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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2018

Public sitting
held on Wednesday, 12 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

Present:	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
		Markiyan Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
		Óscar Cabello Sarubbi
		Neeru Chadha
		Kriangsak Kittichaisaree
		Roman Kolodkin
		Liesbeth Lijnzaad
	Judges *ad hoc*	Tullio Treves
		Gudmundur Eiriksson
	Registrar	Philippe Gautier

Panama is represented by:

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as Agent;

and

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Mr Hartmut von Brevern, Attorney at Law, Hamburg, Germany,

as Counsel;

Ms Mareike Klein, LL.M., Independent Legal Consultant, Cologne, Germany,
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Mr Arve Einar Morch, Manager, Intermarine, Norway,

as Advisers.

Italy is represented by:

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as Co-Agent;

and

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as Lead Counsel and Advocate;

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

as Legal Assistants.

THE PRESIDENT: Good morning, everyone. Yesterday, Panama concluded its first round of oral argument in the Tribunal's hearing on the merits of the *M/V "Norstar"* Case. Today we will hear the first round of oral argument by Italy.

I first give the floor to the Co-Agent of Italy, Mr Aiello, to make a statement.

MR AIELLO: Mr President, distinguished Members of the Tribunal. If it pleases the Tribunal, and before outlining the way Italy's statement will be organized, I shall make a few general preliminary remarks on behalf of Italy.

As I maintained during my brief introduction on Monday, Italy is here to demonstrate once more its confidence in international adjudication. Both during the Preliminary Objections phase of these proceedings, and in the exchange of communications in the merits phase, Italy has always acted in a spirit of cooperation with this Tribunal and with a view to guaranteeing the proper administration of justice. Italy wishes again to express its full trust in the capacity of this Tribunal to settle this case according to rules of international law. I recall this fact with particular emphasis now because Italy's trust in the Tribunal as a judicial institution at the highest level goes together with the determination not to allow its process to be misused.

Mr President, while reiterating its full confidence in this Tribunal, Italy wishes to acknowledge the Judgment of 4 November 2016 on the Preliminary Objections in this case. In particular, Italy acknowledges the precise delineation of the contours of the merits of the case spelled out by the Tribunal in that ruling, which curtails the Tribunal's jurisdiction in this case to the assessment of whether the Decree of Seizure in question amounts to, *vel non*, an infringement of articles 87 and 300 of the Convention.

Mr President, Members of the Tribunal, without prejudice to Italy's principal contentions to the effect that its conduct complained of by Panama in the present proceedings is absolutely lawful under international law, I would like to present the organization of Italy's pleadings of today and tomorrow. Our *plaidoirie* will be organized in five parts.

First, Professor Attila Tanzi will address some general issues concerning Panama's misconstruction of the disputed facts and of their legal relevance. His speech will come in three parts. The first part of his speech will be devoted to a few fundamental clarifications about this case. He will respond to Panama's attempt to enlarge the boundaries of this dispute, as delineated by this Tribunal in its Judgment of 4 November 2016, by presenting additional claims and trying to characterize Italy's defences as counterclaims. He will address Panama's conflation between the Preliminary Objections and the merits phase of these proceedings, as well as its confusion between Italian domestic law and international law. He will conclude this part by showing how Panama has failed to address significant arguments advanced by Italy in its written pleadings and how it falls short of the required standard of proof.

The second part of Professor Tanzi's speech will sketch Panama's mischaracterization of the factual background relevant to the present dispute. To that end, consistent with the narrative that Italy has presented in its Counter-Memorial

and Rejoinder, Professor Tanzi will correctly present the Italian criminal investigations and proceedings which led to the adoption of the Decree of Seizure of the *"Norstar"*. He will deal with those factual elements that are strictly relevant for the present dispute, and will single out by contrast those elements of fact pleaded by Panama that are entirely immaterial for the purposes of the present case. In particular, he will also address the scope and purpose of the Decree of Seizure of the *"Norstar"*. He will also present the reasons which led to the release of the *"Norstar"* and the acquittal of the persons accused in the Italian criminal proceedings. He will conclude the second part of his speech by addressing the vessel's condition at the time of its arrest and the failure to retrieve the vessel. Finally, the third part of Professor Tanzi's speech will emphasise the remedies available to the shipowner and how he and his associates have remained inactive all along, whilst having ample opportunity to avoid, or reduce to the minimum, the economic damages they now claim, by resorting to the appropriate domestic or international remedies in a timely fashion.

After the morning break, Professor Ida Caracciolo will respond to Panama's argument alleging Italy's breach of article 87 UNCLOS. Following Professor Tanzi's elaboration of the scope and the factual background of the present dispute, Professor Caracciolo's speech will come in three parts: first, she will demonstrate that Italy has not breached article 87, paragraph 1. She will elaborate on the fact that the *"Norstar"* was not in the high seas at the time of the adoption of the Decree of Seizure and the request for its execution and she will show that, in any case, the Decree was not able to interfere with Panama's freedom of navigation. She will further demonstrate that freedom of navigation does not apply outside the high seas and cannot be interpreted as freedom to gain access to the high seas and that the extraterritorial nature of an exercise of jurisdiction is not relevant from the perspective of freedom of navigation under article 87. Second, Professor Caracciolo will show that the Decree of Seizure and the request for its execution targeted activities carried out by the *"Norstar"* on the Italian territory, the Italian internal waters, and/or the Italian territorial sea, and not on the high seas. Third and last, she will respond to Panama's argument concerning article 87, paragraph 2, by showing that the obligations herein contemplated concern Panama, and not Italy.

This afternoon Mr Paolo Busco will counter Panama's arguments concerning the alleged breach of article 300 UNCLOS. His speech will come in three parts: first, he will make a few preliminary clarifications on the issue. Second, he will respond to Panama's unsubstantiated assertion that Italy has abused its rights. Third, he will address Panama's argument according to which Italy has breached its obligation of good faith. To this end, he will first respond to Panama's assertion that Italy breached article 300 due to its conduct prior to and during these proceedings and that article 300 authorizes a broad and liberal interpretation of article 87 UNCLOS. Then, he will address Panama's argument that Italy has allegedly breached article 300 by adopting the Decree of Seizure too hastily, by waiting until 1998 to arrest the *"Norstar"*, by waiting to arrest the vessel until it was put into port in Spain and by detaining the *"Norstar"* for an excessively long period.

Mr Busco will respond to Panama's additional claims based on articles 92 and 97 UNCLOS. He will demonstrate that such claims are new. Following this point, he will show that, since these claims were neither "implicit" in the Application of Panama,

nor do they directly arise out of the subject-matter of the dispute as delineated by the Tribunal, they fall outside the scope of the present dispute and are inadmissible. Last, he will respond to Panama's argument according to which articles 92 and 97 are "inextricably linked" to article 87, by showing their autonomous nature.

Professor Tanzi will take the floor tomorrow morning, responding to the human rights claims advanced by Panama. He will demonstrate how such claims fall outside the scope of the present dispute. Without prejudice to this assertion, he will take the opportunity to underline how the Italian proceedings were in full conformity with Italy's international human rights obligations, stressing that Italy has neither breached the right to property of, or denied justice to, the shipowner and the other persons involved in the operations of the *"Norstar"*.

Professor Francesca Graziani will take the floor and respond to Panama's arguments on its claim for compensation, without prejudice to Italy's argument on the inexistence of a breach of articles 87 or 300 UNCLOS. Her speech will come in three parts: first, Professor Graziani will reiterate that Panama has not discharged its burden of proof with regard to compensation. Second, she will demonstrate that Italy has no obligation to compensate the alleged damages claimed by Panama because Panama has not demonstrated the existence of a direct causal link between the alleged wrongful act and damages claimed by Panama. Next to that, and without prejudice to the above arguments, she will elaborate on the duty to prevent and mitigate damages and demonstrate that, in any case, the causal link has been interrupted due to the conduct of the shipowner and the other persons involved in the operations of the *"Norstar"*. Third, she will demonstrate how Panama's quantification of damages is excessive and disproportionate.

Mr President, Members of the Tribunal, as communicated to this Tribunal with its letter of 23 August 2018, Italy will also avail itself of two expert witnesses. These are Dr Vitaliano Esposito, former Public Prosecutor at the Italian Court of Cassation and expert in Italian criminal law and procedure, and Captain Guido Matteini, a naval expert. Italy will examine Dr Vitaliano Esposito and Captain Guido Matteini tomorrow morning, after the break, at the end of the speeches of counsel for Italy. Dr Esposito will give testimony on four specific issues of Italian criminal procedure pertinent to the Italian criminal proceedings involving the *"Norstar"* which may be relevant as part of the disputed facts. Captain Matteini will give testimony relating to the damages claimed by Panama, with special regard to the value of the *"Norstar"* at the relevant time.

Mr President, Members of the Tribunal, this ends my introduction and I thank you for your attention. Mr President, I would request that you invite Professor Attila Tanzi to the podium.

THE PRESIDENT: Thank you, Mr Aiello. I now call upon Mr Tanzi to make a statement.

MR TANZI: Good morning, Mr President.

Mr President, distinguished Members of the Tribunal, it is a privilege to appear once again before you representing my country, Italy.

As anticipated by the Agent, my response this morning to Panama's mischaracterizations will come in three parts and I will be on my feet for about 90 minutes.

First, I will make some cross-cutting, general remarks that are essential to properly frame this case and appreciate its true nature. Second, I will illustrate the facts of this case, and I will respond to Panama's main misrepresentations of the factual record of this dispute. Third, I will illustrate the remedies available under Italian law to the shipowner in order to seek redress against any alleged misconduct by the Italian authorities, including mechanisms to repossess the vessel, to obtain redress for any wrong allegedly suffered by the crew and others connected to the *"Norstar"*.

Mr President, distinguished Members of the Tribunal, I will start by addressing four preliminary issues, which emerge from the fundamental misconceptions and omissions that Panama has advanced in its written pleadings and reiterated during the first two days of this hearing. They are, in summary: first, the scope of the dispute before the Tribunal; second, Panama's confusion between the incidental proceedings on Preliminary Objections and the present proceedings on the merits; third, Panama's failure to appreciate the relevance to the present dispute of the distinction between domestic law and international law; fourth and last, I will address Panama's failure to discharge its burden of proof on essential elements of its claim.

Mr President, Members of the Tribunal, first and foremost**,** a fundamental point which requires clarification concerns Panama's misconception of the scope and contents of the present dispute. On Monday and Tuesday, we heard the opposing Agent and Counsel attempting to plead a case which, in fact and law, is different from the one before you. We heard that this case is not about the Decree of Seizure and the request for its execution, but also about the execution itself, as if these were not distinct phases. We heard them invoke articles 92 and 97 of the Convention; we heard them plead violations of various human rights obligations in a manner that suggests the Tribunal should become a human rights court and find on breaches of human rights conventions. In the written pleadings, Mr President, we even heard opposing Counsel incomprehensibly argue about mysterious counterclaims that Italy never made.

