INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

THE M/V "NORSTAR" CASE
(PANAMA *v.* ITALY)

List of cases: No. 25

JUDGMENT

2019

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AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU NAVIRE « NORSTAR »
(PANAMA c. ITALIE)

Rôle des affaires : No. 25

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10 APRIL 2019
JUDGMENT

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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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THE M/V "NORSTAR" CASE
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JUDGMENT

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Present: *President* PAIK; *Judges* NDIAYE, JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON; *Registrar* GAUTIER.

In the *M/V "Norstar" Case*

between

Panama,

represented by

Mr Nelson Carreyó Collazos Esq., LL.M., Ph.D., *ABADAS* (Senior Partner), Attorney at Law, Panama,

as Agent;

and

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

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

as Counsel;

Ms Mareike Klein, LL.M., Independent Legal Consultant, Cologne, Germany,

Ms Miriam Cohen, Assistant Professor of International Law, Université de Montréal, Member of the Quebec Bar, Montreal, Canada,

as Advocates;

Ms Swantje Pilzecker, *ALP Rechtsanwälte* (Associate), Attorney at Law, Hamburg, Germany,

Mr Jarle Erling Morch, *Intermarine*, Norway,

Mr Arve Einar Morch, Manager, *Intermarine*, Norway,

as Advisers,

and

Italy,

represented by

Ms Gabriella Palmieri, Deputy Attorney General, Italy,

as Agent;

Mr Giacomo Aiello, State Attorney, Italy,

as Co-Agent;

and

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

as Lead Counsel and Advocate;

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

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

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

as Counsel and Advocates;

Mr Gian Maria Farnelli, University of Bologna, Italy,

Mr Ryan Manton, Member of the New Zealand Bar, Associate, *Three Crowns LLP*, Paris, France,

as Counsel;

Mr Niccolò Lanzoni, University of Bologna, Italy,

Ms Angelica Pizzini, Roma Tre University, Italy,

as Legal Assistants,

THE TRIBUNAL,

composed as above,

after deliberation,

delivers the following Judgment:

I. Introduction

1. By an Application dated 16 November 2015 and filed with the Registry of the Tribunal on 17 December 2015 (hereinafter "the Application"), the Republic of Panama (hereinafter "Panama") instituted proceedings against the Italian Republic (hereinafter "Italy") in a dispute "between the two states concerning the interpretation and application of the United Nations Convention on the Law of the Sea … in connection with the arrest and detention by Italy of mv Norstar, an oil tanker registered under the flag of Panama."

2. Together with the Application, a letter dated 2 December 2015 from the Vice-President and Minister of Foreign Relations of Panama was filed with the Registry, informing the Tribunal of the appointment of Mr Nelson Carreyó as Agent in "the case concerning the arrest of the [M/V] NORSTAR".

3. On 17 December 2015, the Registrar transmitted certified copies of the Application and the letter to the Minister of Foreign Affairs and International Cooperation of Italy and also to the Ambassador of Italy to Germany.

4. The originals of the Application and the letter were received by the Registry on 21 December 2015.

5. In its Application, Panama invoked, as the basis for the jurisdiction of the Tribunal, the declarations made by the Parties in accordance with article 287 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention").

6. In its Application, Panama requested that the dispute be referred to the Chamber of Summary Procedure of the Tribunal, pursuant to article 15, paragraph 3, of the Statute of the Tribunal (hereinafter "the Statute"). By letter dated 17 December 2015, the Registrar invited the Government of Italy to communicate its position in this regard at its earliest convenience, but not later than 8 January 2016.

7. The case was entered in the List of cases as Case No. 25 on 17 December 2015.

8. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar, by letter dated 18 December 2015, notified the Secretary-General of the United Nations of the Application.

9. In accordance with article 24, paragraph 3, of the Statute, the Registrar, by note verbale dated 21 December 2015, notified the States Parties to the Convention of the Application.

10. By letter dated 29 December 2015 addressed to the Registrar, the Minister of Foreign Affairs and International Cooperation of Italy notified the Tribunal of the appointment of Ms Gabriella Palmieri, Deputy Attorney General, as Agent in the case.

11. By letter of the same date addressed to the Registrar, the Agent of Italy, referring to the proposal by Panama to refer the dispute to the Chamber of Summary Procedure, expressed Italy's "preference for the case to be heard before the Tribunal *in plenum*."

12. In accordance with article 45 of the Rules of the Tribunal (hereinafter "the Rules"), on 28 January 2016, the President of the Tribunal held consultations with the representatives of the Parties at the premises of the Tribunal

to ascertain their views with regard to questions of procedure in respect of the case. During these consultations, the President indicated to the Parties that, in light of article 108, paragraph 1, of the Rules, the case would be considered by the full Tribunal.

