panama also submits that since no *fumus*
47 *commissi delicti*, *fumus boni iuris*, or *periculum in mora* applies, Italy’s arrest order
48 violated its duty to act in good faith.

49
50 Was it necessary, justified, urgent and/or reasonable to arrest the *M/V “Norstar”*?

1
2 According to the UNCLOS commentary by Proelss,

3
4 Article 300 is limited in its effect to an auxiliary function of acting as “a catalyst
5 between the facts and the norm” along the lines of the notion of
6 reasonableness.

7
8 An indicator of the meaning of reasonableness and the factors to be demonstrated in
9 the “*Camouco*” Case before this Tribunal in determining whether the bond imposed
10 by a French court was reasonable. The Tribunal considered a number of factors,
11 including the gravity of the alleged offences, the range of penalties that could be
12 imposed, the value of the detained vessels and cargos seized, and the amount of the
13 bond imposed by the detaining State, amongst others.

14
15 Those factors led the Tribunal to find that the bond imposed was unreasonable.
16 Likewise, the present case can also be examined to determine whether Italy acted in
17 a reasonable manner, in good faith. For instance, was the amount of the security
18 proposed by the Italian Prosecutor as a condition for release of the vessel
19 reasonable?

20
21 On 11 August 1998, the arrest order was issued and it was sent to Spain the very
22 same day. However, the Italian Prosecutor based his decision only on Italian
23 jurisdiction and legal regime, despite the fact that the *M/V “Norstar”* was a foreign
24 flag vessel representing another State. This led to the wrongful belief that, since the
25 vessel was not on the high seas, no breach of article 87 could be attributed to Italy.

26
27 However, there has never been any principle, precedent, nor piece of evidence to
28 support this belief. The right to freedom of navigation applies just as much to vessels
29 in the internal waters of a foreign State as it does to their normal commercial
30 operations on the high seas, simply because such business depends upon their
31 ability to return to open water. Freedom of navigation encompasses freedom of
32 movement of ships, as was expressly mentioned by Judge Wolfrum in his statement
33 of ITLOS on 8 January 2008.

34
35 In paragraph 133 of its Counter-Memorial, Italy gave another reason for arresting the
36 *M/V “Norstar”*, stating that it was acting

37
38 to secure evidence which was necessary in order to ascertain whether the
39 defendants had committed certain crimes on the Italian territory.

40
41 Yet, the law of the sea does not support the hindrance of the movements of foreign
42 vessels to “ascertain” the existence of suspected crimes. In fact, when we carefully
43 analyse all the Italian pleadings in this case, we can easily see that Italy has
44 grounded all of its arguments in potential, alleged suspicions, thought of, or imagined
45 crimes or offences.

46
47 Was the commission of a crime objectively proven to support an order of arrest
48 based on a precautionary measure? No, because the arrestor State has not shown
49 the existence of the necessary *fumus boni iuris* or *fumus commissi delicti* and
50 *periculum in mora*, which are conceptually at the root of any such action.

1
2 However, precautionary or interim measures may be ordered only if it has been
3 established that they are, one, justified *prima facie* in fact and in law (i.e. *fumus boni*
4 *iuris* and *fumus commissi delicti*), and that they are urgent (i.e., *periculum in mora*).

5
6 In addition, *periculum in mora* implies that there had to be a risk of imminent and
7 irreparable harm to the interests of an arresting State, to be avoided by means of an
8 arrest as a precautionary measure. Italy has not demonstrated any *periculum* nor
9 any risk of suffering serious and irreparable damage.

10
11 In fact, as of yet, no such risk has ever been raised during the proceedings in Italy,
12 or before this Tribunal. Panama considers it pertinent to recall that on 4 September
13 1998, the diplomatic service of its Foreign Office in Rome rightly warned the Italian
14 Prosecutor of the international law implications of arresting another vessel, as it did
15 in the case of the “*Spiro F*”, but, despite such warning, Italy went ahead with the
16 arrest.

17
18 If Italy had been acting in good faith in its international dealings concerning freedom
19 of navigation, it would have taken the time necessary to determine the validity of this
20 warning.

21
22 If Italy had also considered the interests of Panama, it could have waited to
23 determine how its judiciary would assess the viability of the Prosecutor’s suspicions
24 before going ahead with the arrest. In this event, no breach of article 87 would have
25 ensued, and no claim would have been presented before this Tribunal.

26
27 The acts or omissions complained of by Panama are all based on the abuse of Italy’s
28 public authority (*acta jure imperii*). When such authority is wrongfully exercised, and
29 the force of legal proceedings is used to submit innocent persons to criminal trial, the
30 confiscation of their property, or other damage, an abuse of rights based on a lack of
31 good faith inevitably ensues.

32
33 Even if the interpretation of the Italian customs laws had given rise to concerns
34 regarding the possible commission of a crime in this case, such concerns would not
35 have constituted probable cause for seizure.

36
37 Probable cause implies that a seizure will be made under circumstances which
38 warranted suspicion. However, there were no such circumstances. If some doubt as
39 to the application of the Italian jurisdiction had arisen, it would have been clear that
40 further action by Italy would be at its own risk. Since the Italian judicial authorities
41 themselves have held that Italy’s pursuit of the “*Norstar*” was wrongly executed,
42 international liability clearly arises, just as it did in the “*Coquitlam*” Case.

43
44 Panama’s position is that before arresting a vessel, the arresting State must
45 establish the existence of a probable cause to believe that an offence has truly been
46 committed and that the defendant is likely to have committed it.

47
48 On 18 December 1920, the International Arbitral Award found that the officer
49 ordering the arrest acted in the *bona fide* belief that revenue laws had been

1 breached in the case of the “*Coquitlam*” between Great Britain and the United
2 States. In other words, the good faith of the arresting officers was unquestioned.

3
4 However, even though this was taken into account as an explanation given by the
5 same officers for their actions, it could not absolve the liability of the Government of
6 the United States to Great Britain. At that time, the interpretation of the US customs
7 statutes gave rise to some doubt, which negated the notion that there was probable
8 cause for seizure.

9
10 Probable cause for seizure was defined by United States Chief Justice Marshall in
11 that case as something that

12
13 in this case there was no doubt as to the circumstances of fact under which
14 the seizure took place, but, ... since it has been decided by the United States
15 judicial authorities that this application was wrong, liability clearly arises.

16
17 The arresting State must establish the existence of probable cause to believe
18 that an offense has truly been committed and that the defendant is likely to
19 have committed it.

20
21 Along the same lines, Panama concludes that in this case Italy has not proved it had
22 a probable cause for the arrest. In any case, there was no urgency for Italy to
23 enforce it. Ultimately, no crime, alleged, suspected, or thought of, could have justified
24 the conduct resulting in the wrongful arrest of this vessel.

25
26 I will now ask you, Mr President, to give the floor to Ms Mareike Klein who will
27 continue with the next issue, titled “Intentional Silence”.

28
29 **MS KLEIN:** Distinguished President, Members of the Tribunal, it is an honour for me
30 to appear before you today, representing the Republic of Panama in the
31 *M/V “Norstar”* Case. I will now move to our next point on intentional silence.

32
33 Although during the Preliminary Objections phase of this trial, Panama has had
34 opportunity to observe the consequences for Italy due to its failure to answer any of
35 Panama’s communications concerning the arrest of the *M/V “Norstar”*, Panama still
36 believes that there is more to say about this issue of silence. Panama contends that
37 by keeping intentionally silent when confronted with the claim that article 87 was
38 breached, Italy acted in a manner contrary to its duty of good faith.

39
40 In the *Pedra Branca* Case between Malaysia and Singapore *Pedra Branca/Pulau*
41 *Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)* [2008], the ICJ
42 held that: “Silence may also speak, but only if the conduct of the other state calls for
43 a response.”

44
45 Italy excuses its inaction by citing its belief that the prospects of a settlement were
46 non-existent. If Italy knew that such prospects were “non-existent”, why did it not
47 communicate this immediately to Panama? Instead, Italy decided to hide its true
48 beliefs by refusing to reply at all. This exemplifies a further failure to fulfil the good
49 faith expectations of article 300.

1 The Italian refusal to answer has cost Panama a great deal of time, efforts and also
2 resources.

3
4 Panama submits that such silence is the basis for a material finding of conduct
5 contrary to the duty of good faith primarily because Italy still has not provided any
6 valid justification for such behaviour.

7
8 On the contrary, Italy persists in claiming that its silence did “not mean that there was
9 no reason for Italy other than bad faith”.

10
11 But what is that “other reason” that Italy has continually failed to identify? All of
12 Panama’s efforts to obtain a response regarding this claim have been unsuccessful,
13 yet in spite of this Italy now simply suggests that Panama is only presuming Italy’s
14 bad faith without evidence.

15
16 In fact, by making unsupported charges about what is presumed, Italy has continued
17 to act contrary to its good faith duty. Panama will confirm this when we examine the
18 Italian conduct with reference to its duty to maintain the *M/V “Norstar”* while it was
19 under its jurisdiction and control and its duty to take positive steps to return it to the
20 shipowner as had been ordered by Italian courts.

21
22 I will continue with Panama’s next point: the continued withholding of relevant
23 information.

24
25 In addition to the letter (Telespresso), dated 4 September 1998, included in Annex 7
26 of the Reply, warning the Italian Prosecutor of the non-existence of a contiguous
27 zone, Panama has also shown in Annex 12 of its Reply, that on 18 February 2002
28 the Prosecutor received another letter (apart from the one dated 12 February 2002)
29 from the same Service of Diplomatic Litigation, Treaties and Legislative Affairs of the
30 Ministry of Foreign Affairs of Italy, which expressly referred to the Panama agent’s
31 claim for damages.