Panama's attempt to enlarge the dispute is not limited to the law. Both Counsel and witnesses for Panama referred time and again to the *"Spiro F"* case, a case which has nothing to do with the present dispute. Its only purpose is to blur the factual matrix before you, Mr President. There is one link only between the two vessels: the *"Spiro F"* replaced the *"Norstar"* in summer 1998, before the Decree of Seizure. At that point the *"Norstar"* left the stage and never made its return.

Against Panama's multiple attempts to enlarge the dispute, Mr President, Members of the Tribunal, Italy is pleased to be able to rely on the Tribunal's Judgment of 4 November 2016, which delineated with crystal-clear language the boundaries of the Norstar case.

According to the Tribunal's Judgment, with special regard to paragraphs 122 and 132, the merits of the present case exclusively concern the questions of

(a) whether the Decree of Seizure and its request for execution constitute a breach of article 87 of the Convention";[1] and, (b) whether Italy has breached article 300 regarding the way it fulfilled its obligations under article 87.[2]

The confusion between the Decree of Seizure and its request for execution on the one hand, and the actual enforcement of those acts, on the other, is best epitomized by the summary of Panama's Reply, at paragraph 592, which you may find at tab 3 of your folder and is now shown on the screen. You may note that, in the first indent, the alleged breach of article 87 by Italy is described to consist of "ordering and requesting [the] arrest" of the *M/V "Norstar"*; but in the fourth indent it is stated that "[t]he arrest of the *M/V 'Norstar'* was unlawful",[3] and in the fifth indent one finds the statement whereby "[…] Italy arrested the *M/V 'Norstar'*".[4] This statement is complemented by the incomprehensibly dramatic – and false – assertion that "[t]he arrest of the *M/V 'Norstar'* was an extreme, violent, and forceful action on the part of Italy."[5]

Mr President, Members of the Tribunal, by speaking only of the Decree of Seizure and the request for execution when delineating the dispute in its Judgment, the Tribunal has limited this case to the question of the legality under articles 87 and 300 of these acts alone. The Tribunal has thus made clear that there is a difference between detention, that is, enforcement action, and acts that are the logical precedents to the enforcement action.

As observed by Judge Attard and Judge Wolfrum, "[t]he Judgment has identified the Italian Public Prosecutor's Decree of Seizure against the *M/V 'Norstar'* together with the request for judicial assistance (paragraph 122) as the relevant act[s]".[6]

In other words, this case, as delineated by the Tribunal, is plainly not one about the enforcement of the Decree.

Indeed, Mr President, this case could not be about enforcement.

If the case were about enforcement of the Decree, the Tribunal would likely have had to decline its jurisdiction over the entire *"Norstar"* dispute, since article 87 of the Convention would not have been relevant *ratione loci*. As you are aware, the Decree *was* enforced in Spain's internal waters, an area of the sea where article 87, simply put, does not apply.

The Tribunal's delineation of the dispute has far-reaching implications for the overall tenability of Panama's claim. This, Mr President, is a claim for damages, as Panama itself has portrayed it. Even if any damage could be found to have been caused under the circumstances of this case, such damage would stem from the enforcement of the Decree, not from the Decree and the request for execution as

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[1] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44 ff., para. 122.
[2] *Ibidem*, para. 132.
[3] *Reply of the Republic of Panama*, 28 February 2018, para. 592.
[4] *Ibidem*.
[5] *Memorial of the Republic of Panama*, 11 April 2017, para. 93.
[6] *M/V "Norstar"* (see footnote 1), Joint Separate Opinion of Judges Wolfrum and Attard, para. 28.

such. Thus, even if, *arguendo,* the Decree and the request for execution as such were to be found unlawful, Panama would not be entitled to anything more than a declaratory judgment to this effect.

Panama does not limit itself to trying to enlarge this dispute by confusing the Decree of Seizure with its execution. It also tries to bring new causes of action. In particular, Panama has attempted to advance additional claims based on articles 92 and 97 of the Convention, as well as on human rights, with special regard to the right to property and due process.

Even if Panama's claims were not judicially barred, they must be declared inadmissible because Panama did not include these claims in its Application, and the claim must be indicated in the Application expressly. As this Tribunal observed, "it is not sufficient for an applicant to make a general statement without invoking particular provisions of the Convention that allegedly have been violated."[7]

Neither article 92 nor article 97 are mentioned in Panama's Application.

Finally, Mr President, on Panama's repeated attempts to enlarge the dispute, Panama's written pleadings went so far as to attribute two counterclaims to Italy which Italy never filed. Panama characterizes two of Italy's defences as counterclaims: the first is based on the shipowner's contributory fault due to its lack of action in retrieving the vessel; and the second is based on its failure to discharge the duty to mitigate the damage claimed.

As observed by the ICJ in *Application of the Genocide Convention (Bosnia* v. *Serbia)*, "a counter-claim is independent of the principal claim in so far as it constitutes a separate 'claim', that is to say an autonomous legal act the object of which is to submit a new claim to the Court".[8]

Mr President, Members of the Tribunal, Italy's arguments are not independent of Panama's claims, nor can they be considered as "autonomous legal act[s] the object of which is to submit a new claim". We are simply responding to Panama.

Mr President, my second general consideration concerns Panama's confusion between the Preliminary Objections and the merits phases of the proceedings. Panama relies on statements that the Tribunal made in its Preliminary Objections Judgment in respect of the relevance of articles 87[9] and 300,[10] mischaracterizing them in a manner that suggests that the Tribunal determined already in November 2016 that those provisions have been breached. This includes Panama confusing the *prima facie* assessment of the relevance of articles 87[11] and 300[12] for jurisdictional purposes with the putative assessment of their actual infringement.

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[7] *M/V "Norstar"* (see footnote 1), pp. 28-29, para. 109.
[8] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, p. 256, para. 27.
[9] *Reply* (see footnote 3), para. 9. See also *ibidem*, paras. 59-61, 82, 185, 195-196.
[10] *Ibidem*, para. 242.
[11] *Ibidem*, paras. 9, 59-61, 82, 185, 195-196.
[12] *Ibidem*, para. 242.

However, it is a basic principle that what a court or tribunal states during the Preliminary Objections phase in respect of issues that remain to be determined on the merits does not prejudice the court or tribunal's evaluation of those issues at the merits stage. As stated by the ICJ in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, in its Judgment on Preliminary Objections "[t]he Court must … emphasize that its ruling in the present Judgment … does not in any way prejudge the merits".[13]

The Tribunal in this case has already confirmed the same principle in its Preliminary Objections Judgment when it explained that the Tribunal "is not concerned in the preliminary objection proceedings with the question as to whether or not the conduct of Italy would amount to an internationally wrongful act and thus give rise to international responsibility".[14]

The Tribunal noted that articles 87 and 300 of the Convention are "relevant" to the present case but it clearly stopped short of considering whether Italy had breached those provisions. In fact, in light of the new evidence or the continued lack thereof, to prove that the *"Norstar"* was on the high seas at the time of the Decree and request for execution, nothing would prevent this Tribunal from adjudging and declaring, even at this merits stage, that article 87 is simply irrelevant to this case.

Mr President, Members of the Tribunal, my third general consideration concerns another fundamental confusion emerging from Panama's pleadings. This is the one between domestic law and international law, and their respective relationship in general terms and as regards this case.

Panama appeared to accept this fundamental distinction on Monday morning. Mr Carreyó cited a passage from the PCIJ's judgment in *Treatment of Polish Nationals in Danzig*, which confirmed that the legality or otherwise of conduct under domestic law does not determine whether there is a breach of international law.[15] Mr Carreyó also then insisted that, "[w]ith this in mind, Panama will continue to refrain from addressing any of the Italian legal provisions, but will use only its judgments as elements of evidence before this Tribunal."[16]

And yet, Mr President, despite saying that it appreciates the distinction, Panama's arguments are ridden by this confusion.

First, the Italian courts acquitted those involved with the *"Norstar"* on the basis of the fact that a crime was not found to have been committed. That is, an acquittal on the merits. The Italian judicial authorities never said that the Decree of Seizure was in any way unlawful because of its extraterritorial application or for any other reason. It is therefore a logical fallacy to say, as Panama does, that, because those involved with the *"Norstar"* were acquitted, then article 87 of UNCLOS was breached and that Italy cannot *venire contra factum proprium*. The argument just does not follow.

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[13] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia*), *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, para. 56.
[14] *M/V "Norstar"* (see footnote 1), para. 162.
[15] ITLOS/PV.18/C25/1, page 6, lines 44-50; page 7, lines 1-2.
[16] *Ibidem*, page 7, lines 4-6.

However, Mr President, even if the Italian courts had declared the Decree unlawful as a matter of Italian law, and not simply acquitted the accused, as they did, opposing Counsel is oblivious of the distinction between domestic and international law as it was applied by the Chamber of the ICJ in the *Elsi* Case. There, the Court stated that "the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law".[17]

As enunciated by the PCIJ, "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts."[18] It therefore follows that, if the Italian courts had declared the Decree unlawful as a matter of Italian law, which they did not, this would not mean that there is a breach of international law.

In this respect I must also respond to Mr Carreyó's complaint raised on Monday that "there was an error of judgment when the arrest of the *'Norstar'* was ordered".[19] Mr President and Members of the Tribunal, a State cannot possibly be held internationally responsible for conducting investigations that ultimately led to the acquittal of the defendants. That would represent an intolerable interference with each State's sovereign right to investigate and prosecute crime.

For the same basic reason, Mr Carreyó's suggestion that wrongfulness under international law somehow followed because no compensation was paid as a matter of domestic law[20] must also fail. Again, a State cannot possibly be held internationally responsible every time it does not award compensation to an individual who has been acquitted of a crime, particularly if it has not been asked for. In fact, as I will explain later, those involved with the *"Norstar"* could have pursued compensation before the Italian courts, but they did not.

Mr President, I have come to my fourth and last preliminary point which is important that we keep in the front of our considerations. It concerns the generally recognized principle that "evidence produced by the parties [must be] 'sufficient' to satisfy the burden of proof".[21] The principle applies to assertions of fact and their credibility, as well to contentions of law and their reliability.

Article 28 of the Statute of the Tribunal provides that, when one of the Parties is absent, the Tribunal "must satisfy itself … that the claim is well founded in fact and law". Even when both Parties take part in the proceedings, the Tribunal must presumably want to be satisfied that the claim is indeed well founded in fact and law.

I must also emphasize, as a general proposition, that Panama must bear the evidential consequences of its significant delay in commencing this case. As the tribunal in the *Gentini* Case said, "great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence."[22]

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[17] *Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, para. 124.
[18] *German Interests in Polish Upper Silesia (Germ.* v. *Pol.)*, *1926 P.C.I.J. (ser. A) No. 7* (May 25), p. 19.
[19] ITLOS/PV.18/C25/2, page 22, lines 37-38.
[20] *Ibidem*, page 34, lines 1-7.
[21] C. Brown, *A Common Law of International Adjudication* (OUP 2007), p. 101.
[22] *Gentini case* (1903) *X RIAA 551*, p. 561.