13. Having ascertained the views of the Parties, by Order dated 3 February 2016, the President, in accordance with articles 59 and 60 of the Rules, fixed the following time-limits for the filing of pleadings in the case: 28 July 2016 for the Memorial of Panama, and 28 January 2017 for the Counter-Memorial of Italy. On 3 February 2016, the Registrar transmitted a copy of the Order to each Party.

14. Since the Tribunal does not include upon the bench a member of the nationality of the Parties, each of the Parties availed itself of its right under article 17, paragraph 3, of the Statute to choose a judge *ad hoc*. By letter dated 20 February 2016, the Agent of Panama informed the Registrar that Panama had chosen Mr Gudmundur Eiriksson to sit as judge *ad hoc* in the case. The Deputy Registrar transmitted a copy of the letter to Italy on 22 February 2016.

15. By letter dated 23 February 2016, the Agent of Italy informed the Registrar that Italy had chosen Mr Tullio Treves to sit as judge *ad hoc* in the case. The Registrar transmitted a copy of the letter to Panama on 24 February 2016.

16. No objection to the choice of Mr Eiriksson as judge *ad hoc* was raised by Italy, and no objection to the choice of Mr Treves as judge *ad hoc* was raised by Panama. No objection to the choice of the judges *ad hoc* appeared to the Tribunal itself. Consequently, in accordance with article 19, paragraph 3, of the Rules, the Registrar informed the Parties by separate letters dated 16 March 2016 that Mr Eiriksson and Mr Treves would be admitted to participate in the proceedings as judges *ad hoc*, after having made the solemn declaration required under article 9 of the Rules.

17. On 11 March 2016, within the time-limit set pursuant to article 97, paragraph 1, of the Rules, Italy filed with the Tribunal "written preliminary objections under article 294, paragraph 3, of the United Nations Convention on the Law of the Sea" (hereinafter "the Preliminary Objections") in which Italy "challenge[d] the jurisdiction of [the] Tribunal, as well as the admissibility of Panama's claim". The Registrar notified Panama of Italy's Preliminary Objections on the same date. Upon receipt of the Preliminary Objections by the Registry, the proceedings on the merits were suspended pursuant to article 97, paragraph 3, of the Rules.

18. At a public sitting held on 19 September 2016, Mr Treves and Mr Eiriksson each made the solemn declaration required under article 9 of the Rules.

19. At a public sitting held on 4 November 2016, the Tribunal delivered its Judgment on Preliminary Objections (*M/V "Norstar"* (*Panama* v. *Italy*), *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44). In paragraph 316 of the Judgment, the Tribunal decided as follows:

(1) By 21 votes to 1,

Rejects the objections raised by Italy to the jurisdiction of the Tribunal and finds that it has jurisdiction to adjudicate upon the dispute.

...

(2) By 20 votes to 2,

Rejects the objections raised by Italy to the admissibility of Panama's Application and finds that the Application is admissible.

20. A copy of the Judgment was handed over to each Party at the public sitting on 4 November 2016. By letter dated 25 November 2016, a copy of the Judgment was also transmitted to the Secretary-General of the United Nations pursuant to article 125, paragraph 3, of the Rules.

21. Pursuant to article 45 of the Rules, at the request of the President, the Registrar sent a letter dated 4 November 2016 to the Parties to ascertain their views with regard to the further procedure in respect of the merits of the case. Panama transmitted its views in a communication received on 15 November 2016 and Italy transmitted its views in communications received on 12 and 21 November 2016.

22. In accordance with article 59 of the Rules, the President, having ascertained the views of the Parties, fixed, by Order dated 29 November 2016, the following time-limits for the filing of pleadings in the case: 11 April 2017 for the Memorial of Panama, and 11 October 2017 for the Counter-Memorial of Italy. On 29 November 2016, the Registrar transmitted a copy of the Order to each Party.

23. The Memorial of Panama was duly filed on 11 April 2017 and a copy thereof was transmitted to Italy on the same date.

24. As Part IV of its Memorial, Panama had filed a document entitled "Request for Evidence", in which it requested the Tribunal, *inter alia*: to order Italy to provide certified copies of files concerning the *M/V "Norstar"* which were allegedly held by different authorities of Italy; to order Spain to provide certified copies of files concerning the *M/V "Norstar"* which were allegedly held by different authorities of Spain; to order two private entities (International Bunker Industry Association and CM OLSEN A/S) to provide information on the actual values for bunkers on board the *M/V "Norstar"* and the costs and number of surveys the *M/V "Norstar"* should have undergone from 1998 to 2017; and to call as witness Mr Arve Morch from Norway. As justification for its "Request for Evidence", Panama referred in Part IV of its Memorial to "the lapse from the date of the initiation of damages (nearly 20 years)" and to different factors which "ha[d] proved difficult to examine and provide the Tribunal with documents concerning this case".