32
33 However, it was not until 2016 that Italy, for the first time, disclosed the existence of
34 these very important documents; and, as of now, Italy has not provided any of the
35 letters sent from its own Ministry of Foreign Affairs that Panama has requested
36 through the intervention of this Tribunal.

37
38 Panama contends that Italy has always been opposed to disclosing all of the public
39 documents concerning the criminal proceedings against the *M/V “Norstar”*. As a
40 result, it has withheld vital information relevant to this case.

41
42 This is certainly evidence of the lack of compliance on the part of Italy with its duty to
43 act in good faith because the refusal to respond described above not only shows that
44 Italy had taken due notice of this claim, but also that it had been investigating it in a
45 confidential manner since at least September 2001 – and this is important – without
46 engaging directly with Panama as it should have done from the very first instance
47 that Panama attempted to open a dialogue.

48
49 If Panama had been informed in 2001 by Italy that all its efforts to find answers to its
50 formal requests would have been in vain, it would have proceeded accordingly.

1
2 By withholding relevant information, Italy breached its duty to cooperate in the
3 resolution of this conflict – there would have been opportunities before coming to this
4 Tribunal – and therefore failed to act in good faith as expected by the international
5 community of sovereign States.
6

7 Further grounds for requesting this Tribunal to hold Italy in breach of its responsibility
8 to act in good faith concern the contradictory reasons it used to support its order of
9 arrest.
10

11 I will now move to *non concedit venire contra factum proprium* (estoppel).
12

13 Italy has admitted that the arrest of the *M/V “Norstar”* was executed while it was
14 within the internal waters of Spain due to its belief that arresting it on the high seas
15 would amount to a breach of article 87. On the other hand, Italy also based its order
16 of arrest on the constructive or presumptive presence doctrine, which may only be
17 applicable for seizures on the high seas. This represents a clear contradiction.
18

19 With respect to those grounds concerning the location of the activities for arresting
20 the *M/V “Norstar”*, Italy initially stated that the arrest order was given for offshore
21 bunkering that the *M/V “Norstar”* had been carrying out. Later, however, it argued
22 that the *locus* of activity was within Italian territory, without giving any further
23 explanation or justification as to how it reached this conclusion. It now seems
24 apparent that Italy was trying to suggest that article 87 was not violated in this case.
25

26 It is highly contradictory for Italy to first admit that the arrest order was issued based
27 on conduct on the high seas, beyond its territorial waters, and then claim that the
28 basis for the arrest order had been criminal operations within Italy.
29

30 As such, Italy’s conduct may hardly be considered to exemplify good faith, since this
31 contradiction in light of the facts implies that Italy sought to mislead by revising its
32 justification for the arrest. Panama contends that the conduct of Italy constitutes
33 procedural estoppel because a State is not allowed by the law to state something
34 and then pretend that this statement had no importance. Panama has relied, from
35 the very beginning, on the veracity of the original statement, and has acted
36 accordingly prior to and during these proceedings.
37

38 The rule *non concedit venire contra factum proprium* also concerns the location of
39 the activities for which the *M/V “Norstar”* was arrested, as well as the fact that Italy
40 kept the *M/V “Norstar”* under its jurisdiction for an excessive period rather than
41 promptly taking positive steps to return it.
42

43 Since Italy had once determined that the *M/V “Norstar”* had transacted its business
44 beyond its territory, it is disingenuous for it to contend now that the *M/V “Norstar”*
45 “was arrested to secure evidence for crimes on the Italian territory”.
46

47 Italy’s denial of its own reasons is itself a breach of its duty of good faith. Although
48 Italy did take into account the Savona judgment confirming that the *M/V “Norstar”*
49 transacted its business extraterritorially, it did so only in a footnote, showing that it
50 has not yet sufficiently considered that the Savona court said that,

1
2 before asserting any kind of criminal liability, a preliminary test is needed as to
3 where the provision of supplies occurred because if it took place outside the
4 line of territorial waters no one of the offences charged does actually exist.
5

6 It is inconsistent, then, for Italy to subsequently allege otherwise, as it has in
7 paragraph 135 of its Counter-Memorial, when it stated that the reason for the arrest
8 of the “*Norstar*” was for “a crime that it was suspected of having [been] committed in
9 Italy”.

10
11 As a consequence, Panama requests the application of the principle of *non concedit*
12 *venire contra factum proprium* because, if Italy had originally stated that the
13 *M/V Norstar*’s conduct had taken place outside its territorial waters, no offences
14 were actually committed. The law forbids Italy to now argue in direct opposition to
15 the conduct it itself had stated was responsible for this case being brought before the
16 Tribunal.
17

18 With regard to the fact that Italy kept the *M/V “Norstar”* under its jurisdiction for an
19 excessive period of time without taking positive steps to return it, it is ironic that after
20 suddenly rushing to arrest the *M/V “Norstar”* as we have demonstrated before, Italy
21 did not show the same interest or the same sense of urgency when it came to
22 returning it. Despite knowing that the order of arrest was revoked, Italy did not take
23 any operative measures to promptly return the vessel to its owners or to Panama.
24

25 This was proved on 21 March 2003, when Italy told the shipowner that

26
27 the deadline to withdraw the vessel was 30 days from receiving the
28 communication and that in case of nonwithdrawal, the judge would order the
29 sale.
30

31 In an attempt to profess its good faith, Italy has stated in para. 264 of its
32 Counter-Memorial that it tried to return the “*Norstar*” claiming that “only about
33 5 months passed between the shipowner’s request for release and the actual
34 knowledge by him of the release”, considering this to be “hardly a long
35 detainment able to deprive a shipping company of all of its income”.
36

37 However, Italy has only referred to the timeframe between the shipowner’s request
38 and its actual knowledge of the release. With this argument Italy has, again, intended
39 to divert the discussion from the issue of the excessive period of detention and its
40 failure to take positive steps to return the vessel.
41

42 In fact, the *M/V “Norstar”* has never been returned. Even after considering the Italian
43 comment on this matter *in arguendo*, Panama has concluded that Italy has not
44 shown good faith because it has distorted reality. In addition, five months is certainly
45 long enough to destroy the financial viability of a shipping business as the one that
46 was conducted by Intermarine.
47

48 Whereas five months has been considered by Italy to be “hardly a long detainment”,
49 Panama’s position is that damages started from the very first moment that the vessel
50 was actually detained.
51

1 Thus, the material period of delay is from the date of the execution of the arrest
2 (25 September 1998 or 5 September 1998, as it has been accepted by Italy as well)
3 to the date when the vessel was ultimately sold in 2015. Yet, what is even more
4 important is that the productive capacity of the ship ceased, and the shipowner lost
5 access to its property.
6

7 Since the procedure to return or release the *M/V "Norstar"* was never effectively
8 initiated, and despite all the efforts from Panama to communicate, Italy never
9 showed any interest in discussing this issue with Panama or its shipowner. The lifting
10 from the arrest was never effectively enforced. Due to Italian inaction, and its
11 avoidance to communicate, Panama now expects to be compensated since this is
12 the only possible form of reparation that remains viable.
13

14 Although Italy has suggested that by ordering "the definitive release of the vessel", it
15 has been released of its liability, the truth is that there has been no such effective
16 release and delivery at all, and its liability continues until it has fully compensated
17 Panama for all the losses that it has caused.
18

19 Italy has admitted that on 13 November 2006 the vessel was still under the
20 jurisdiction of the Savona Tribunal. Since then, Italy has not showed any concern
21 about the fate of the *M/V "Norstar"* but a complete avoidance of communication.
22 Therefore, it is totally disingenuous for Italy to now suggest that the burden of
23 responsibility falls on the owner, because he failed to retrieve the vessel in either
24 1999 or 2003.
25

26 The Italian reference in paragraph 60 of its Counter-Memorial to
27

28 the Tribunal of Savona requesting the Spanish Authorities to inform the
29 custodian of the ship of the release and return to the shipowner, and then
30 confirm the release to the Italian authorities
31

32 represents another example of a conduct far from the requirements of good faith,
33 because Italy has attempted to absolve itself with a letter "dated 17 April 2003,
34 saying that the Spanish Judicial Authorities instructed the Provincial Maritime
35 Service to lift the detention" and that "on 21 July 2003 the detention was
36 consequently lifted ... with Order No 84/03", continuing by adding in paragraph 60
37 that the following day
38

39 the Captain of the Provincial Maritime Service informed the competent
40 Spanish Judicial Authorities that the detention of the *M/V "Norstar"* had been
41 lifted, and attached the relevant documentation as evidence
42

43 and adding that
44

45 The document withdrawing the seizure and custody No 84/03 dated 21 July
46 2003 is attached.
47

48 However, no such document referred to as "Order No 84/03" was included with the
49 Counter-Memorial, nor has it ever been presented by Italy into evidence in this
50 Tribunal.
51

1 Nevertheless, even if such a release order had been attempted to be executed, it
2 would not have been effectively enforced without an actual and formal delivery and
3 receipt by the shipowner or authorized persons.
4

5 Italy argues that by ordering the “definitive release”, the responsibility for its actions
6 shifted to the shipowner who “failed to retrieve it” without noting that damages had
7 already been incurred, and that this does not rectify the situation.
8

9 Although the Italian courts ordered the release, this decision was never executed
10 and Italy has not taken any further steps to comply with it, or even to show that it has
11 ever had the intention to do so. One single example will suffice: Where are the
12 documents of the *M/V “Norstar”*? Where are the logbooks of the *M/V “Norstar”* of the
13 deck and the engine, which were always kept also on the deck of the vessel? If Italy
14 had truly desired to show the condition of the *M/V “Norstar”* or its sincere wish to
15 return it, it would have taken care of this important document, as well as others,
16 because they were on the vessel when the vessel was seized. However, if we asked
17 Italy about it, the most probable answer would be that it should be in Spanish hands
18 and therefore no responsibility should be attributed to Italy for it in this case.
19