It is in this light – or obscurity – that we must consider opposing Counsel's suggestion on Monday, with which Mr Morch agreed,[23] that, had the logbook of the ship been available, the question of the *"Norstar"*'s whereabouts would be easily proved; but, Mr President, had Panama pursued its claim more diligently, certainly before the destruction of the ship, the logbook would probably be available. Mr Morch insisted on Monday that the logbook was still on board of the ship in 2015, that is 12 years after Italy unconditionally released the vessel.[24]

Mr President, Panama's pleadings otherwise give rise to three sets of problems on the point of evidence. The first one pertains to assertions which Panama simply fails to prove by a sufficient standard of proof. Second, we have instances in which Panama tries to make up for this failure by attempting to shift the burden of proof onto Italy. The third one arises from a number of Panama's contentions which are patently disproved by evidence produced by Panama itself.

First, Mr President, Panama advances a significant number of factual and legal contentions which are unsupported by a sufficient standard of proof. I will provide a few examples without prejudice to the irrelevance of such contentions for the purposes of the present dispute. First, Panama asserts that, "up until the date of the enforcement of the arrest order, the vessel had been operating with complete normalcy."[25] That is not proved by Panama, while evidence produced by Italy proves the contrary, namely that at the time of the arrest the vessel was not in a condition that would allow it to sail, not even for one nautical mile. I will revert to this point shortly.

Second, Panama asserts that, "[a]t the time of its arrest, the *M/V 'Norstar'* was a seaworthy, legally manned … tanker" equipped with up-to-date mechanics and technology, as well as that,

> [t]his vessel and its shipowner had a well-established reputation as an ongoing business with important assets on board and a value of US$ 625,000, as had been stated in its certification. At the time of its arrest, the vessel was laden with 177,566 MT gasoil in cargo tanks valued at US$ 108,670.39.[26]

None of that, Mr President, is proved by Panama; and, in fact, the evidence proves that the *M/V "Norstar"* was in a very poor condition, far removed from seaworthiness – and we know nothing about the cargo.

Third, Panama asserts that Italy was in bad faith in conducting its domestic criminal proceedings[27] and in ordering the arrest of the "*Norstar"* while it was in the port of Palma de Mallorca.[28] As observed by the *Lac Lanoux* Tribunal, *"la mauvaise fois ne se présume pas"*.[29] Not only can bad faith not be presumed, Mr President, but such a serious allegation against Italy and against a State must also be proved to a

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[23] ITLOS/PV.18/C25/2, page 12, lines 36-40.
[24] *Ibidem*, page 12, line 30.
[25] *Reply* (see footnote 3), para. 436.
[26] *Memorial* (see footnote 5), para. 23.
[27] *Reply* (see footnote 3), paras. 250-275, particularly para. 253.
[28] *Ibidem,* paras. 293-300, particularly para. 299.
[29] *Affaire du lac Lanoux (Espagne, France), in Report of International Arbitral Awards, 1957*, p. 281, at 305.

rigorous standard of proof. Panama falls far short of that in this case. The point will be elaborated upon this afternoon by my colleague Mr Busco.

Fourth, Panama asserts that there is a nexus between Italy's alleged wrongful conduct and the damages claimed. Professor Francesca Graziani will revert in detail on this point tomorrow, as well as on the grounds for the quantification of each head of damages, and she will show how, here too, Panama patently falls short of a sufficient standard of proof.

Second on evidence, Mr President, it is worth underlining that frequently where Panama cannot prove its assertions, it instead tries to shift the burden of proof onto the defendant. I shall give you just two examples.

When Panama cannot prove the nexus between Italy's alleged wrongful conduct and the damages claimed, it instead urges Italy to demonstrate that a causal link does not exist.[30] But it is for the claimant, in the first place, to demonstrate a positive and not for the defendant to prove a negative. The same applies to evidence concerning the conditions and value of the vessel at the time of the adoption of the Decree of Seizure.[31]

Third, on evidence, Mr President, come Panama's contentions which are patently disproven by evidence produced by Panama itself. This is particularly the case with regard to Panama's surprising assertion that neither the shipowner nor Panama was informed of the release of the vessel and that, accordingly, they were not aware of the possibility of retrieving the "*M/V Norstar*"[32] – assertions that have been somewhat confusingly mitigated during the last two days of hearing.

As it has been shown by Italy in its written pleadings, the very evidence attached by Panama to its pleadings demonstrates that: a) on 11 March 1999 the Office of the Prosecutor of the Tribunal of Savona asked the Italian Embassy in Oslo to inform Mr Morch of the conditional lifting of 24 February 1999;[33] b) on 26 March 2003 Mr Morch was notified by registered email of the judgment of the Tribunal of Savona of 18 March 2003;[34] c) further to that, again, evidence produced by Panama also shows that a hard copy of the judgment in question was delivered to Mr Morch on 2 July 2003 by the Norwegian police upon request of the Italian authorities.[35]

Mr President, I wish to dwell on this aspect of the factual background for two main reasons: first, because it epitomizes the curious circumstance in which Panama's assertions are simply disproven by evidence produced by Panama itself; and, second, because it bears on multiple key legal issues of the present case, including the alleged justification for the owner's inaction with respect to the release of the

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[30] *Reply (see footnote 3), paras. 406-417.*
[31] *Ibidem, para. 533.*
[32] *Ibidem, paras. 459-468.*
[33] *Counter-Memorial of Italy*, 11 October 2017, para. 54, referring to *Memorial* (see footnote 5), Annex 8.
[34] *Rejoinder of Italy*, 13 June 2018, paras. 33-39, specifically para. 37, referring to *Reply* (see footnote 3), para. 463.
[35] *Reply* (see footnote 3), para. 463, referring to *Counter-Memorial* (see footnote 33), Annex Q.

vessel, which we heard during the first two days of this hearing as much as we read in Panama's written pleadings.

I may first draw your attention to paragraph 30 of Panama's Memorial, which you find at tab 5 of your folder and is also being reproduced on the screen before you at this moment. It tells us that Italy diligently engaged in the appropriate communication procedure in order to notify Mr Morch of the final release of the vessel:

> On 18 March 2003, Italy sent to Spain a request for legal assistance … with a certified copy of the operative part of the judgment issued on 14 March 2003, ordering that the *M/V Norstar* be released and returned to its owner, and asking Spain to execute the above-mentioned release order and inform the custodian of the ship of the order and "check whether the property has really been taken back and send me the relevant record".[36]

Annex 11 to Panama's Memorial shows that such request was duly followed through by the Spanish authorities three days later. You may find this document at tab 6 of your Judges' folder.

In addition, Mr President, we learnt from Panama's Memorial that Italy's communication was duly received three days later by Mr Morch, on 21 March 2003. You may find an excerpt of the relevant passage of Panama's Memorial at tab 5 of your folder.

Mr President, I will close on the evidence by stressing the point that the Applicant has the general advantage to decide if and when to file a case based on its preparation, and the evidence shows that Panama's Agent has had this case on his radar screen for nearly 18 years before filing the Application in 2015. Panama has no excuse for its failure to prove its claims.

Mr President, Members of the Tribunal, having addressed you on certain cross-cutting points that Italy thinks should be at the forefront of the discussion in the present case, I will now address you on Panama's main mischaracterizations of the facts.

In my account, I shall, with one exception, limit myself to bringing to your attention only the key factual disagreements between the Parties. Obviously, factual elements include certain issues of Italian law that, as we well know, are facts from the perspective of international law.

Mr President, Members of the Tribunal, one fundamental fact is uncontested between the Parties, and I would like to bring it to the forefront of your attention: the "*Norstar*" was in port when the Decree of Seizure and the request for execution were actually enforced.

With that fundamental clarification made, the key areas of disagreement between the parties are the following:

[36] *Memorial* (see footnote 5), para. 30.

a. The whereabouts of the *"Norstar"* between 11 August and 25 September 1998;
b. The physical conditions of the *M/V "Norstar"* at the time of its arrest;
c. The correct characterization of the relevant Italian law and proceedings;
d. The basis for the adoption of the Decree and the place where the alleged crimes were committed;
e. The reasons why the *M/V "Norstar"* was released and the individuals acquitted; and
f. The communication concerning the release of the vessel and the failure to retrieve the *M/V "Norstar"* by the owner.

Mr President, I will now turn to the whereabouts of the *"Norstar"* between 11 August and 24 September 1998.

According to evidence that Panama itself has submitted at Annex 16 to its Memorial,[37] which you can now see on the screen, the *M/V "Norstar"* entered the bay of Palma de Mallorca in March 1998 and did not leave that bay between that time and the execution of the Decree on 25 September 1998.[38] As much as Panama has contested during this hearing the reliability of its own evidence, it has not been able to prove otherwise.

Mr Morch was cross-examined on Monday on this piece of evidence. According to Mr Morch, the document is generally accurate in describing that the *M/V "Norstar"* entered into port in Palma in March 1998. The only instance that Mr Morch seems to remember of the *"Norstar"* leaving port concerns an alleged voyage to Algeria. Two things must be noted in this regard: first, no evidence has been provided with regard to this voyage; second, according to Mr Morch, the voyage was asserted to have taken place in July, that is, before the Decree of Seizure was issued. Mr Morch could not point to any other instance of the ship leaving port after July 1998.

We have not heard any evidence, Mr President, let alone any convincing evidence, that the ship was in navigation on the high seas on the date of the issuance of the Decree of Seizure and in the period between such issuance and the actual enforcement of the Decree. Simply put, Mr President, Members of the Tribunal, Panama has failed to prove the essential condition for a breach of article 87 to occur, namely, that the ship was on the high seas when the alleged interference with its navigation occurred.

Mr President, I will now address the conditions of the *"Norstar"* at the time of its arrest.

Italy is not surprised that there is no evidence that the ship was on the high seas in the summer of 1998. This is in consideration of the bad physical conditions of the vessel.

It is proved that on Saturday, 5 September 1998 the "*Norstar"* could not sail from Palma de Mallorca, where it was moored, to the port of Palma de Mallorca, which is

[37] *Memorial* (see footnote 5), Annex 16.
[38] *Counter-Memorial* (see footnote 33), para 51.

roughly one mile, under normal weather conditions, namely no precipitations, 27 degrees Celsius and a fairly typical wind speed of 5.3 metres per second, as set out on page 4 of tab 17 of your folder. The evidence also shows that this state of impossibility was due to "the bad conditions of the chains aboard", "the anchor of the starboard [being] broke[n]", "the chain and the one of the portside [being] in very bad state" and, last but not least, "the breakdown of one of the main generator[s]". I refer you to page 3 of tab 17.

Contrary to what Mr Morch said on Monday, this was not a case of the ship being prevented from entering the port simply due to the dangerous cargo.[39] There were clearly much more fundamental failures affecting the seaworthiness of this vessel.

Italy's Agent will later examine Italy's naval expert on the conditions of the *"Norstar"*, from which it will be possible to gather more information on the state of the ship, also in relation to the photographic evidence that we have seen during the first two days of this hearing.