20 Mr President, I would now respectfully ask you to call Mr Carreyó to continue with
21 Panama’s pleadings.
22

23 **THE PRESIDENT:** Thank you, Ms Klein. I then give the floor to Mr Carreyó to make
24 a further statement.
25

26 **MR CARREYO:** Thank you, Mr President.
27

28 Continuing with the analysis of the violations of the duty to act in good faith, Italy
29 believed that it was not actually responsible for the return of the *M/V “Norstar”*, but
30 rather that it was up to the Spanish authorities and the shipowner to make sure that
31 the vessel was returned.
32

33 We will remind the Tribunal that when, during the Preliminary Objections phase, Italy
34 referred in its Reply to the Panamanian complaint that the *M/V “Norstar”* had been
35 “held longer than sensible for purposes of a lawful investigation”, Italy responded that
36 “it was not the Italian authorities that held the vessel” and that since the seizure was
37 not enforced by the Italian authorities, nor was it enforced in Italy, “the Panamanian
38 claim had been addressed to the wrong respondent.”
39

40 Italy has now again intended to blame Spain, not only for the release order
41 enforcement but also for failing to maintain the vessel and to inform the relevant
42 parties to ensure the return of the vessel.
43

44 Although this Tribunal has already held that this argument lacks legal support,
45 Panama would like to refer to it again only to show Italy’s lack of compliance with its
46 duty to act in good faith.
47

48 Concerning Italy’s promise to ensure the return of the *M/V “Norstar”*, it is to be
49 recalled that in its Counter-Memorial Italy stated that it had ordered the unconditional
50 and immediate return of the *M/V “Norstar”* by transmitting the release order to the

1 Spanish authorities, requesting them to inform the custodian of the vessel and
2 ensure its actual return to the shipowner.
3
4 Again, Italy believed that it was not actually responsible for the return of the “*Norstar*”
5 but rather that it was up to the Spanish authorities and the shipowner to make sure
6 that the vessel was returned.
7
8 Despite the grave responsibility that Italy has had as the arresting State, it has not
9 shown any concern as to whether the *M/V “Norstar”* was returned, safely or not.
10
11 Panama contends that Italy should have done much more to comply with the
12 standards of international conduct reflected by the law of the sea. Failing to meet
13 these standards while pretending otherwise is hardly evocative of good faith.
14
15 Meanwhile, no evidence has been presented by Italy to show that the
16 *M/V “Norstar”*’s owner ever failed to fulfill his obligations. Italy could and should have
17 instituted proceedings and/or contacted the Government of Panama to facilitate the
18 *M/V “Norstar”*’s return. This would certainly have then shifted the burden of proof to
19 the shipowner and there would have been certitude about Italy’s intention to return
20 the vessel.
21
22 Italy has inverted the natural order of things. Instead of stating that it was its duty as
23 the arrestor State, to provide for the formal delivery of the vessel, the Italian
24 allegation has been that neither Panama nor the shipowner were complying with “the
25 obligation to retrieve the vessel”.
26
27 The retrieval of the vessel was not an obligation but a right of the shipowner.
28 However, Italy could have provoked the legal existence of such an obligation on the
29 part of the shipowner by instituting proceedings giving rise to determine the validity
30 of the apparent Italian intention of delivery, to show that it was truly interested in
31 returning the vessel.
32
33 This is known as *mora accipiendi*. The *mora accipiendi* is the delay of the creditor, or
34 the delay in performance on the part of the creditor. This might then have been the
35 basis of a valid Italian defence in this Tribunal. However, this has not been the case.
36 On the contrary, Italy has always shown how disengaged it was from the
37 *M/V “Norstar”*’s fate, as we will see later on.
38
39 On the other side, Italy was and indeed still is under the onus to first prove that it has
40 done what was incumbent upon it, in this case ensuring that the *M/V “Norstar”*’s
41 release was fully executed, before advancing negative aspersions that the shipowner
42 was actively refusing to take back its vessel without any valid reason.
43
44 In fact, the *M/V “Norstar”*’s owner had valid reasons for not agreeing to Italy’s terms
45 for recovering the vessel – the excessive bond on the one hand and
46 unacknowledged communications in this regard on the other.
47
48 The rule *negativa non sunt probanda* means that Panama is freed of the duty to
49 establish the absence of a fact. Instead, the burden of proof is placed on Italy to
50 show that fact’s existence. In this case Italy has failed to provide such proof, so its

1 defence has not been validated. There is no legal duty to establish the absence of a
2 fact.

3
4 The Latin maxim *in majore minus inest* (who can do more may also do less) also
5 applies to this case. In this context, since the *M/V "Norstar"* was under absolute
6 Italian jurisdiction and control, as has been proved by the answer of the Genoa Court
7 of Appeal to a 2006 Spanish request to scrap the vessel, Italy would have been
8 expected to start proceedings. Instead, it was Panama who proved to have been
9 very diligent in communicating with Italy despite the latter's intransigence.

10
11 Under these circumstances, Italy would also be expected to present evidence
12 showing that Panama was not complying with its right to retrieve this vessel.

13
14 However, this has not been the case.

15
16 If Italy really wanted to comply with its duty first to minimize damages and, secondly,
17 to act in good faith, it could have simply ordered the sale of the *M/V "Norstar"*, as it
18 had threatened to do, at any stage of the proceedings. Instead, Italy has chosen to
19 blame Spain and the shipowner for not taking back a vessel that was under its
20 absolute control rather than either of theirs.

21
22 Despite its attempt to justify its lack of compliance with its duty to return the vessel,
23 Italy has never acknowledged that, after keeping the *M/V "Norstar"* under its
24 jurisdiction and authority, it has not acted in good faith by blaming Spain and the
25 shipowner for something that was not under their control.

26
27 Concerning the maintenance as its absolute duty, Panama recalls that Italy has
28 stated at paragraph 278 of its Counter-Memorial that

29
30 it was not for Italy to provide for the essential maintenance works to keep the
31 "*Norstar*" operative, nor to update the ship's class certificate and designation.
32 Any complaint concerning the modalities of the enforcement of the Decree of
33 Seizure, and possible damages ensuing from it, should not be addressed to
34 Italy.

35
36 It then cited the Separate Opinion of Judge Ndiaye in the Preliminary Objections
37 judgment of this case using the part where he stated that

38
39 [I]t is Italy which is responsible for the actions of the Spanish authorities, carried
40 out in its name Spain was accountable only for the manner in which the
41 seizure was carried out; that is for the protection of the integrity of the vessel
42 and crew when seized.

43
44 However, Judge Ndiaye did not only state the above part. He also added, on the
45 following page 26:

46
47 [Therefore] it is for Italy to assume the consequences attaching to its order, as
48 the communication between the two States shows. It indicates that not only did
49 Italy assume full responsibility for the seizure, but also that the two States had
50 assessed the question of Italy's responsibility in the matter....

1 It is Italy which assumes responsibility for its actions since it based its request
2 for judicial cooperation on an alleged offence which was not committed.
3

4 As can be easily seen, contrary to what Italy claims, Judge Ndiaye would hold Italy
5 entirely responsible for the *M/V "Norstar"*'s well-being. Panama objects to the tactics
6 that Italy has used to evade responsibility when it comes to the *M/V "Norstar"*.
7

8 Panama contends that if Italy had complied with its duty to act in good faith in the
9 first place, it would have put forward the entire argument that Judge Ndiaye made in
10 his judicial statement and, consequently, would have accepted its responsibility for
11 the maintenance of the *M/V "Norstar"*.
12

13 In order to show conduct in accordance with its duty to act in good faith, Italy should
14 not have portrayed Spain as the party responsible for the condition of the vessel.
15 Yet, Italy is still using Spain, as it did during its Preliminary Objections, as a means of
16 evading its own responsibility. This does not correspond to good faith conduct in any
17 way.
18

19 If the vessel had been returned within a reasonable length of time in the same
20 condition that it was in when the arrest was enforced, far fewer damages would have
21 ensued and no proceedings would have been initiated.
22

23 Furthermore, if the vessel had been well taken care of, or even maintained in a basic
24 manner, it could even have been sold before its public auction for a reasonable
25 price. In other words, Italy has had several opportunities to limit damages. Its failure
26 to do so is its sole responsibility as the State with jurisdiction and control over the
27 vessel, and this constitutes a clear failure to comply with its duty to minimize and
28 mitigate damages inherent in the good faith expectations of signatories to the
29 Convention.
30

31 While more than willing to allot Spain a portion of the blame, Italy has continued to
32 insist that the lion's share of responsibility for maintaining the *M/V "Norstar"* falls on
33 Panama and the shipowner whom it considers to be the culpable parties when it
34 comes to any damage caused.
35

36 But how could either the shipowner or Panama have maintained the ship when
37 neither had access to the vessel which has been under the exclusive jurisdiction and
38 control of Italy? Clearly the answer is that they could not and, thus, for Italy to
39 suggest otherwise is yet another example of its lack of good faith over the course of
40 this case, even if, as Panama contends at this point, it no longer makes sense to
41 argue about the condition of the vessel or its maintenance when the main issue is
42 that the *M/V "Norstar"* was never returned, either damaged or undamaged,
43 Moreover, Italy has completely forgotten about the *M/V "Norstar"* since its arrest.
44

45 It is Italy which has never provided access to evidence about the condition of the
46 vessel. Italy is the State under whose jurisdiction the vessel was kept after
47 5 September 1998, when we first learned that the *M/V "Norstar"* had become the
48 subject of a provisional measure.
49

1 Since the *M/V “Norstar”* has been under the absolute jurisdiction and control of Italy
2 since that time, it is unreasonable to ask the flag State to provide evidence about the
3 vessel’s condition when all indicators of such evidence, such as the log book, the
4 engine log book, the crew list, and any list of goods on board – any accountability of
5 the commercial aspects of the vessel – have been withheld from both Panama and
6 the shipowner even after the arrest was revoked.

7
8 The vessel was effectively confiscated from its owner, forcing a perfectly legal and
9 successful business to go to ruin. It has been shown that there was no obligation for
10 the shipowner to seek redress through the Italian domestic judicial system and that
11 article 292 of the Convention would only apply if there had been a violation of the
12 provisions of the Convention regarding prompt release, upon the posting of a bond
13 or other financial security. Since no bond was posted, this was clearly not the case.

14
15 Italy was the arresting State, and the party upon whom rested the responsibility for
16 taking care of the vessel under arrest as soon as such arrest was enforced. Italy
17 should have, then, promptly taken the appropriate steps to preserve the ship, as well
18 as pay for port fees, fuel, victualling, crew wages, and other necessities. However,
19 Italy has never shown that this was done – not even care about the custody of the
20 vessel.

21
22 On the contrary, it has become evident that Italy completely abandoned its duty to
23 provide for the maintenance of the vessel in order to prevent its decay, therefore
24 confirming its liability for the claimed damages.

25
26 Thus, Panama feels entirely justified in describing Italy’s actions, both during the
27 period between 1998, with the breach of article 87, and 2015, when the vessel was
28 auctioned, and over the course of these proceedings, as being conducted in bad faith.

29
30 The only Italian defences when it comes to the issue of good faith have either been
31 that Panama’s claim “falls outside the jurisdiction of the Tribunal” and that this issue
32 has only been raised as a “general reference to Italy’s obligations under the
33 Convention”. Neither of these defences is valid.

34
35 The reality is that Italy has completely forgotten about the *M/V “Norstar”* since its
36 arrest, only remembering that that ship existed when Panama instituted these
37 proceedings.

38
39 This negligence was further demonstrated by Italy in paragraph 71 of its Counter-
40 Memorial when it expressly admitted that it had not even known the fate of the
41 *M/V “Norstar”* until it had

42
43 learnt from Panama’s Memorial that the *M/V Norstar* was removed from the
44 harbour of Palma de Mallorca in August 2015, following a public auction.

45
46 This confirms that Italy was not complying with its duties of maintenance and care of
47 a ship under its jurisdiction and control.

48
49 Is it good faith when Italy, having jurisdiction and legal control over the *M/V “Norstar”*,
50 did not even know that the vessel had been the object of an auction sale? If Italy had

1 taken care of the *M/V "Norstar"*, as it was legally supposed to do, this vessel would
2 have been returned with only the standard wear and tear.

3
4 Approaching the last section of our oral presentation, Mr President, as part of the
5 violation of acting in good faith, we would like to deal with the legal principle that no
6 one is allowed to take advantage of its own wrong.

7
8 It has been shown that Italy has decided that the arrest of the *M/V "Norstar"* should
9 not have been kept in force, the Italian judiciary having held that "because the fact
10 did not exist, the seizure of motor vessel *M/V 'Norstar'* shall be revoked".

11
12 Panama contends that Italy is still taking advantage of its own wrong with its position
13 during these proceedings. For example, in spite of the fact that it decided to revoke
14 the arrest, Italy has now stated in paragraph 151 of its Counter-Memorial that the
15 *M/V "Norstar"*

16
17 was arrested and detained because it was allegedly part of a unitary criminal
18 plan concerning the commission of the crimes of tax evasion and smuggling
19 in the Italian territory.

20
21 By invoking its own illegal conduct in an attempt to diminish its own liability, Italy is
22 breaching the rule of *nullus commodum capere de sua injuria propria*.

23
24 Bin Cheng, in his well-known *General Principles of Law as applied by International*
25 *Courts and Tribunals*, cited the "*Tattler*" case, where the arbitration tribunal held that

26
27 It is difficult to admit that a foreign ship may be seized for not having a certain
28 document when the document has been refused to it by the very authorities
29 who required that it should be obtained.

30
31 This case is analogous to the present one, in the sense that Italy has now been
32 constructing an entirely new rationale, without considering that it is based on the
33 arguments that led to the revocation of the arrest order and the acquittal of all the
34 persons therein involved.

35
36 Italy has already concluded that no crime existed. Therefore, all current Italian
37 references to "crimes committed within its territory" are, without question, evidence
38 that Italy is attempting to take advantage of its own wrong.

39
40 This exemplifies yet another breach by Italy of its duty to act in good faith.

41
42 Due to a lack of good faith when arresting the *M/V "Norstar"*, Italy frustrated the
43 object of the UNCLOS treaty, namely, the freedom of navigation. All of the Italian
44 conduct leading up to and during the period of detainment has been in violation of
45 article 87, while its conduct since the arrest, including the examples cited by Italy in
46 its Counter-Memorial, has demonstrated a lack of good faith, thereby contravening
47 article 300 of the Convention.

48
49 It has been proved that the courts of Italy held that no crimes had been committed
50 either by the *M/V "Norstar"* or by the persons involved in its operation because the
51 activities performed by this vessel were conducted on the high seas. Since then,

1 however, Italy has been defending itself by stating that the *M/V "Norstar"* was not
2 arrested for having carried out bunkering operations on the high seas but for
3 smuggling and tax evasion. It is illegitimate for Italy to now pretend that it did not
4 know what its own courts had decided.

5
6 Italy has only itself to blame for its own errors of judgment in this regard because the
7 principle of fairness clearly demands that a State is not allowed to act inconsistently,
8 especially when it causes prejudice to others.

9
10 Nevertheless, Italy has insisted on using its own wrong to counter Panama's claim
11 regarding article 87.

12
13 By continuously asserting that it did not arrest the *M/V "Norstar"* due to its bunkering
14 operations, but rather in connection with the suspected crimes of smuggling and tax
15 evasion, Italy has been taking advantage of its own wrong.

16
17 This has been proved, with the Italian courts' judgments ordering the release due to
18 the fact that no crime had been substantiated because the place of operations of the
19 *M/V "Norstar"* was the high seas, in direct contravention of article 87.

20
21 It is not juridically logical for a State to order the deprivation of freedom, particularly
22 after such order has been held to be unlawful, only to rely on this same order to
23 defend its legitimacy.

24
25 In conclusion, it is more than evident that, by arresting the *M/V "Norstar"* for legal
26 activities on the high seas, Italy breached article 87 of the Convention, and is taking
27 advantage of its own wrong by claiming otherwise. The good faith and fair conduct of
28 the Prosecutor are questionable, and do not prevent his action from being an error in
29 judgment for which Italy is liable. All current references to "crimes committed within
30 its territory" are evidence that Italy is attempting to take advantage of its own wrong.

31
32 Throughout these proceedings, Italy has been relying on the very order that deprived
33 the *M/V "Norstar"* and Panama of freedom on the high seas in the first place.

34
35 Honourable Mr President and Members of this Tribunal, I have now finished with my
36 oral presentation on this first round of the oral hearings and would appreciate if you
37 may call on Ms Miriam Cohen, who will address the next issue on the violation of the
38 duty not to abuse rights.

39
40 **THE PRESIDENT:** Thank you, Mr Carreyó. We have reached 11.30. At this stage
41 the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at
42 noon.

43
44 (Break)

45
46 **THE PRESIDENT:** I understand that the next speaker is Ms Cohen. I now give the
47 floor to Ms Cohen to make a statement.

48
49 **MS COHEN:** Thank you, Mr President. Mr President, Members of the Tribunal, it is
50 an honour for me to continue Panama's submission in the first round. In the interests

1 of time, this morning I will focus on four points: the first one, the alleged influence on
2 the damages quantum; secondly, the non-compliance by Italy with its own order to
3 execute the release of the *M/V "Norstar"*; thirdly, the onus of proof; and then the
4 alleged contributory negligence.

5
6 Starting with the alleged influence on the damages quantum, I will start with the
7 condition of the *M/V "Norstar"*.

8
9 Italy has devoted a great deal of attention to speculating on the condition of the
10 vessel, intending to rebut Panama's claim concerning the reparation for damages
11 and the quantification of damages suffered.

12
13 Italy has simultaneously declared that the *M/V "Norstar"* was in a state of
14 abandonment, with one engine not working and with other broken parts, while being
15 used as a makeshift shelter for homeless people. To this end, Italy relied on a story
16 published on a Spanish website in 2015 that Panama had presented to show the
17 auction sale of this vessel.

18
19 In its Counter-Memorial, Italy stated that the *M/V "Norstar"* had been in such a
20 derelict condition since 14 April 1998, months before the arrest, because "the port
21 police ha[d] found on several occasions people sleeping inside"

22
23 and because

24
25 the unmade beds, cereals on the table, and towels hung on the door hanger
26 indicated the crew's rapid flight [and that] the sailors who were on board
27 disappeared leaving the boat in the middle of the night.

28
29 It added that the *M/V "Norstar"*'s condition made it unfit for navigation outside the
30 internal waters of Palma, stating that a fax, dated 7 September 1998, recounted the
31 bad condition of the chains, a broken anchor, and the breakdown of one generator, as
32 well as the lack of any fuel.

33
34 Panama contends that this third-hand evidence used by Italy is not only unreliable,
35 but also riddled with inaccuracies and contradictions. Please allow me to explain.

36
37 First, while Italy states that the vessel was in a totally decrepit state, it is noteworthy
38 that in the Statement of Detention, the Lieutenant of the Provincial Maritime Service
39 of Palma did not depict such a disastrous condition at the time of the arrest, even
40 noting that the captain "resides in the *M/V 'Norstar'*".

41
42 An officer of the Spanish Civil Guard, in a signed document, also stated that the
43 captain could be located "at the vessel where he lives" without describing any
44 squalor or abandonment.