Mr President, I will now turn to Panama's assertion that the investigations, the Decree of Seizure and the appeal by the Public Prosecutor at the Savona Tribunal against the judgment rendered by the latter in 2003 were the result of some kind of prosecutorial abuse of power by the Italian authorities, by which Italy prosecuted conduct for which it knew its courts did not have jurisdiction. This is a patent and offensive mischaracterization.

In the first place, and despite the evidence provided by Mr Rossi on Monday suggesting without foundation the existence of some malicious reason behind the Italian authorities' investigations, the evidence produced by Italy in its written pleadings unquestionably proves the contrary; namely, it proves that the Decree of Seizure was adopted once the investigations ,which were conducted primarily against an Italian national, had provided sufficient *fumus* for the investigative authorities to reasonably suspect that Mr Rossi had engaged in a tax evasion plan which was supposedly carried out through the use of the *M/V "Norstar"* with the support of those involved with it.

Mr Rossi's direct involvement, and that of his company Rossmare International, in the alleged criminal activity in question emerged from reasonable suspicion – I repeat suspicion – that he organized the purchase of fuel in Livorno and other European Union ports;[40] the issuance by Mr Rossi of false invoices, namely invoices addressed to non-European Union nationals upon the resale of fuel to Italian and other European Union-flagged vessels; and the advertisement by Rossmare International of the supply of duty-free fuel.[41]

The close relationship between Mr Rossi and Rossmare International, on the one hand, and the *"Norstar"*, on the other, was proven by evidence to the effect that the former paid in advance the expenses of the masters and the crew of the latter;[42] and

[39] ITLOS/PV.18/C25/2, page 3, lines 15-21.
[40] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (*Counter-Memorial* (see footnote 33), Annex A), at 1.
[41] *Ibidem*, at 7.
[42] *Ibidem*.

that Mr Rossi gave instructions to the masters of the *"Norstar"* on fuel resale through a mobile phone which he gave to the crew of the vessel and which was paid by Rossmare International.[43]

As to the Decree of Seizure, the facts simply show that there is nothing abusive behind this Decree. As we have seen, it was adopted on the ground of a regular investigatory framework and it was based on sufficient *fumus* for the purposes of further investigation into alleged criminal activity carried out primarily by an Italian national in relation to alleged crimes committed exclusively on Italian territory. I refer you to tab 8 of your folder.

Panama also contends that the Decree was unlawful under Italian law because it was issued on 11 August 1998, that is, before the formal completion of the investigations, which took place on 24 September.

However, in line with article 109 of the Italian Constitution, the judiciary directly availed itself of and was in constant control of the judicial police. I may refer you to page 3 of tab 9. The investigations had started in September 1997 and, therefore, the Public Prosecutor has been in close contact with the fiscal police and kept informed of the investigations all along ever since then, that is, for nearly one year.

THE PRESIDENT: Mr Tanzi, I am sorry to interrupt you. I have been informed that the interpreters are having difficulty in following your statement. It is very important that your statement is duly and accurately interpreted. Therefore, could you please slow down a little?

MR TANZI: I will do so with pleasure, Mr President.

THE PRESIDENT: Thank you.

MR TANZI: Panama also alleges that the Italian criminal proceedings constituted an extraterritorial exercise of criminal jurisdiction. Panama asserts that the Decree as adopted in "the wrongful conclusion that the activity of the vessel while carrying out on the high seas constituted a crime".[44] I may refer you to tab 5 and to the text before you on the screen, which will also correct my actual reading, Mr President, and I thank you for bearing with it.

Mr President, Members of the Tribunal, the investigations which led to the Decree targeted suspected offences allegedly committed on Italian territory and applied domestic legislation whose scope of application is far from having any extraterritorial reach.

Against Panama's insistence to the contrary, suffice to reiterate that the evidence produced by Italy in its written pleadings unquestionably demonstrates that the Decree was adopted as part of criminal proceedings concerning conduct constituting alleged offences which occurred exclusively in Italian territory. Indeed, the Decree was adopted pursuant to article 253 of the Italian Code of Criminal Procedure, which

[43] *Ibidem*.
[44] *Memorial* (see footnote 5), para. 20.

you can find at page 1 of tab 9, and we will refer to it shortly, which provides the grounds for probationary seizure for the purpose of the investigation of crimes that fall within the scope of article 6 of the Italian Criminal Code – a key provision which lays down the principle of territoriality of crimes under Italian law; and you can find it at page 3 of tab 9, Mr President.

The investigations which led to the Decree in question showed sufficient *fumus boni iuris* to further enquire into an alleged tax evasion plan which consisted of alleged offences committed on Italian territory, and certainly not bunkering, which is not outlawed under Italian legislation. In fact, had the fuel been consumed by the *"Norstar"* and the leisure boats in question on the high seas and/or carried to ports located in the internal waters other than those of Italy or of other EU coastal States, such as Gibraltar, the resale of the fuel in question on the high seas would not have raised the slightest suspicion concerning offences of the kind in question.

On the contrary, the suspected criminal scheme which was investigated basically consisted of three elements: first, loading the tanker with fuel purchased from the Italian port of Livorno in exemption of excise duties and VAT – that is, avoiding 70 per cent of the regular fuel price – upon false declarations that the fuel was meant for the vessel's own ship store; second, the subsequent resale to Italian and other European leisure boats stationed on the high seas off the coasts of the Italian city of Sanremo, which rendered the just mentioned declarations false declarations; third, the re-entry of the leisure boats into Italian territory and the internal waters with fuel on board, thus potentially eluding the payment of the fiscal duties due under Italian law. The second element, namely the sale of fuel on the high seas, did not constitute a suspected offence as such, but it was materially instrumental in grounding the suspicion that the fuel declaration – which was filed at the time of purchase on Italian territory – was false, and that the re-entry into Italian ports could amount to tax evasion. Here, again, the suspected offences would occur exclusively on Italian territory.

Mr President, I will now turn to the Decree in question. On 11 August 1998, the Prosecutor at the Tribunal of Savona issued a Decree of Seizure against the *"Norstar"* based on article 253 of the Italian Code of Criminal Procedure. According to this provision, which you find at tab 9 of your folder and on the screen before you:

> 1. The judicial authority adopts, with motivated order, the seizure of the *corpus delicti* and of any other thing related to the crime and necessary to the assessment of the factual background of the case.
>
> 2. The things on or through which the crime was committed, as well as the product, profit or price of the crime, are to be considered *corpus delicti*.

By way of background, it is important to keep this provision in mind, and I will revert to it shortly.

I will now show that the Decree did not target bunkering activities, which means activities carried out on the high seas, but rather targeted alleged offences that occurred within Italian territory.

This is plainly corroborated by the text of the Decree, which reads in part as follows, and you can see it on the screen before you. These pieces of legislation have been reproduced in Annexes B, C and E of Italy's Counter-Memorial:

> Having regard to the criminal proceedings filed against ROSSI SILVIO and others for the offence pursuant to Articles 81(2) and 110 crim. code, Articles 40(1)(b) and 40(4) of Legislative Decree no. 504/95, Articles 292-295(1) of Decree of the President of the Republic no 43/3 and Article 4(1)(f) of Law no. 516/82, committed in Savona and in other ports of the State during 1997.[45]

The description of the conduct which was the object of the investigations and constituted the suspected crimes is again to be found in the Decree of Seizure. For the most relevant parts, it reads:

> As a result of complex investigations carried out it emerged that ROSSMARE INTERNATIONAL s.a.s., managed by ROSSI SILVIO, sells in a continuous and widespread fashion, mineral oils (gas oil and lubricant oil) for consideration, which it bought exempt from taxes (as ship's stores) from customs warehouses both in Italy (Livorno) and in other EU States (Barcelona) and intended to trade in Italy, thus evading payment of customs duties and taxes by fictitiously using oil tankers, which are in fact chartered, and by resorting also to consequent tax fraud in respect of the product sold.

I refer to the rest of the text there in tab 8 of your folder, Mr President.

The crimes in connection to which the Decree of Seizure was adopted under article 253 of the Italian Criminal Code, which I read in full a second ago, are the following:

a. avoiding the payment of excise duties on mineral oil under Article 40(1)(b) and 40(4) ("Avoidance of the ascertainment or payment of excise duty on mineral oils") of the Legislative Decree no. 504/95 containing the Act on production and consumption taxation and the relevant criminal and administrative fines;[46]
b. smuggling under article 292 of the Decree of the President of the Republic no. 43/73, occurring in case of avoided payment of border's fees due for goods;[47]
c. stating in the income tax return or in the annexed budget or financial statement, income or other revenues, or expenses or other negative components, different from the real ones by utilizing documents certifying facts not true or putting in place a fraudulent behaviour with a view to evading income taxes or VAT or obtaining undue reimbursement for him/herself or for third parties (Article 4(1)(f) of Law no. 516/82).[48]

[45] Seizure order by the Public Prosecutor of the Tribunal of Savona, 11 August 1998 (*Counter-Memorial* (see footnote 33), Annex I).
[46] Legislative Decree No. 504 of 26 October 1995, Article 40 (*Counter-Memorial* (see footnote 33), Annex B).
[47] Decree of the President of the Republic No. 43 of 23 January 1973, Articles 2, 253-254 and 292-295*bis* (*Counter-Memorial* (see footnote 33), Annex C).
[48] Law No. 516 of 7 August 1982, Article 1, amending Law Decree No. 429 of 10 July 1982, Article 4 (*Counter-Memorial* (see footnote 33), Annex E).

In sum, Mr President, the disputed Decree was adopted simply because it represented *corpus delicti.*

I pause here to emphasize that Mr Carreyó misused this term on Monday in order to advance an incorrect characterization of the Decree and of the concept of *corpus delicti.* In particular, Mr Carreyó described that *corpus delicti*

> refers either to the proof that a crime has been committed before a person can be convicted of having committed that crime, or to the object upon which the crime was committed, which itself proves the existence of that crime.

He then asked: "How, then, can Italy continue to pretend that the material acts of the *'Norstar'* could still be considered as alleged criminal conduct by describing it as a *corpus delicti*?"[49]

But that is not at all what Italy is doing. *Corpus delicti* is a term which may have different connotations. But article 253, paragraph 1, of the Italian Criminal Procedure, which I had shown you on the screen a while ago and which is again being reproduced before you, clearly indicates that *corpus delicti* may refer to an object that is "necessary to the assessment of the factual background of the case". That was precisely the purpose of the Decree in this case under which the *"Norstar"*, as *corpus delicti*, was simply an instrument to be used in the further investigation of suspected smuggling and tax evasion.

The fact that this investigation did not lead to the ultimate prosecution of the individuals concerned – and condemnation – of course, does not necessarily mean that the seizure of that *corpus delicti* must therefore have been wrongful. As I will revert to shortly, the Italian courts acquitted the defendants, but did not find the Decree to be unlawful.

Mr President, Members of the Tribunal, I should also emphasize at this point that Mr Carreyó's assertions on Monday that the seizure was a *sine die* confiscation is simply wrong. This seizure, by its very nature, as a means of investigation, as we have just seen from article 253 of the Italian Procedural Criminal Code, was only a temporary measure. That is also why, of course, the vessel was conditionally released in February 1999 and unconditionally released in March 2003. Clearly, there was nothing confiscatory about this seizure, nor anything *sine die* about it, and it was only the owner's failure to retrieve the vessel that extended the period of the seizure.