45
46 In any case, it cannot be sustained that the immediate degradation of the *M/V "Norstar"*
47 occurred while the captain was still on board, particularly since the Spanish authorities
48 did not make any reference to such conditions on the date of the arrest's enforcement,
49 as any reasonable arrest proceedings would require from the officers in charge.

1 Italy has linked the information contained in the internet publication with the date of
2 the enforcement of the arrest, stating that at that moment the vessel “was used as a
3 makeshift shelter for homeless people”. That homeless people would immediately
4 descend on a ship just arrested in port is a most unlikely scenario. Nevertheless, Italy
5 has painted such a dramatic picture, which can be qualified as a desperate attempt to
6 suggest that the amount of damages claimed by Panama should be diminished.

7
8 Secondly, while the Memorial did say that the ship entered Palma in March of 1998,
9 Italy failed to note in its Counter-Memorial that while Panama added that

10
11 The rust, the excrement of gulls and the dust have been taking possession of
12 the ship, contributing thus to the bad state, fruit of the passage of years

13
14 it was referring to its condition in 2015, not 1998. In its arguments, Italy has not
15 made this distinction, which means that Italy has used a description of the vessel in
16 2015 to suggest that it was in such condition on the date of the arrest, 1998. This
17 represents a gross distortion of the facts. As Captain Husefest, an experienced
18 seaman, has declared in his testimony, it is an untrustworthy statement.

19
20 In other words, by means of deceptive reasoning, Italy has avoided taking
21 responsibility for its extended detention of the *M/V “Norstar”*, which ultimately led to
22 its complete deterioration.

23
24 It is true that the *M/V “Norstar”* entered Palma at the end of March 1998, but in April
25 and May the cargo hold and derrick of the vessel were extensively upgraded for the
26 lobster (insulated cooling room), and regular maintenance work was also carried out.
27 This work was completed before the ship was delivered to the charterer on 20 June
28 1998 to fulfil a charter contract dated 10 May 1998 with a cargo of gasoil from Malta.
29 The captain was Tor Tollefsen, who also loaded the vessel in Algeria. The vessel
30 was then loaded with a total of 273,776 metric tons of gasoil in Algeria and was,
31 during the summer of 1998, operating and supplying gasoil on the high seas.

32
33 The *M/V “Norstar”* had a normal bunkering operation during the summer of 1998,
34 both before departure and after arrival from Algiers. The designated position
35 approved by the customs authorities in Palma and the port authority was 24 nautical
36 miles off the coast between Mallorca and Ibiza. This position was south-east of Ibiza
37 and south-west of Mallorca, and the operation had been approved by the authorities.
38 Contrary to Italy’s 12 nautical miles, Spain had a 24 nm territorial water area. When
39 the ship was delivered, the first cargo came from Malta and later also from Algeria.
40 The list Petter Vadis sent in 2001 was information about names of mega yachts and
41 quantity delivered in the above position on the high seas.

42
43 It has also been proven that in 2001, Mr Emil Petter Vadis, then managing director
44 for the shipowner, provided a list of clients from 1998, from which it can be seen that
45 the *M/V “Norstar”* was not in a bad condition, but rather in very good working order
46 and performing her usual operations until its arrest.

47
48 **THE PRESIDENT:** Ms Cohen, I was informed that our interpreters are having
49 difficulties in following your statement. Could you slow down a little bit, so that your
50 statement is accurately interpreted.

1
2 **MS COHEN:** Certainly, Mr President. Thank you.

3 The vessel could have never been delivered on a time charter without certificates or
4 class nor without being fully seaworthy.

5
6 It is also pertinent here to refer to the fax dated 7 September 1998, in which it is
7 shown that the Port Authority of Palma had never given permission to berth the *M/V*
8 "*Norstar*" since it was in the bay. Furthermore, after the seizure, the Port Authority
9 refused to grant entrance to any berth, the reason being that the vessel carried
10 "dangerous cargo" as it considered the gasoil on board.

11
12 The fax of 7 September 1998 intended to make it clear to the port authority that the
13 ship would be seriously damaged if it remained at anchorage in the bay, and that,
14 therefore, it was urgent to find it a suitable berth. This is why Transcoma Baleares
15 SA, acting on behalf of the shipowner, presented such a distorted picture of the
16 *M/V "Norstar"*, i.e., in order to obtain a berth for the vessel.

17
18 The execution of the decree of seizure was carried out by the Spanish authorities on
19 25 September 1998, following a request from the competent Spanish judge on the
20 previous date. It would appear, however, that already on 5 September, the same
21 authorities had started the process of arrest of the *M/V "Norstar"*, moored off the port
22 of Palma de Mallorca. It appears that they did so with the assistance of Transcoma
23 Baleares SA, a service provider operating in the ports of Spanish islands.

24
25 Thus, the manner that this document has been used by Italy, in addition to the fact
26 that it could, at best, be considered as only hearsay evidence, does not constitute a
27 formal description of the vessel at that time. The photos of the *M/V "Norstar"*
28 presented to prospective clients show an entirely different vessel.

29
30 In short, the fax used by Italy does not prove that the *M/V "Norstar"* was in bad
31 condition when the arrest was made. On the contrary, Panama has shown that up
32 until that date, the vessel had been operating with complete normalcy. Thus,
33 Panama submits that it can only be concluded that the damage that befell the
34 *M/V "Norstar"* occurred subsequent, rather than prior, to the arrest.

35
36 I move on now to the non-compliance by Italy with its own order to execute the
37 release of the *M/V "Norstar"*.

38
39 Italy has argued that the damages suffered by Panama do not bear connection with
40 the breach of the Convention because the shipowner did not retrieve the
41 *M/V "Norstar"*, either in 1999 or in 2003.

42
43 Italy is trying to place a blame for damages on the owner, characterizing it as the
44 most significant event in the history of this case. This is a blatant distortion of the
45 facts.

46
47 Furthermore, even if Italy's version were true, neither of the moments Italy refers to
48 had significant weight to break the causative link between the arrest and the
49 damages Panama claims, as it proposes.

50

1 The Italian interpretation portrays a shipowner who voluntarily did not retrieve the
2 vessel, making him responsible for the damages when the onus was on Italy to
3 comply with its own order to execute the release of the *M/V "Norstar"*.
4

5 Panama takes issue with the Italian assumption, because no evidence of this has
6 been supplied. Not only was the damage caused by lack of maintenance, but neither
7 the shipowner nor Panama ever declined to take back the vessel on either occasion.
8 But allow me to elaborate.
9

10 The pretext that the shipowner did not retrieve the *M/V "Norstar"* in 1999.
11

12 The retrieval of the *M/V "Norstar"* in 1999 cannot be at the expense of Panama or
13 the owner of the vessel because the request to put down security was not supported
14 by a legal arrest.
15

16 In addition, this is particularly true because the shipowner was conducting a
17 business which was cut short by the illegitimate confiscation of its sole asset, an
18 action which deprived it of all of its income from the very moment that the arrest was
19 enforced.
20

21 Italy has claimed that such an assertion "was not supported by any evidence" and
22 that "only five months passed between the shipowner's request for release and the
23 actual knowledge by him of the release," this hardly being a "long detainment". We
24 have already referred to this erroneous characterization of its financial status that
25 Italy has implied.
26

27 If the *M/V "Norstar"* could not continue its commercial activities, according to the *res*
28 *ipsa loquitur* doctrine, it follows that he would likely be unable to put down security;
29 nor did the owner have the option of providing security through his bank, which had
30 announced by fax dated 16 September 1998 (I refer to Annex 2 of the Reply) that
31 this was not possible.
32

33 Finally, even if the owner had had the financial means to post the bond, this payment
34 would not have been reasonable because once the *M/V "Norstar"* would be released,
35 there was no assurance that it would not have been arrested again as the witness
36 Mr Morch has stated in his declaration.
37

38 If Italy truly believed that the shipowner was not complying with its duty to take
39 possession of the vessel, Italy should have conveyed this concern without delay. It
40 could have instituted proceedings to reveal the alleged lack of interest of the
41 shipowner, and/or Panama, in the fate of the vessel, if this indeed had been the
42 case.
43

44 Since this suspicion is unfounded, however, it is unsurprising that there is no
45 evidence that either Panama or the shipowner actively refused to take possession of
46 the *M/V "Norstar"*, either in 1999 or in 2003. Thus, the causative link has remained in
47 effect.
48

49 The damages incurred were proximate and foreseeable by Italy. Panama will
50 demonstrate that the causal link exists factually and legally.

1 Italy has claimed that the quantum of the bond was entirely reasonable, but Panama
2 contends that by simply characterizing the bond in this way does not eliminate its
3 original illegitimacy in the first place. The legal principle that applies here is that an
4 accessory thing does not lead but rather follows its principal. Since the arrest order
5 was revoked, there is no point in discussing anything related to that order, including
6 the bond that ensued.

7
8 On the one hand, Italy claims that at the time of the arrest the vessel “was in
9 anything but good condition” while, on the other, it demanded a security of
10 250 million lira. If the ship was only scrap, as Italy has stated, the required guarantee
11 is disproportionate and, for that very reason, unlawful.

12
13 In addition, when the arrest was revoked Italy should have released the
14 *M/V “Norstar”* without any security. The demand for a bond for an arrest that was
15 eventually revoked, was therefore unlawful, regardless of its amount.

16
17 I turn to the pretext that the shipowner did not retrieve the *M/V “Norstar”* in 2003:

18
19 Neither the shipowner nor Panama were ever contacted to discuss any steps to be
20 taken to deliver the *M/V “Norstar”* in 2003, as we heard during Mr Morch’s testimony
21 yesterday. Therefore, it is difficult to imagine how this retrieval could have taken
22 place. This lack of contact further exemplifies the lack of the Italian interest in the
23 ship’s fate.

24
25 Furthermore, the shipowner could not take possession in 2003 if it has been shown
26 that the *M/V “Norstar”* had not received any maintenance and had not been
27 surveyed, an entire responsibility of Italy, as Panama established.