Mr President, there is no denying that, as Panama has pointed out, the Public Prosecutor envisaged, if necessary, the "hot pursuit" of the vessel under article 111 of UNCLOS in order to enforce the Decree, and that he also referred to a contiguous zone that Italy has not promulgated. But this is immaterial for the international legal assessment of the Italian conduct in the instant case. Had the Decree been enforced by the Italian Coast Guard on the high seas on either ground, then the facts of this case would have been materially different. But of course Italy did not enforce the

[49] ITLOS/PV.18/C25/2, page 36, lines 1-6.

Decree on the high seas; this is a different dispute from the one which is being portrayed by Panama.

Finally on extraterritoriality, Mr President, even if, *arguendo,* elements of extraterritoriality were to be found in the Decree in question, the fact remains that it has not produced the slightest physical or otherwise concrete interference on the *"Norstar"*'s navigation on the high seas. Professor Caracciolo after me, and Mr Busco this afternoon, will elaborate on this point.

Mr President, I shall now turn to Panama's repeated assertions that the Decree of Seizure was found to be wrongful by the Italian judiciary itself. I have already illustrated how, even if, *arguendo*, this were to be considered as true, the question of any wrongfulness under international law would be an entirely separate question, governed by a different legal standard. However, Mr President, in the present circumstances there is no real need to resort to such basic principles of international law, since, as a matter of fact, the Decree in question was never found unlawful by the Italian courts.

I should respond at the outset here to Mr Carreyó's statement of Monday that "the Italian judgments and [their] reasoning cannot be disassociated from the decree of seizure because such judgments reflect the final outcome of the Italian decision that is at the root of this case".[50]

But, Mr President, Members of the Tribunal, Mr Carreyó ignores the precise basis on which the Tribunal of Savona acquitted the defendants and which, as I shall now explain, fully contradicts Panama's case.

As already amply recalled, one of the grounds upon which Panama alleges that Italy's domestic courts found the Decree in question to be illegal under Italian law is that of the alleged "extraterritorial" reach of the Decree.

But, Mr President, this is not at all the reasoning followed by the Tribunal of Savona.

The fact of the matter, Mr President, is that the accused were not acquitted because the crimes allegedly committed through the *"Norstar"* consisted of conduct carried out on the high seas, but just because it was carried out without reaching the threshold of criminal responsibility for conduct carried out in Italy.

Had the Italian courts found that the Italian jurisdiction was exercised extraterritorially by the Public Prosecutor, they would have declined jurisdiction because the crime would have been one out of the reach of the Italian judiciary. They would not have acquitted those involved on the merits of the claim, as they did; they would have declined jurisdiction.

Mr President, I will now briefly summarize the actual reasoning of the Italian judiciary, whose decisions you may find in your Judge's folder, at tab 10.

[50] ITLOS/PV.18/C25/1, page 18, lines 17-21.

As to the alleged crime of "avoiding the payment of excise duties on mineral oil under Article 40(1)(b) and 40(4) of the Legislative Decree no. 504/95", the Tribunal found that the Italian fiscal law does not require a leisure vessel, supplied abroad in exemption of VAT and excise duties, to declare the fuel and pay customs upon return to Italian waters and harbours, unless such fuel is unloaded or consumed within the customs line. Since this was found not to have been the case, the Tribunal declared that the crime of evasion of excise duties and VAT had not been committed.

As to the crime of smuggling, the Tribunal found that failure to mention the exempted fuel in the Ship's Bulletin does not constitute smuggling because the relevant provisions of Italian law do not contain an explicit provision sanctioning such failure with specific regard to mineral oil products, but only others. Again, the Tribunal of Savona simply found that the crime had not been committed.

Lastly, as to the crime of tax fraud, the Tribunal deemed that it was not sufficiently demonstrated that the amount of gas oil reintroduced into Italy's territory reached the value threshold of criminal relevance established by Italian law (7.5 million Italian lira at the time). Again, the Tribunal found that the crime was not committed.

In sum, Mr President, what the Italian courts did was simple and straightforward, and certainly does not correspond to what Panama tries to portray: the Tribunal of Savona acquitted the accused based on its assessment that the conduct of the accused fell short of the criminal threshold provided for under Italian law. The Appellate Court of Genoa, which was in no way concerned with the *M/V "Norstar"*, simply confirmed the acquittals in the former judgment. As observed by the ICJ, "[i]t would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law".[51]

You can find this quote in tab 11, Mr President.

Panama has also tried to pull the wool over our eyes by telling the story that the decision by the Tribunal of Savona of 2003, which lifted the seizure after the acquittal, "was not full and final"[52] and that "the Savona Public Prosecutor appealed the decision in front of the Court of Appeal of Genoa, despite having full knowledge of its illegal conduct when ordering and requesting the arrest of the *M/V 'Norstar'*".[53]

This, again, is just untrue.

It is true that the Public Prosecutor appealed the decision of the Tribunal of Savona. However, the appeal did not encompass the part of the judgment which provided for the release of the *"Norstar"*. The Prosecutor did not apply for suspension of the lifting and, therefore, under the Italian Code of Criminal Procedure the release of the *"Norstar"* became irrevocable and final on 20 August 2003.

[51] *Elettronica Sicula S.P.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15 ff., para. 124.
[52] *Application of the Republic of Panama*, 16 November 2015, para. 8.
[53] *Memorial* (see footnote 5), para. 32.

It is unquestionable that the owner was promptly informed of the judicial decision on the lifting of the seizure and, thus, that this decision was final.

Mr President, Members of the Tribunal, I may refer you to tab 6 of your folder. There you find the communication, dated 18 March 2003, by the Tribunal of Savona to the Spanish authorities of the judgment of 13 March 2003. The relevant passage of that communication reads as follows: "I hereby forward a certified copy of the operative part of the judgment issued by this Court on 14 March 2003 *ordering that the motorship Norstar be released and returned* to the company Intermarine A.S."

Mr President, there was evidently nothing *sine die* about that Decree. Italy has already demonstrated that the Spanish authorities took note of such request and definitely withdrew the seizure on 21 July 2003. You may find the relevant document, again, at page 2, tab 6 of your Folder.

Annex 12 to Panama's Memorial shows that the Tribunal of Savona had sent to Intermarine the notification of the lifting on 21 March 2003; that on 3 April 2003, the Italian Ministry of Justice requested the Norwegian authorities to notify Intermarine of exactly the same information; and the Norwegian Ministry of Justice confirmed on 23 July 2003 that Mr Morch was notified with a copy of the relevant documents on 2 July 2003. You may find a copy of those communications in your folder, at tab 16.

Panama remarkably itself acknowledges that the shipowner was informed of the lifting of the seizure just a couple of weeks after the judgment was rendered, as follows:

> The ship owner received a document identified as R.G. 415/02 dated 21 March 2003 by registered mail dated 26 March 2003 which was the decision of 13/14 March 2003 that ordered "that the seizure of motor vessel Norstar be revoked and the vessel returned to INTERMARINE A.S. and the caution money released." The same document (415/03) was later on 2 July 2003 delivered by the police.[54]

Again, you may find a copy of the relevant communication at tab 16 of your folder.

While we have responded to Panama's repeated claims of lack of communication by the Italian judiciary of their decisions, we now hear from opposing Counsel that this is no longer the problem. The problem now, as we have heard this week, is that

> simply informing the ship owner of the judgment ordering the release of the vessel was not sufficient and did not relieve Italy from its duty to take the necessary, positive and effective steps to enforce this order and place the *"Norstar"* at the disposition of the shipowner.[55]

Mr President, Panama has not substantiated this assertion with any authority. The existence of a duty of a kind referred to by Panama would go beyond the reasonable standards contained in due process principles that, as I have just shown, have been fully complied with: by investigating the vessel according to the law, by releasing the

[54] *Reply* (see footnote 3), para. 463.
[55] ITLOS/PV.18/C25/3, page 24, lines 17-20.

vessel according to the law, by acquitting the accused according to the law, and promptly notifying the interested individuals of all of the above.

Mr President, Members of the Tribunal, I will now turn to the issue of the owner's failure to retrieve the vessel.

As Italy has explained in its pleadings, in February 1999 the ship was released upon the payment of a security, whereas in March 2003 it was definitely released. However, the vessel was not retrieved by the owner on either occasion.

Panama tries to blame Italy for this failure. When it comes to describing the conduct of the Italian judicial authorities with regard to the application to lift the seizure of the *"Norstar"*, Panama tries to depict a set of factual circumstances that would suggest neglect and arbitrariness on the part of the Italian judiciary.

In paragraph 28 of its Memorial, Panama refers to an application by the owner to lift the seizure of the vessel and suggests that, at one and the same time, such application was met with a refusal, and an offer of release against an unreasonable bond, on 18 January 1999. Panama adds that "[t]his decision was communicated to the shipowner on 29 June 1999". You can find this at tab 5 of your folder, Mr President.

The very evidence produced by Panama shows a more articulated picture than this incomplete account. First, the refusal dated 18 January 1999 was explained in the operative part of the decision in question to be of a temporary nature, based on the fact that the "investigative exigencies" had not yet been completed. Mr President, Members of the Tribunal, I can refer you to tab 12 of your folder. In fact, this refusal was followed only five weeks later by a conditional release, once the investigative and probationary purposes had been achieved. Mr President, there was evidently nothing *sine die* about that Decree.

Second, with regard to the communication to the shipowner of the refusal of the 18 January 1999 request for release, which occurred through diplomatic channels only in June 1999, it would be surprising if the shipowner's attorney in the meantime had not received ordinary judicial notification. This is the law and the uncontroversial practice in Italy and the negative cannot be presumed.

Third, in any case, the issue of this tardy communication is superseded by the fact that the refusal of 18 January 1999 was followed five weeks later, in February, by the decision of the release of the vessel against a security. We learn this from Annex 8 to Panama's Memorial.

Fourth, to confuse matters more, in its Memorial, at paragraph 28, Panama tells us that this decision, which is dated 24 February 1999, was communicated to the shipowner in June, but from Annex 9 to Panama's Memorial it appears that such communication referred to the refusal of 18 January, whereas from Annex 8 we learn that on 11 March the Public Prosecutor of the Tribunal of Savona requested the Italian Embassy in Oslo to inform Intermarine that the vessel could be released upon security. You can find the relevant passages at tab 13 of your folder, Mr President.

Panama also tries to advance arguments about the alleged illegitimacy of the release order of 1999. I address these arguments here since, as already recalled, these issues of Italian law constitute a fact from the perspective of international law.

Panama puts forward three arguments in order to ground the alleged wrongfulness of the conditional release of the vessel. Each one of them is unfounded as a matter of fact. First, Panama contends that "[s]ince the arrest of the *M/V 'Norstar'* was unlawful, Italy had the duty to release the *M/V 'Norstar'* without any consideration or security".[56]

Second, Panama contends that the security was unreasonable.