28
29 Since there was not an effective return, Panama’s position is that all the damages
30 claimed in this case remain the responsibility of Italy, particularly when taking into
31 account that it has admitted that as early as 15 August 2001 Panama began claiming
32 damages.

33
34 Neither the shipowner, Panama, nor the charterer could have retrieved the vessel
35 without the knowledge and consent of the Italian and Spanish authorities, neither of
36 which ever developed or coordinated an orderly procedure for the *M/V Norstar”*s
37 transfer of control.

38
39 On the contrary, it has been shown that the Italian attitude towards the situation has
40 been to avoid any communication with Panama or the shipowner’s agent.

41
42 We have already discussed how Italy has always tried to place its own fault on
43 others. This time Italy blamed the shipowner. In this regard, Italy made available the
44 letter 415/02, dated 18 March 2003, requesting Spain to execute the release order
45 and inform the custodian of the outcome of such request.

46
47 The judgment of 13/14 March 2003 contained an order to revoke the seizure and
48 return the *M/V “Norstar”*. This was received on 26 March 2003 by Mr Arve Morch,
49 through registered mail, dated 21 March 2003.

1 In its Rejoinder, Italy stated that it informed “the Spanish authorities about the order
2 of release so that it could be executed.”

3
4 Italy is again attributing to Spain the responsibility “to execute the release order”
5 when it was its own duty, as the arresting State, to do so.

6
7 Despite the name, address, and all the particulars of the shipowner’s manager
8 having been on file with Italy, neither of these parties ever received a copy of this
9 message.

10
11 On 3 April 2003, by means of a note dated 21 March 2003, the Ministry of Justice in
12 Rome made a request to the Ministry of Justice in Oslo for international judicial
13 co-operation. This note contained the same information (i.e., the 13 March 2003
14 judgment of the Tribunal of Savona), and stated that Italy was waiting “to receive
15 receipt of the act demonstrating the communication, or to be informed of the reasons
16 for a failure to communicate”.

17
18 This document was sent out again on 2 July 2003 by the police to Intermarine’s
19 representative, Mr Arve Morch, and this time it was received on the very same day.
20 However, this was the last message from Italy that reached Mr Morch, and did not
21 provide any details about how the *M/V “Norstar”* would be returned.

22
23 Italy has simply assumed that since the shipowner was informed about its judiciary’s
24 decision to return the *M/V “Norstar”* this knowledge was tantamount to actual
25 delivering the vessel; yet, clearly, the return of the ship never occurred.

26
27 In its Counter-Memorial, Italy referred to a document entitled *Notification of the*
28 *Release by the Spanish authorities 22 July 2003*. In turn, this document mentions a
29 letter dated 21 July 2003 that was written by the Captain of the Provincial Maritime
30 Service in Spain and sent on 22 July 2003 to the judge in Palma de Mallorca.
31 However, this letter has not been placed into evidence by Italy, so we have been
32 unable to assess its value or even its veracity.

33
34 In any case, it is obvious that a document dated 21 July 2003 could not have been
35 included with the documents Mr Morch received on 2 July 2003. Therefore, the
36 shipowner was not duly and timely informed of this decision in any message sent
37 after that date.

38
39 Italy has not presented any other documentation showing there was further
40 communication regarding this matter after 21 July 2003. Therefore, it is completely
41 improper, under the circumstances of this case, to pretend that the vessel was
42 delivered by simply producing the release order.

43
44 If Italy had effectively and truly decided to execute the release of the vessel, it could
45 have easily sent an official communication to Panama or the shipowner to coordinate
46 this, particularly taking into account that Panama had been intending to
47 communicate with Italy since 2001 through its agent.

48
49 Italy has also argued that the shipowner is responsible for not maintaining the
50 *M/V “Norstar”* – but how could he? It is important to note that the *M/V “Norstar”*

1 needed to undergo a special survey every five years in order to renew its
2 classification certificate and maintain its navigation licence, the last inspection having
3 taken place in June 1996. Due to the detention by Italy, the *M/V "Norstar"* would
4 have needed extensive upgrading in preparation for the next survey in 2001.

5
6 The vessel had also to undergo annual surveys, as well as an intermediate survey
7 between two special surveys. The last special survey and dry docking was
8 performed in Valletta, Malta in 1996, where frames and some plating in the lower
9 forepeak and the floor between upper and lower forepeak were changed, and new
10 chainlockers were made. Both propellers, the two main engines and both auxiliary
11 engines were opened for inspection by *Det Norske Veritas*, and all equipment
12 checked, before the vessel was submitted to an extensive upgrading.

13
14 Also, a number of heating coils not in use for gasoil were removed in early 1997
15 during operation for the major oil company, Texaco, in Gibraltar. In addition, as a
16 result of a recommendation from *Det Norske Veritas*, during the annual survey in
17 1997, a new anchor chain was ordered from China and delivered in Malta the same
18 year.

19
20 Panama would like to stress, for the burden of proving considerations, that all the
21 documentation concerning the above maintenance records was stored in the
22 vessel's files onboard and, thus, accessible only to Italy while it held the
23 *M/V "Norstar"* under its authority and control. This was made clear by Mr Morch
24 yesterday during his testimony.

25
26 Just before the arrest and during its bunkering operations off Mallorca the ship had
27 never been alongside in port but anchored in Palma bay. While the cooling room
28 (cargo hold) was being upgraded after the *M/V "Norstar"*'s arrival from Malta, the
29 *M/V "Norstar"* was berthed to a barge in the Palma de Mallorca bay.

30
31 How could Italy expect the shipowner to take possession of his vessel in 2003, five
32 years after the seizure, when it has been shown that it had not received the
33 necessary maintenance work and had not been the subject of the corresponding
34 mandatory surveys? The answer is it shouldn't, because the responsibility for its
35 maintenance, as we have established, during that period fell entirely on the
36 shoulders of Italy, since it was Italy that had custody of the vessel.

37
38 If the ship had been issued a valid class and the appropriate certificates in 1999 or
39 any time afterwards, the shipowner would have had to be in a position to have
40 access to the vessel in the port of Palma. Unfortunately, this was not the situation.
41 Italy has never shown any acknowledgement of the surveys required to maintain its
42 class and, thus, should be held to account for this.

43
44 As already mentioned, neither the shipowner, the charterer, or the flag State, has
45 ever received any confirmation that the ship was ready to be delivered, despite
46 Italy's obligation, as the State having the *M/V "Norstar"* under its sole jurisdiction and
47 control, to do so.

48
49 Furthermore, neither the Spanish chief engineer living in Palma, the shipowner, nor
50 the flag State were ever informed about any intention to execute the order of release.

1 Instead, only upon a request from its owner to bring the *M/V “Norstar”* alongside after
2 several months in the Palma bay, did the port authority request a tug with welding
3 equipment to cut a new anchor chain bought from China, and brought the vessel
4 alongside, which the port authority had been refusing, adducing that the ship had
5 dangerous cargo (gasoil) on board.
6

7 The chief engineer was the only authorized person to start the “Norstar”’s two main
8 engines and two auxiliary engines and generators. This was the reason for using the
9 tug with welding equipment to cut the anchor chain after the decision from the Port
10 Authority to bring the ship alongside.
11

12 Despite being in possession of the particulars (name, address, telephone number) of
13 the chief engineer, to be found on the documents stored in the captain’s office,
14 however, he was never asked to help start the engines or the alternator or to lift the
15 anchor chain with the ship’s winch. This is probably why the owner never received
16 any invoice from the Palma Port Authority.
17

18 The most widely used test, the but-for test or, as it is more often encountered in civil
19 law countries, the *sine qua non* test, posits that the act or omission of the defendant
20 is the cause of the harmful outcome if the outcome would not have occurred without
21 that act or omission.
22

23 The aforementioned examples demonstrate that Italy’s omissions caused the
24 harmful outcome or the damages.
25

26 The anchorage in Palma Bay was free. The chief engineer was at his home in
27 Palma, and by the time he arrived at the port the crew on the tug explained to him
28 that they had cut the anchor chain and brought the ship alongside upon request from
29 the port authority.
30

31 Since Italy did not answer any of the communications from Panama, which initiated
32 contact in 2001, how can it seriously state that the duty to retrieve it fell largely on
33 the shipowner? After all, Italy admitted that on 15 August 2001 a letter was sent to
34 the Italian Government asking Italy “to lift the seizure within a reasonable time and to
35 compensate the damages thereto”.
36

37 I now turn to the onus of proof.
38

39 Panama requests that the Tribunal take into account its difficulties in trying to obtain
40 evidentiary documents located in either Italian or Spanish territory. Importantly,
41 Panama stresses that it has requested Italy to give access to their criminal process
42 files. Italy denied it, stating that Panama had to particularize the documents
43 requested. Panama asks: how can it be so specific about documents when we do
44 not have an opportunity to review the files. Panama even used diplomatic means
45 and no answer was received, as Panama has informed the Tribunal by means of a
46 *note verbale* recently submitted.
47

48 Panama thus hopes that the Tribunal will adjust the standard of proof placed upon it,
49 as was done in the *Corfu Channel Case*, where the Court allowed recourse to
50 indirect evidence for the same reason, namely that the United Kingdom could not

1 secure sufficient evidence because the relevant facts were within the territorial
2 sphere of Albania, to which it had no access.

3
4 In the *Parker Case*, between the United States and Mexico, the principle of
5 cooperation of the parties was also affirmed by the Claims Commission (United
6 States/Mexico) precisely because certain evidence was much easier to obtain by
7 Mexico, the defendant, than by the United States, the plaintiff, because this evidence
8 was located in its home territory.

9
10 The *probatio diabolica* rule states that the ratio inherent in the rules of burden of
11 proof for negative facts applies to cases where an actor faces problems establishing
12 the evidence, provided such problems are beyond its reach and no fault is imputable
13 to it. This principle is applicable to Panama in the present case because it has
14 requested evidence from both Italy and Spain without success.

15
16 Panama has never denied having knowledge of the release order. What Panama
17 has always argued is that simply informing the shipowner of the judgment ordering
18 the release of the vessel was not sufficient and did not relieve Italy from its duty to
19 take the necessary, positive and effective steps to enforce this order and place the
20 *M/V "Norstar"* at the disposition of the shipowner so that he could appraise its
21 condition through the intermediation of a competent authority.

22
23 Panama reiterates that if the *M/V "Norstar"* has always been under the jurisdiction
24 and control of Italy, the burden of proving its condition at the moment of the arrest
25 rests upon Italy because all the documents which could be used to prove this fact
26 may only have been presented by Italy. It is impossible for Panama to present
27 documentary evidence that Italy has had under its control and governance.

28
29 In the present case, Italy is still relying on the impetus for an arrest that was revoked
30 by its own courts. This action, found to be unsupported when legally tested within
31 Italy, cannot be expected to yield a different outcome when analysed in light of
32 articles 87 and 300 of the Convention.

33
34 Even if the *M/V "Norstar"* had been arrested within Italian territory, this would have
35 still have entailed the violation of article 87 because Italy would have still hampered
36 the freedom of navigation of a vessel conducting lawful activities in international
37 waters and would have had to rely on the same evidence.

38
39 Freedom of navigation includes activities ancillary or related to this right. There is the
40 presumption that this freedom not only applies to navigation but to new or as yet
41 unnamed lawful uses of the sea that do not compromise the rights of other states or
42 individuals.

43
44 When Italy bases its defence on describing Panama as one who simply "portrays the
45 bunkering activity on the high seas as the reason for the seizure", Panama replies
46 that the proved facts in this case refute this characterization. For instance, the
47 Tribunal of Savona judgment itself stated:

48
49 The purchase of fuel intended to be stored on board by leisure boats outside
50 the territorial sea line and its subsequent introduction into the territorial sea

1 shall not be subject to the payment of import duties as long as the fuel is not
2 consumed within the customs territory or unloaded on the mainland.
3

4 And that

5
6 whoever organizes the supply of fuel offshore – it does not really matter
7 whether this occurs close to, or far from, the territorial waters line – does not
8 commit any offence even though he/she is aware that the diesel fuel is used
9 by leisure boaters sailing from the Italian coast Nor is there an offence ...
10 when diesel fuel, either sold or transshipped offshore, has been purchased on
11 the Italian territory with a relief from the payment of excise duties because the
12 fuel was regarded as a store. These goods are then considered to be foreign
13 goods once the ship leaves the port or at least the territorial waters line.
14

15 It has also been proved that in his appeal the Prosecutor himself stated that he was
16
17 not contesting whether the vessels seized could carry out bunkering
18 operations, but rather that the activity carried out was quite different from
19 actually being bunkering.
20

21 However, Italy has not been able to explain what was this activity “quite different
22 from actually being bunkering” that the *M/V “Norstar”* was involved in which led to its
23 arrest.
24

25 Therefore, every time that Italy refers to the arrest of this vessel as if it were “in
26 connection with the suspected crimes of smuggling and tax evasion”, we are in the
27 presence of the use of evidence whose roots have been deeply affected by its
28 illegitimacy and which Panama requests this Tribunal to appraise, because a coastal
29 State is not empowered by the Convention to treat bunkering, either in its contiguous
30 zone or even less on the high seas, as amounting automatically to the unlawful
31 import of goods into its customs territory, without further proof.
32

33 I now move on to the alleged contributory negligence and duty to mitigate damages
34 claims.
35

36 By proposing the existence of contributory fault and the duty to mitigate damages on
37 the part of Panama, Italy has sought to offset or reduce the amount of compensation
38 for damages.
39

40 Italy has not established any proportionate share of causation. Therefore, Panama
41 would like to reaffirm that Italy itself has shown that the damages claimed by
42 Panama are well founded because it has tacitly acknowledged that damages have
43 indeed arisen. Without damages having been caused, no contributory fault or duty to
44 mitigate damages could be invoked.
45

46 The fact that Italy has stated that its arguments are being articulated in the
47 alternative and in another line of defence does not change the logical consequence
48 of such argumentation because if there were no damages, no active defences
49 concerning damages could have been articulated. Furthermore, the fact that Italy
50 has articulated arguments in this regard is only possible and logical if concerns
51 regarding damages were valid.

1
2 Italy has not in any of its pleadings specified any tally or percentage of contributory
3 negligence or damages that Panama should have mitigated. This makes it
4 impossible for Panama to argue against such a defence.

5
6 To briefly conclude, because Italy wrongly seized and held on to a foreign vessel,
7 Italy forced the collapse of a legitimate business and its defence to the contrary has
8 neither validity nor legal standing.

9
10 Thank you, Mr President, Members of the Tribunal, for your attention this morning.
11 This concludes my presentation. With your permission, Mr President, I would like to
12 give the floor to my colleague Dr von der Wense.

13
14 **THE PRESIDENT:** Thank you, Ms Cohen. I now give the floor to Mr von der Wense
15 to make a statement.

16
17 **MR VON DER WENSE:** Thank you, Mr President. Distinguished President and
18 Members of the Tribunal, it is an honour for me to appear before you today on behalf
19 of the Republic of Panama.

20
21 In the following statement I would like to address the matter of the amount of
22 reparation by way of compensation.

23
24 Italy has accepted that

25
26 the damages that would bear a direct connection to Italy's conduct ... would
27 be only the direct damages concerning the loss of the vessel ... and the loss
28 of the cargo ... by the charterer.

29
30 However, Italy does not offer any reasons why the rest of the damages are not to be
31 considered direct damages.

32
33 The lost profits resulting from the detention and the consequential inability of the
34 *M/V "Norstar"* to conduct further business, as well as all of the damages caused to
35 the persons connected therewith have one and only one root cause – the arrest
36 enforcement.

37
38 After supplying bunkers on the high seas for many years, the *M/V "Norstar"* was
39 suddenly detained and, as a result, the bunker remaining on board was no longer
40 available, thereby curtailing the *M/V "Norstar"*'s profitability. The ultimate demise of
41 the ship is clearly a direct consequence of the arrest and its subsequent detainment.
42 The shipowner could not have complied with his duty to pay wages to the crew while
43 the *M/V "Norstar"* was detained.

44
45 If it were not for its wrongful arrest, neither the *M/V "Norstar"*, the persons interested
46 therein, nor Panama would have had to institute proceedings. Because the
47 *M/V "Norstar"* was arrested, the owner was unable to pay the taxes and fees owed to
48 the Panama Merchant Marine; and, if it were not for the unlawful arrest of the
49 *M/V "Norstar"*, the natural persons therein connected would not have been subjected
50 to criminal proceedings in Italy and now have to appear in front of this Tribunal.

1 These proceedings have entailed expenses and legal fees, causing significant pain
2 and suffering. It is not to be considered lightly that by not responding to its claims,
3 Italy has forced Panama to hire legal counsel, at significant expense, to obtain
4 appropriate redress.

5
6 It is essential to distinguish between direct and indirect damages, and to constrain
7 Italy from exaggerating our demand, as it has when it stated in paragraph 164 of the
8 Rejoinder that Panama was attempting

9
10 to extend the scope of compensable damages also to damages that are
11 speculative, not proximate by time and logic and not naturally connected to
12 the alleged illegal act.

13
14 Italy's example, according to which the cause of a homicide could be traced back to
15 the birth of the murderer yet a future murderer being born not being attributable to a
16 mother as a causal link is entirely unfitting in this case. For a child born later to
17 become a murderer is statistically very unlikely and depends on many other factors,
18 of course. By contrast, the fact that the owner and the charterer of a vessel that is
19 being seized will suffer a loss of profit is the norm and a logical consequence.

20
21 The same applies to the other damages claimed by Panama, for which Italy denies a
22 causative link. The owner of a vessel being seized typically has to continue paying
23 the wages of the crew as well as fees and taxes to the Maritime Authority despite no
24 longer drawing revenue. Unless the responsible State releases the vessel, he will
25 typically seek legal counsel to regain possession of the vessel and will therefore
26 incur attorney's fees. Those wrongly accused of a criminal offence will typically retain
27 legal assistance and will subsequently suffer financial damages in the amount of the
28 lawyer's fees. Those who had to endure a seven-year criminal case will usually
29 suffer a significant psychological burden for years, even though being innocent and
30 acquitted at the end of the trial. If a vessel in a port is prevented from leaving the port
31 due to seizure, it will typically incur additional fees to the port authority.

32
33 All this shows that the damages claimed by Panama are by no means abstruse,
34 improbable damages which cannot be attributed to Italy. Rather, Italy must have
35 been aware at all times that the seizure of the *M/V "Norstar"* would in all likelihood
36 cause the damages. This establishes a causative link for all damages claimed by
37 Panama.

38
39 Furthermore, in paragraph 166 of the Rejoinder, Italy claims that the taxes due to the
40 Panama Maritime Authority do not constitute damages, as the owner could have
41 used other resources to pay these, for example by revenues generated in other
42 manners: by taking out a loan or from savings of the shipowner or by selling any
43 asset of the company. This of course is no convincing argument. After all, in each of
44 these examples the owner would incur an equal loss of assets elsewhere, as this
45 would reduce his savings, his other assets or revenues generated in other manners
46 by the respective amount or would have incurred other costs.

47
48 Italy's suggestions that the owner could have drawn on other assets would logically
49 only have resulted in shifting the damages to a different area of the owner's assets.
50 However, they would not have compensated for the damages incurred. The

1 damages could and, in fact, can only be compensated by the injuring party, in this
2 case Italy, compensating the damages, thus adding this sum of indemnity to the
3 assets of the injured party. This is precisely what Panama is claiming in these
4 proceedings.