Third, Panama asserts that, anyhow, "the owner of M/V Norstar could not provide [the security] as through the long arrest the market for such business had been destroyed with no further income."[57]

THE PRESIDENT: Mr Tanzi, I am sorry to interrupt you but we have reached 11.30. At this stage the Tribunal will withdraw for a break of 30 minutes. You may continue your statement at noon, when we will resume the hearing.

(*Break*)

THE PRESIDENT: I give the floor to Mr Tanzi to continue his statement.

MR TANZI: Thank you, Mr President, Members of the Tribunal. As to the first point, on the alleged unlawfulness of the Decree under Italian law pleaded by Panama, I have already demonstrated how the adoption of the Decree was in full conformity with the Italian law. I have already illustrated how the Tribunal of Savona in its Judgment of 2003 never found the Decree unlawful, whereas, as just emphasized, the Appellate Court of Genoa did not address the issue of the Decree's lawfulness, simply because the release of the vessel by the Tribunal of Savona had not been appealed by the Prosecutor.

As to the second point, namely the alleged unreasonableness of the security invoked by Panama, it is simply unfounded. The security was determined in the amount of 250,000,000 Italian lira – i.e. approximately US$ 145,000. If we take the value of the ship suggested by Panama – that is, US$ 625,000 – the bond corresponded to less than 25 per cent of the value declared by Panama.

Mr President, the case law of this Tribunal on prompt release plainly shows that the amount of the security at issue was not only reasonable, but it was far lower, and I would say generous, with respect to the average standard followed by this Tribunal.

Suffice to recall the Tribunal's precedents in the *Monte Confurco*, *Camouco* and *Volga* cases: there, the security was equal to or greater than the value of the ship. For reason of brevity, Mr President, I may refer you to tab 14 for the relevant passages.

[56] *Reply* (see footnote 3), para. 450.
[57] *Application* (see footnote 52), para. 7.

Third, Mr President, on Panama's contention that the shipowner was unable to pay the security because "through the long arrest [of the *M/V 'Norstar'*] the market for [its] business had been destroyed".[58] Mr President, either the owner and Inter Marine had "[a]t the time … a well-established reputation as an ongoing business",[59] and in that case five months of seizure of one of his ships would not be able to put him "out of business"; or it was already in poor financial condition at the time of the seizure.

This, Mr President, appears to be the real situation and this accounts for at least one of the reasons why the bond was not payed and the *"Norstar"* was not retrieved by the owner. Let us look at tab 15, Mr President, at the letter by Sparenbanken dated 16 September 1998, that is a few days prior to the actual enforcement of the seizure of the vessel. This document[60] refers to "Inter Marine's financial position, with poor liquidity and a high level of short-term debt".

This is obviously a matter on which Panama should have been able to provide evidence; yet the only document that Panama has submitted is a letter dated 27 May 2001 by Mr Emil Petter Vadis, the managing director of Inter Marine, to Mr Morch.[61] This email merely contains a list of clients that the *"Norstar"* allegedly supplied in the summer of 1998, but this very generic list says nothing about the financial state of Inter Marine and plainly contradicts what we heard on Monday from Mr Silvio Rossi.

Mr President, Members of the Tribunal, Italy may not be held accountable for Panama's or the owner's difficulties and failures.

I will now turn, Mr President, to the remedies available, the options available under Italian law for the shipowner to retrieve the vessel and for him and the other individuals involved with the *"Norstar"* to obtain redress for the alleged damages derived from the Decree.

Italy has already explained in its written pleadings that the shipowner and the other persons involved had multiple legal remedies they could resort to if they really believed at the relevant time that the security was truly unreasonable and that they had suffered a truly unjust damage, and if they truly thought that the ship was worth anything close to what Panama is now claiming before you.

In the first place, Mr President – and I refer you to tab 9 – the owner could apply before the same Public Prosecutor for the re-examination of the Decree under article 257 of the Code of Criminal Procedure. You may find again at tab 9 the relevant criminal law and procedural criminal law provisions.

Had that remedy proved unsuccessful, the individuals in question could have lodged a claim against the refusal of re-examination of the Decree before the Judge of the Preliminary Investigations under Article 263, paragraph 5, of the Code of Criminal Procedure.

[58] *Ibidem*.
[59] *Memorial* (see footnote 5), para. 23.
[60] *Reply* (see footnote 3), Annex 2.
[61] *Reply* (see footnote 3), Annex 1.

Had that remedy proved unsuccessful, too, the applicants could have then applied against the decision of the judge of the preliminary investigations before the Court of Cassation under article 324 of the Code of Criminal Procedure. Had that remedy proved unsuccessful too, and the individuals in question were truly convinced at the relevant time – as much as Panama now seems to be – that the security was truly unreasonable, that they had suffered a truly unjust damage, and if they truly believed that the ship was worth anything close to what Panama is now claiming before you, then, Mr President, they could seek redress by suing the Italian Ministry of Justice for damages. Under article 2043 of the Italian Civil Code, any person who, by an intentional or negligent act, causes unfair damage to another, must compensate the victim; under article 28 of the Italian Constitution, civil liability for breaches of criminal, civil or administrative law by State officials applies also to the State and State entities. This provision is also to be found in tab 9 of your folder, Mr President.

Mr President, if the individuals in question were truly convinced at the relevant time – as much as Panama now seems to be – that the Italian judiciary was tainted by bad faith and that, therefore, the Italian domestic remedies would be arbitrary and discriminatory, and if they truly believed that the ship was worth anything close to what Panama is now claiming before you, then either the owner, or Panama, could also have lodged an application for prompt release under article 292 UNCLOS. Of course, neither the owner nor Panama took any of these actions.

I will now conclude my speech by recalling the most salient preliminary points and facts in this case. They demonstrate that this case, at the end of the day, is a simple and narrow one. In particular it concerns an alleged breach of article 87 and article 300. No other alleged breach is relevant.

It concerns the lawfulness under international law of the Savona Public Prosecutor's Decree of Seizure and Italy's request for assistance from the Spanish authorities, both in August 1998. No other Italian conduct is relevant for the purposes of the present dispute.

The Decree and request were based on the Italian authorities' good faith investigation into alleged criminal conduct carried out primarily by Italian nationals and exclusively on Italian territory.

The *"Norstar"* was arrested in September 1998 not on the high seas, but in Spain's internal waters.

When it was arrested, the *"Norstar"* was not seaworthy and it was in fact in such poor condition that it could not even sail one nautical mile into the port.

The Tribunal of Savona in February 1999 ordered the conditional release of the *"Norstar"* upon payment of a minimal security. That order was duly communicated to the shipowner, but the vessel was not retrieved.

The Tribunal of Savona ultimately acquitted the defendants and ordered the unconditional release of the *"Norstar"* in March 2003. This was not because any of the alleged criminal conduct took place on the high seas beyond Italy's jurisdiction – not at all.

Mr President, thus is the simple and narrow nature of this case. What these facts also reveal is the perfectly ordinary exercise of a State's sovereign right to investigate and prosecute possible crimes relating to tax and customs infringements on its territory, and the legitimate powers to temporarily seize property for the purpose of investigating such crimes. In this case, the investigation and prosecution led to the acquittal of the defendants and the release of the vessel seized, but that too, Mr President, is ordinary. Panama's attempts to elevate the ordinary processes of a State's criminal courts into a breach of international law must be rejected by this Tribunal.

Mr President, Members of the Tribunal, this concludes my speech. I kindly ask you to invite Professor Caracciolo to take the floor and present the arguments concerning article 87. I thank you for your attention, Mr President.

THE PRESIDENT: Thank you, Mr Tanzi. I then give the floor to Ms Caracciolo to make a statement.

MS CARACCIOLO: Mr President, distinguished Members of the Tribunal, I am honoured to appear before you today, and especially to do so on behalf of my country, Italy.

In my presentation, I shall explain why Italy has not, by means of the Decree of Seizure of the *M/V "Norstar"* and the request for its execution with regard to activities carried out by the *"Norstar"* on the high seas, violated article 87 of the Convention vis-à-vis Panama.

In order to duly respond to the allegations submitted by Panama in the pleadings as well as in the hearings, my presentation will be divided into four main parts.

The first part will dwell on the subject matter of the present dispute with regard to article 87, paragraph 1, of the Convention. Building up on what Professor Tanzi has said, I will point to Panama's misleading interpretation of the Judgment adopted by this Tribunal on 4 November 2016.

The second part will deal with the alleged breach of article 87, paragraph 1, of the Convention. In particular, I shall demonstrate: (a) that the *"Norstar"* was not navigating on the high seas when the Decree of Seizure and the request for its execution were issued; (b) that the Decree of Seizure and the request for its execution were not able to interfere with Panama's freedom of navigation, and in fact did not determine any interference; (c) that freedom of navigation on the high seas cannot be interpreted as a provision that applies to areas other than the high seas, or as freedom to gain access to the high seas; (d) that the question of the extraterritorial nature of an exercise of jurisdiction is not relevant from the perspective of freedom of navigation under article 87.

In the third part, I shall focus on the fact that, even if the extraterritoriality of an exercise of jurisdiction is a matter that is not relevant under article 87, the Decree of Seizure and the request for its execution in any event targeted crimes committed by the *"Norstar"* within the Italian territory (that is to say, the Italian internal waters,

and/or the Italian territorial sea). In other words, that Italy did not exercise its jurisdiction extraterritorially, but sought to prosecute domestic crimes.

Finally, the fourth part will stress that article 87, paragraph 2, is not applicable to Italy in the instant case; and, for this fact alone, it cannot have been breached.

Mr President, Members of the Tribunal, I come to the first part of my presentation, which deals with the subject matter of the present dispute and Panama's misleading interpretation of the Judgment of 4 November 2016 vis-à-vis article 87, paragraph 1.

As my colleague Professor Tanzi has already illustrated, the subject matter *sub judice* has been attentively curtailed by the Tribunal in November 2016. At paragraph 122 the Tribunal clearly established that the measures under scrutiny are uniquely the Decree of Seizure and the request for its execution from the perspective of articles 87 and 300.

Panama ignores the Tribunal's ruling. In the pleadings as well as in the hearing, Panama has continuously and insistently attempted to enlarge the subject matter of the instant dispute. For example, going beyond the terms of its application, Panama tries to expand the dispute to articles 92 and 97 of the Convention, on which Mr Paolo Busco will elaborate later on. Human rights claims are similarly based on this expansive approach. Professor Tanzi will address you on this matter tomorrow. For what is relevant from the specific angle of my presentation, Panama has conflated the execution of a Decree of Seizure and a request for its execution, with the notion of the actual execution and enforcement of those acts, hence trying to present before the Tribunal a dispute that is different, and larger, from the one the Tribunal has decided to admit to the merits.