5
6 Apart from this, Italy's suggestions, further, would have been impracticable. Panama
7 has already pointed out that the owner was unable to draw on other assets after the
8 arrest of the vessel and was unable to produce any other revenues, as the vessel
9 was its only one. Even the bank was unwilling to provide a security. The owner was
10 therefore in no way able to pay the taxes due to the Panama Maritime Authority from
11 other assets.

12
13 Even if the owner was able to pay some of the costs, for example the wages of the
14 crew, this does not change the fact that these costs constitute a financial loss, as a
15 payment eliminated the owner's debt and reduced his assets by the respective
16 amount.

17
18 After all, compensation for damages can, in the present case, only be made through
19 a compensation payment from Italy.

20
21 In its Rejoinder, Italy further argued that only those damages derived from the
22 Decree of Seizure or from the request for execution as such could be claimed, but
23 not from the actual enforcement of the order of arrest. Italy is quoting paragraph 122
24 of the judgment of 4 November 2016 and in paragraph 159 of the Rejoinder claims
25 that the Tribunal

26
27 limited its investigation to the compatibility with Article 87 of the Decree of
28 Seizure and the Request for its Execution, as opposed to their actual
29 execution.

30
31 This argumentation of Italy of course is not convincing in any way. Italy is once again
32 trying to deny its responsibility for the enforcement of the arrest by shifting all
33 responsibility to Spain, although Italy itself has given the order for that enforcement.
34

35 In addition, Italy cited the judgment of 4 November 2016 deliberately incompletely.
36 After all, further down in the judgment, in paragraph 165, the Tribunal states:

37
38 In the view of the Tribunal, the above facts and circumstances indicate that,
39 while the arrest of the *M/V "Norstar"* took place as a result of judicial
40 cooperation between Italy and Spain, the Decree of Seizure and the request
41 for its enforcement by Italy were central to the eventual arrest of the vessel. It
42 is clear that without the Decree of Seizure, there would have been no arrest.
43

44 In paragraph 166 of the judgment, the Tribunal further stressed it

45
46 does not consider relevant to the present case the reference made by Italy to
47 the distinction between a State's conduct that completes a wrongful act and
48 the State's conduct that precedes such conduct and does not qualify as a
49 wrongful act, stated in the *Gabčíkovo-Nagymaros Project* case.
50

1 But rather:

2
3 The present case, which involves the action of more than one State, fits into a
4 situation of aid or assistance of a State in the alleged commission of an
5 internationally wrongful act by another State.
6

7 Therefore, not Spain, but Italy is responsible for the enforcement of the arrest, even
8 if Italy sought assistance from Spain. After all, as the Tribunal accurately stated,
9 without the Decree of Seizure and the request for its enforcement, there would have
10 been no arrest.

11
12 As a result, it is not a matter of distinction whether the damages incurred were
13 caused by the Decree of Seizure, the request for execution as such, or by the actual
14 enforcement of the order of arrest. After all, Italy is responsible for all three
15 proceedings, thus all damages caused by these. In other words, the enforcement of
16 the arrest is only the third step in the causal chain initiated by Italy alone.
17

18 Italy therefore cannot dispute that there is a causal link between the Decree of
19 Seizure and the request for execution on the one hand and all damages claimed by
20 Panama on the other hand.

21
22 I would now like to address the individual heads of damages.

23
24 First, I would like to address the value of the *M/V "Norstar"*. Based on the
25 examinations of the witnesses, I draw the following two conclusions.

26
27 Firstly, Italy's claim of the estimation of value from C M Olsen A/S not being based
28 on a physical inspection is false. The inspection might not have occurred at the
29 actual time of the arrest – how could it? – which was also stated in the estimation of
30 value. However, C M Olsen A/S inspected the *M/V "Norstar"* prior to signing the
31 charter contract. C M Olsen A/S also had pictures showing the *M/V "Norstar"* during
32 its use by the charterer. Since the charter contract took effect on 20 June 1998 and
33 expired on 24 September 1998, the pictures were three months old at the most. After
34 all, the *M/V "Norstar"* also had the required class records, although CM Olsen A/S
35 was unable to verify this personally, as the papers were aboard the *M/V "Norstar"*.
36 However, the witness Arve Morch confirmed the existence of the class records and
37 that the vessel was in good physical and seaworthy condition. This was also
38 confirmed by the witness Tore Husefest.
39

40 This all leads to the conclusion that the estimation of value is very sound and
41 realistic and reflects the actual value of the *M/V "Norstar"* at the time of the arrest.
42 The estimation of value is therefore of very evidential value. Nevertheless, if Italy
43 considers that the estimation cannot be accepted against all these considerations,
44 the burden of proof for contradicting facts lies with Italy.
45

46 Secondly, Italy's claim that the estimation of value confuses the criteria used for
47 estimation of the damage for the direct loss with the criteria used for estimation of
48 *lucrum cessans* is also not convincing. As calculated by the expert Mr Estribí, it is a
49 matter of fact that the value of a vessel particularly also depends on whether it can
50 be chartered out for a profit.

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Both of these aspects are not mutually exclusive. Had Italy immediately refunded the US\$ 625,000.00 for the loss of the vessel, the owner would have been able to purchase and charter out an equivalent replacement vessel and would not have incurred further loss of revenue, but the loss would have remained US\$ 625,000.00. However, since Italy did not promptly compensate the loss of the vessel in the amount of US\$ 625,000.00, further damages in the form of loss of revenue were incurred.

The fact that these additional damages were incurred cannot retrospectively affect the value of the vessel at the time of the arrest. Therefore the value of the vessel of US\$ 625,000.00 was a correct estimate. Whether or not an additional loss of revenue was incurred does not affect the value of the vessel. After all, there is no confusion of criteria, as falsely alleged by Italy.

Based on this, the estimation of value is compelling evidence of the value of the *M/V "Norstar"*. Panama has sufficiently demonstrated that the owner suffered financial damages of US\$ 625,000.00 due to the loss of the *M/V "Norstar"*, to be compensated by Italy.

Next I will address the damages for loss of revenue to the owner.

In this regard, Italy alleges Panama is unjustly applying interest to loss of potential revenue, incurring twice in double recovery. Italy cites Professor Stephan Wittich in this respect, who stated:

if lost profits are to be awarded, they may not be the basis for an award of interest ... because the capital sum cannot be simultaneously earning interest and generating profits.

However, this argument does not apply in this case. After all, for each year Panama is claiming the loss of profit, the owner suffered for the respective year for being without the ship. However, this loss of profit is not included as a cost item in the following year. In fact, no damages are claimed for that the previous year's lost profits could have generated profits.

Thus, Panama – according to Professor Stephan Wittich – can (at a minimum) demand interest for the respective loss of profit for each single year, namely until the respective loss of profit is compensated by Italy, which it has not done to date. Interest can therefore be rightly be demanded to this day and beyond, until damages have been compensated. Therefore, the allegation of double consideration of loss of profit is not valid.

Italy furthermore argues that the charter contract does not justify a loss of revenue for a period of more than six years. This argument was refuted in the present oral proceedings. The witnesses confirm that the *M/V "Norstar"* could have been chartered for bunkering activities or similar purposes to date, earning profits calculated by Mr Estribí. The calculation is therefore also correct from this aspect.

1 Italy further argues that damages for loss of revenue require that the claimed profits
2 must not be merely speculative, but reasonably foreseeable at the time of the
3 breach, which Italy believes is not the case. Italy thereby repeats its contemplations
4 on the causative link, which I have already addressed. I therefore repeat: the fact
5 that the owner of a seized vessel will suffer a loss of profit is in no way speculative or
6 unforeseeable but, rather, the usual consequence. It would have been Italy's burden
7 of proving that this case is deviating from this rule. A causative link therefore clearly
8 exists in this case.

9
10 With respect to the period during which the loss of profit arises, the following applies:
11 an object which can be profitably chartered or rented being withheld from the owner
12 will cause the owner a continued loss of profit. This is the case until the object is
13 returned to the owner or the loss is compensated to allow him to acquire an object of
14 equal value, and to charter or rent it out. Since Italy never released the
15 *M/V "Norstar"*, the loss of profit continues to exist until Italy replaces the loss of the
16 vessel by paying the US\$ 625,000.00.

17
18 Of course, the period over which the loss of profit was suffered can basically also be
19 limited to the durability of the respective object. As confirmed in the testimonies,
20 however, the *M/V "Norstar"* was in an excellent condition at the time of its arrest and
21 could have been chartered out to this day. Therefore, in this case the period of loss
22 of profit is not limited by the lifespan of the vessel.

23
24 So, in summary, the full loss of profit to the owner was foreseeable and obvious, and
25 is therefore anything but speculative.

26
27 Lastly, with respect to the quantification of loss of profit, Italy argues that Panama
28 has not taken into account expenses associated with the use of the vessel and –
29 where these were taken into account – Panama did not provide evidence about the
30 sources and methods of this calculation. However, as to be shown at a later stage,
31 the calculation considers the operational costs as, for example, the crew wages or
32 other operational expenses.

33
34 Based on all this, the total loss of profit has been calculated clearly in every aspect
35 and established.

36
37 I would now like to address the question of continued payment of wages and
38 payment due for fees and taxes to the Panama Maritime Authority.

39
40 **THE PRESIDENT:** Mr von der Wense, I am sorry to interrupt you but we have
41 reached 1 p.m., which brings us to the end of this morning's sitting. The statement of
42 Mr von der Wense will be continued this afternoon, when the hearing is resumed at
43 3 p.m. The sitting is now closed.

44
45 *(The sitting closed at 1.05 p.m.)*