This approach, wrong as it is, does not assist Panama in any way; and, indeed, it is not clear what Panama seeks to obtain by conflating the notion of Decree of Seizure, and the request for its execution, with the notion of execution of the Decree of Seizure and of the request. Even if this dispute were about the execution of the Decree, Panama would not be able to demonstrate a breach of article 87 for the simple fact that the execution of the Decree was perfectly legal, having occurred in the internal waters of Spain, an area of the sea where article 87 does not apply, let alone can be breached.

Mr President, Members of the Tribunal, let me also point to another grave error that Panama has incurred with regard to the interpretation of the Judgment of 4 November. As Professor Tanzi has mentioned previously, Panama has maintained that in its Judgment this Tribunal has already determined the dispute by establishing the responsibility of Italy for the breach of article 87, paragraph 1.

Mr President, Members of the Tribunal, you may find that this is a rather plain point to argue, but it is nevertheless necessary, since there is no doubt that Panama looks at the 4 November Judgment as a sort of pre-decision on the merits. Panama claims, for example that:

> the Tribunal tacitly rejected the Italian argument … deciding that: "the decree of seizure … against the *M/V 'Norstar'* … and the request for its

> execution by the Prosecutor at the Court of Savona may be viewed as an infringement of the rights of Panama under article 87 as the flag State of the vessel".[1]

This point has been stressed by Panama time and again. Thus, according to Panama the Judgment of 2016 is not an interlocutory decision but a definitive decision on the breach by Italy of the navigational rights of Panama on the high seas.[2] In doing so, Panama not only undermines the importance and authority of the present proceedings on the merits and also disregards one of the most established principles applicable to international proceedings, namely that a decision on a preliminary objection cannot lead to any adjudication on the merits. Allow me to mention the Permanent Court of International Justice, which qualified a preliminary objection as one "submitted for the purpose of excluding an examination by the Court of the merits of the case, and being one upon which the Court can give a decision without in any way adjudicating upon the merits".[3]

Equally, in the *South West Africa* case of 1996, the International Court of Justice stressed that "a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with a preliminary objection."[4]

Also in the *Fisheries Jurisdiction* case of 1973 as well as in the *Nicaragua* case of 1984, the Court concluded as follows: "the Court will avoid not only all expression of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits."[5]

Bearing in mind these considerations, I wish to emphasize what exactly this Tribunal ruled in November 2016. At paragraph 110, the Tribunal stated that at the stage of Preliminary Objections its function is to establish "a link between the facts advanced by Panama and the provisions of the Convention referred to by it and show that such provisions can sustain the claims submitted by Panama".[6]

This much having been clarified, I will now turn to explaining why Italy has not, by means of the Decree of Seizure and the request for its execution, breached article 87 of the Convention.

Mr President, Members of the Tribunal, in order for a breach of article 87 to occur, the *condicio sine qua non* is that article 87 is in the first place applicable at the time when the alleged interference with freedom of navigation occurs. Clearly, if the provision is not applicable, all the more so, it cannot be breached. It is not contested between the Parties that when the Decree of Seizure was executed, the

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[1] *Reply of the Republic of Panama*, 28 February 2018, para. 82; and *M/V "Norstar" (Panama* v. *Italy)*, *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44 ff., para. 122.
[2] *Reply* (see footnote 62), paras. 184-187.
[3] *Panevezys-Saldutiskis Railway (Est.* v. *Lith.)*, *1938 P.C.I.J. (ser. A/B) No. 76* (Feb. 28), p. 22.
[4] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, pp. 36-37, para. 59.
[5] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3, p. 7, para. 11; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, p. 397, para. 11.
[6] *M/V "Norstar"* (see footnote 1), para. 110.

M/V "Norstar" was not on the high seas. The execution of the Decree, while not being the subject of this dispute, is therefore certainly not in breach of article 87.

I shall now demonstrate that also the Decree of Seizure and the request for its execution did not breach article 87, paragraph 1, because the *M/V "Norstar"* was not navigating on the high seas at the time of their adoption.

Mr Busco the other day made reference in cross-examination to a document submitted by Panama itself in these proceedings, according to which the *M/V "Norstar"* entered the port of Palma de Mallorca in March 1998, namely several months before the date of the Decree of Seizure, and never once did it leave the port between March 1998 and the 25 September of the same year, when the Decree was executed.[7]

As Professor Tanzi has already argued, no evidence has been provided by Panama's witnesses during cross-examination of the fact that the *"Norstar"* was navigating in the summer of 1998.

Ultimately, what Panama has not been able to prove is a critical condition for its case that the vessel was on the high seas on 11 August 1998 when the Decree of Seizure was issued and the request for execution transmitted to the Spanish authorities and at any other time thereafter.

Other documents show why this is the case; namely, that the technical bad conditions of the *"Norstar"* made navigation impossible outside the internal waters of Palma de Mallorca.

The vessel's poor conditions in the summer of 1998 are also confirmed by a fax sent by Transcoma Baleares to the Spanish port authorities in Palma de Mallorca on 7 September 1998, that is to say 28 days after the adoption of the Decree of Seizure and the request for its execution. Indeed, in this communication Transcoma refers to the bad condition of the chains aboard, the broken starboard anchor, the breakdown of one of the two generators, and the lack of any fuel.[8]

Mr President, Members of the Tribunal, Panama sustains that the *"Norstar"* was in excellent condition and navigating on the high seas when the Decree of Seizure and the request for its execution were issued. Italy believes that this is not the case. We have also heard from Panama's witnesses that the ship was perfectly efficient at the time of its arrest, which occurred on 25 September 1998. Contemporary evidence, like the fax sent by Transcoma Baleares dated 25 September shows exactly the opposite.

Mr President, Members of the Tribunal, let me make one final consideration. Panama, as the claimant in this case, has to prove that the conditions for a breach of article 87 have occurred. This includes proving the conditions that constitute a logical precedent for a breach to occur, namely that the ship was on the high seas when the alleged interference with freedom of navigation took place. In this case, the alleged

[7] *Counter-Memorial of the Italian Republic*, 11 October 2017, para. 51.
[8] *Report of the seizure by the Spanish Authorities, 25 September 1998* (*Counter-Memorial* (see footnote 68), Annex K), at 3.

interference is constituted by the Decree of Seizure and the request for its execution. Panama has not been able to discharge the burden placed upon it that the vessel was on the high seas when these acts were adopted. Saying that one does not recall where the ship was or that the ship may have been on the high seas, but may well have been in port, is obviously not enough to prove that the ship was for sure on the high seas, when the acts whose legality is being investigated in these proceedings came to light.

Mr President, Members of the Tribunal, in conclusion: the Decree of Seizure and the request for its execution did not breach article 87, paragraph 1, because it is not proven that the vessel was on the high seas when they were issued.

Mr President, Members of the Tribunal, without prejudice to what I have already stated, I shall now contest Panama's argument that the Decree of Seizure and the request for its execution amount to an interference with the freedom of navigation of the *"Norstar"* and hence are in breach of article 87.

Apodictically, in the Reply Panama affirms that "Italy's conduct amounted to physical interference with the movement of the *M/V 'Norstar'"*.[9]

According to article 87, the high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by the Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States freedom of navigation.

The essential content of freedom of navigation consists in a prohibition for States other than the flag State to interfere with the navigation of a vessel on the high seas.[10]

In the *Nuclear Tests* Case before the International Court of Justice, the interdiction by France, also through the use of force, of vast areas of the Pacific closed to foreign shipping in 1974, was at the basis of the protest by New Zealand, which argued that: "the interference with ships and aircrafts on the high seas and in the superjacent air space … constitute[s] infringement of the freedom of navigation".[11]

In the *Croatia* v. *Slovenia* Case, an arbitral tribunal under Annex VII of the Convention described the meaning of freedom of navigation under article 87, paragraph 1, stating that "ships and aircraft of all flags and of all kinds, civil and military, exercising the freedom of [navigation] are not subject to boarding, arrest, detention, diversion or any other form of interference".[12]

What can be derived from this is that, while the degree of interference may vary, at least some degree of interference with freedom of navigation is necessary in order

[9] Reply (see footnote 62), para. 90.
[10] T. Treves, 'Navigation', in R. J. Dupuy, D. Vignes (eds.), *A Handbook on the New Law of the Sea*, *Volume 2* (Nijhoof 1991) 835, p. 837.
[11] *Nuclear Tests (Australia* v. *France*), Application Instituting Proceedings, 9 May 1973, p. 28.
[12] *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009*, PCA Case No. 2012-04, Final Award, 29 June 2017, p. 361, para. 1129.

for a breach of article 87 to be conceivable. Where there is no interference of any sort, there cannot be a breach of article 87.

The first question to ask is: what sort of interference typically is relevant from the perspective of article 87? Other provisions of the UNCLOS case law and scholars suggest that the interference relevant from the perspective of article 87 is interference that reaches a certain threshold, essentially physical interference or threat of physical interference.

Article 110, paragraph 1 of the Convention, for example, describes boarding as interference. It reads as follows: "Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship … is not justified in boarding it unless there is reasonable ground".

In this sense, for the Convention, interference with navigation occurs when an enforcement action or other kind of tangible and material interference impedes the movement of a ship.

The Convention has adopted a notion of interference on the high seas that has remained unchanged for centuries. Already in 1893, Professor Halleck used language suggestive of physical interference when qualifying the term. He warned that "[t]o enter into [a non-national] vessel, or to interrupt its course, by a foreign power in time of peace ... is an act of force, and is *prima facie* a wrong, a trespass, which can be justified only when done for some purpose, allowed to form a sufficient justification by the law of nations."[13]

International jurisprudence corroborates the assessment that breaches of article 87, paragraph 1, typically involve conduct by a coastal State amounting to material interference with the navigation of a foreign vessel. In its pleadings, Italy has already referred to two arbitral tribunals' awards of 1921. In one, the *"Wanderer"* Case, the tribunal stated that "[t]he fundamental principle of the international maritime law is that no nation can exercise a right of visitation and search over foreign vessels pursuing a lawful vocation on the high seas, except in time of war or by special agreement."[14] Again, visitation and search are conducts that point towards a high threshold when characterizing the word interference: some sort of physical, material interference with the movement of a vessel appears necessary.

More recently, and as regards the case law of this Tribunal, in the *M/V "Saiga"* Case the complaint by the Applicant State regarding article 87 concerned the following activities: "[I]nter alia the attack on the *M/V 'Saiga'* and its crew in the exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and the removal of the cargo of gasoil".[15]

In the *"Volga"* Case the activities put in place by the Australian military personnel and lamented by Russia amounted to enforcement measures, namely the boarding of the Russian fishing boat when it was on the high seas, its detention by the military

[13] H. Halleck, *Elements of International Law and the Law of War* (3rd edn; Baker 1893), p. 264.
[14] *Owners, Officers and Men of the Wanderer (Gr.Br).*v. *United States* (1921) VI RIAA 68, p. 71.
[15] *Counter-Memorial* (see footnote 68), para. 83.

personnel and, finally, its diversion under escort of a military warship towards an Australian port.[16]

Again, in the *"Arctic Sunrise"* Case, the Netherlands objected to the "boarding, investigating, … arresting and detaining the *'Arctic Sunrise'*" as measures contrary to article 87, paragraph 1, of the Convention.[17]

Allow me also to refer to the Separate Opinion to the Judgment of 2016, where Judges Wolfrum and Attard explained that freedom of navigation is to be interpreted as freedom from enforcement actions. In particular, Judges Wolfrum and Attard held that

> [c]onsidering the object and purpose of article 87 of the Convention, this provision first and foremost protects the free movement of vessels on the high seas against enforcement measures by States other than the flag State or States so authorized by the latter. [E]nforcement actions … which hinder the freedom of movement of the vessel concerned.[18]

To conclude, it is enforcement activities that are typically deemed to interfere with the freedom of navigation of vessels. This is because only these activities are capable of materially hampering or hindering the movement of a foreign vessel on the high seas. It clearly follows that a Decree of Seizure and a request for execution, until the moment they are enforced, are unable to produce any of the effects indicated above. Without being executed, they are devoid of any enforcement effects *per se*. Thus they cannot breach alone article 87, paragraph 1, and they did not, in this case. As to Panama's new and rather surprising claim that some Italian war vessels would have threatened the *"Norstar"* at gunpoint on the high seas, I can only say that this is an entirely unsubstantiated assertion. One would expect to see some evidence of this conduct, since this is a case about article 87. However, even if the conduct to which Panama refers had happened, which it did not, certainly it had nothing to do with the Decree of Seizure and the request for its execution.

Mr President, Members of the Tribunal, Italy does not deny that in certain exceptional circumstances an act that falls short of enforcement action may still become relevant from the perspective of article 87, for instance when it produces some "chilling effect". Let us take the case of a piece of legislation that allows the extraterritorial exercise of a country's jurisdiction to prescribe and hence criminalize certain conducts on the high seas. A ship may self-restrain herself from crossing those areas of the sea where the extraterritorial legislation is applicable and this may, potentially, be conduct that is relevant from the perspective of article 87. Mr Busco will later address you on this matter. However, let me say for now that chilling effect of any sort and intensity presupposes evidently and necessarily two conditions: (a) that the source of the chilling is actually known, or at least knowable, by the entity that has exercised self-restraint, because logically there can be no inhibition, even in theory, when a threat is not known or not knowable; and (b) that a clear causal link between the ship's self-restraint and the act said to determine the chilling subsists. Therefore, the existence of a chilling effect cannot but be

[16] *Ibidem*, para. 84.
[17] *Ibidem*, para. 82.
[18] *Ibidem*, paras. 85-86.

ascertained on a case-by-case basis, taking into consideration the specific circumstances of each event. I need scarcely add that, being extraordinary, if at all relevant from the angle of article 87, chilling effect cannot be lightly presumed.

Turning then to the present case, Italy's position is that the Decree of Seizure and the request for its execution did not interfere with the navigation of the *"Norstar"*, even from the modest and limited perspective of a chilling effect. Indeed, neither Panama, the owner of the *"Norstar"*, the charterer, the master nor the crew knew or could have known of the Decree of Seizure and the request for its execution. That is because, according to the Italian Code of Criminal Procedure, all investigative acts conducted by the Public Prosecutor and/or the judicial police are covered by investigative secrecy. This secrecy is specifically necessary in order to permit that a probative seizure can achieve its purpose. By definition, a probative seizure needs to be carried out "by surprise" to prevent suspects from tampering with evidence and undermining the course of justice.[19]

In the Rejoinder, Italy quoted the Italian Court of Cassation, which stated as follows: "[t]he effectiveness of seizure depends upon the secrecy of its issuance and promptness of its execution. It cannot be effectively repeated, since the element of surprise is its inherent feature and may not be renewed".[20] Similarly, the Tribunal of Milan held that "[t]he … notification of impending investigations … would frustrate the effectiveness of the seizure, which is an unexpected act of investigation".[21]

Our Agent will later examine President Esposito on this matter, and he will confirm to the Tribunal that a Decree of Seizure and a request for execution are, until the moment of their enforcement, secret. As such, they are not able to produce any inhibition, or chilling effect on those that they target.

Mr President, Members of the Tribunal, let me also address the Decree in an even more abstract dimension than the chilling effect.

Panama extrapolates the following language from the Decree of Seizure: "having noted that the seizure of the mentioned goods must be performed also in international seas". It does so while discussing article 300 and good faith, but I address this point in my speech because it is relevant to article 87.

I would like to make three observations.

First, had the Decree of Seizure been executed on the high seas, it would ordinarily have constituted interference with the freedom of navigation of Panama. However, for the reasons explained above, the Decree of Seizure and the request for execution did not determine any interference. This is enough for the purposes of the present case. The fact that the Decree of Seizure and the request had not the power to interfere and did not interfere with the *"Norstar"*s ability to navigate means that no breach of article 87 occurred vis-à-vis Panama.

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[19] European Court of Human Rights, *Garcia Alva* v. *Germany* (Application No. 23541/94), Judgment, 13 February 2001, para. 42.
[20] *Rejoinder of the Italian Republic*, 13 June 2018, para. 50.
[21] *Ibidem*.

Second, the fact that the Prosecutor issued, together with the Decree of Seizure, a request for execution addressed to authorities in Spain, where the *"Norstar"* was located, is evidence of the fact that the Decree was intended to be executed in Spain. Italy would not have needed the co-operation of the Spanish authorities, had it meant to arrest the vessel on the high seas.

Third, one cannot conclude that the Decree of Seizure would be illegal only because it mentions in the abstract the possibility of an enforcement on the high seas. There are exceptional circumstances in which enforcement on the high seas by a coastal State against a foreign ship is allowed. One of these exceptions is hot pursuit, under article 111 of the Convention, and indeed, article 111 of the Convention is quoted in the Decree of Seizure, even if Panama, unsurprisingly, fails to mention it, as a possible basis for the arrest. The legality of a possible arrest under international law of the *"Norstar"* pursuant to article 111 is not part of the dispute in this case.

However, it seems appropriate that the Prosecutor envisaged hot pursuit. The *"Norstar"* was thought to have violated the laws and regulations of Italy. Hot pursuit commencing in the territory of Italy and continuing onto the high seas was rightfully considered by the Prosecutor as a possible option.

Mr President, Members of the Tribunal, I shall now turn to the question that article 87, paragraph 1, is not violated because article 87 cannot be interpreted as a provision that applies anywhere else than the high seas, or conferring a right to a ship detained in port in the context of legal proceedings to gain access to the high seas.

Panama has repeatedly attempted to say that even if the *"Norstar"* was in Spanish internal waters in the summer of 1998, nevertheless it enjoyed the freedom of navigation enshrined in article 87, paragraph 1. Let me draw your attention to the fact that Panama has continuously changed its interpretation of freedom of navigation in the attempt to justify its claim. The concept has been interpreted from time to time as freedom of navigation "on" the high seas, as freedom of navigation "of" the high seas and as freedom of navigation "towards" the high seas. Let me give you some examples of Panama's creativity in proposing always-new facets of the concept of freedom of navigation.

In the Application, Panama holds that "the right of peaceful navigation of the Republic of Panama through the Norstar was violated by the Italian Republic agents … hindering the movements and activities of foreign vessels in the High Seas".

In the Memorial Panama still tides to the assertion that article 87 establishes the freedom of navigation "on the high seas which all States enjoy".[22]

However, in the Reply Panama's strategy suddenly changes. Panama begins to interpret the freedom of navigation as freedom of navigation everywhere in maritime spaces, including from internal waters towards the high seas.[23] According to

[22] *Memorial of the Republic of Panama*, 11 April 2017, para. 68.
[23] *Reply* (see footnote 62), para. 70.

Panama "the fact that a vessel is in port does not affect its right to enjoy freedom of navigation, including the freedom to sail towards the high seas".[24] Finally, from that Panama infers that "the consequence of Italy's wrongful arrest would have been the same no matter where the arrest took place, because it would have impeded the *M/V 'Norstar''*s freedom to sail or navigate on the high seas in any case".[25]

Panama's position on interpreting article 87, paragraph 1, as if the provision established an absolute freedom of navigation at all times and everywhere is completely untenable.

It is a fact that the Convention ensures the access to and from the open sea. Let me mention article 36, on the freedom of navigation in straits used for international navigation; article 58, on the freedom of navigation in the exclusive economic zone; also articles 17 to 26 and article 52, on the innocent passage in the territorial sea and through archipelagic waters, since the right of innocent passage is nothing more than a remnant of the full freedom of navigation in those maritime spaces now included in the territorial seas of coastal States.

However, the Convention is absolutely silent on navigational rights of foreign vessels in the internal waters. This because internal waters are assimilated to the land territories of States. Therefore, as is confirmed by article 8, paragraph 1, of the Convention,[26] the internal waters' regime is characterized by the unlimited sovereignty of the coastal State,[27] thus excluding any right of navigation for foreign ships, except the cases of distress or special agreement. This is also corroborated by article 8, paragraph 2, of the Convention, which allows the right of innocent passage of foreign ships in those internal waters that before their enclosure by straight baselines were part of the territorial sea.

Equally, the absence of navigational rights in the coastal States' internal waters is confirmed by the long-lasting States' practice to conclude bilateral treaties on friendship, commerce and navigation providing access of the ships of one State to the ports of the other.

Also scholars are adamant on the lack of any right of foreign vessels to navigate towards the high seas in internal waters. Professor Hoffmann writes that:

> all waters inside a coastal State's baselines are internal waters where foreign ships enjoy no rights of navigation except as otherwise provided in a treaty

[24] *Ibidem*, para. 72.
[25] *Ibidem*, para. 75.
[26] "*Article 8. Internal waters*
1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
2. Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."
[27] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, p. 111, paras. 212 and 213.

that may confer a right of access, or where before its enclosure by straight baselines, the internal waters were part of the territorial sea.[28]

Professor Bangert observes that "[t]he most important constituent element of the internal waters regime is the lack of any right of passage for foreign ships, except in cases of distress or special agreement".[29]

Professors Churchill and Lowe point out that "[t]he coastal State enjoys full territorial sovereignty over its internal waters. Consequently, there is no right of innocent passage, such as exists in the territorial sea, through them".[30]

Finally, Professor Tanaka comments that "[u]nlike the territorial sea, the right of innocent passage does not apply to internal waters".[31]

THE PRESIDENT: Ms Caracciolo, I am sorry to interrupt you but we have now reached 1 p.m. This brings us to the end of morning sitting. You may continue your statement in the afternoon when the hearing is resumed at 3 o'clock. The sitting is now closed.

(*The sitting closed at 1.00 p.m.*)

[28] A.J. Hoffmann, 'Navigation, Freedom of', *Max Planck Encyclopedia of Public International Law* (April 2011) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1199?prd=EPIL>, para. 7.
[29] K. Bangert, 'Internal Waters', *Max Planck Encyclopedia of Public International Law* (February 2018) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1968>, para. 16.
[30] R.R. Churchill, V. Lowe, *The Law of the Sea* (3rd edn; Manchester University Press 1999) p. 61.
[31] Y. Tanaka, *The International Law of the Sea* (CUP 2012), p. 78.