25. By letter dated 11 April 2017, the Registrar requested the Agent of Panama to provide clarification as to the status of the "Request for Evidence" contained in Part IV of Panama's Memorial. By letter dated 17 April 2017, the Agent of Panama provided further legal justification in support of its "Request for Evidence". The Registrar forwarded a copy of Panama's letter to Italy on 2 May 2017, for Italy's information and comments, if any. No comments were received from Italy.

26. In the same letter of 11 April 2017, the Registrar requested the Agent of Panama to supplement documentation provided in Panama's Memorial in accordance with article 64, paragraph 3, of the Rules. On 24 April and 26 May 2017, Panama submitted the documents requested by the Registrar and copies thereof were transmitted to Italy on 12 June 2017.

27. By letter dated 28 July 2017, the Registrar requested Panama to provide additional information concerning its "Request for Evidence", in particular, whether it had requested the documents concerned from Italy and Spain through diplomatic channels and whether it had requested the information sought from the two private entities. The Registrar also stated in his letter that

it was for the Parties to call witnesses to appear before the Tribunal, in accordance with articles 72 and 78 of the Rules.

28. On 30 August 2017, Panama informed the Registrar that it had sent to Italy, by note verbale dated 8 August 2017, a formal request to obtain certain documentation which it intended to use as evidence. In the said note verbale, a copy of which was received by the Registry on 19 September 2017, the Ministry of Foreign Affairs of Panama transmitted a request to the Ministry of Foreign Affairs and International Cooperation of Italy to obtain the following documentation: certified copies of the file relating to the arrest of the *M/V "Norstar"*, managed by the Ministry of Justice, Department for Affairs of Justice, General Directorate for Criminal Justice; certified copies of the file relating to the arrest of the *M/V "Norstar"*, managed by the Ministry of Foreign Affairs, Diplomatic Contentious Service for Treaties and Legislative Affairs; and certified copies of the file relating to the arrest of *M/V "Norstar"* and the prosecution of five persons in the Criminal Court of Savona.

29. With regard to Panama's request, Italy, by letter dated 19 September 2017, stated that, while it was ready to act cooperatively, "a request for disclosure of documents must be precise and punctual" and "cannot refer generically to the entirety of a respondent's file". Italy invited Panama "to indicate specifically which documents it intend[ed] to seek disclosure of".

30. The Parties exchanged further correspondence on the matter. By letter dated 6 October 2017, Panama repeated its request for evidence as contained in the note verbale of 8 August 2017. In its letter of 11 October 2017, Italy stated that:

> Italy would … be prepared to share a list of the documents that Italy's files contain, subject to conditions of reciprocity with Panama with respect to its own files. It would then consider a specific and qualified request from Panama … and reserves the right to make a similar request to Panama.

In response, by letter dated 6 November 2017, Panama stated that it wished "to accept the Italian proposal to allow non restricted access to any of the files related to the M/V Norstar under the control of any of the branches of the Panamanian Government". By letter dated 16 November 2017, Italy contended that Panama had misinterpreted its proposal of 11 October 2017, stating that

its proposal was that "Panama should make a qualified request ... which Italy would then consider promptly", and that "Panama's response appears to indicate that it has rejected Italy's proposal."

31. By two separate letters dated 9 October 2017, received in the Registry on 10 and 16 October 2017, Panama filed additional documents consisting of an "Economic Report" and a "Claim Total Damages", which were communicated to Italy on 11 and 16 October 2017. By letter dated 26 October 2017, Italy informed the Tribunal that it did not intend "to challenge the production of [these] documents under Article 71 of the Rules".

32. The Counter-Memorial of Italy was duly filed on 11 October 2017 and a copy thereof was transmitted to Panama on the same date.

33. On 6 November 2017, the President of the Tribunal held telephone consultations with the representatives of the Parties. During the consultations, the President informed the Parties that the status of Panama's "Request for Evidence" would be considered by the Tribunal in March 2018.

34. During the same consultations, the President ascertained the views of the Parties as regards the need for them to submit further written pleadings. On that occasion, Panama expressed the view that a second round of written pleadings was necessary while Italy stated that it did not consider a second round necessary but would not object to a decision of the Tribunal authorizing a second round of written pleadings.

35. In accordance with article 60 of the Rules, the Tribunal, having ascertained the views of the Parties, authorized, by Order dated 15 November 2017, the submission of a Reply by Panama and a Rejoinder by Italy.

36. In the said Order, the Tribunal fixed the following time-limits for the filing of those pleadings in the case: 28 February 2018 for the Reply of Panama, and 13 June 2018 for the Rejoinder of Italy. By separate letters dated 15 November 2017, the Registrar transmitted a copy of the Order to each Party.

37. The Reply of Panama was duly filed on 28 February 2018 and a copy thereof was transmitted to Italy on 1 March 2018.

38. On 15 March 2018, the Tribunal met to deliberate on the "Request for Evidence" contained in Part IV of the Memorial by Panama, in light of the correspondence exchanged between the Parties. By letter dated 28 March 2018, the Registrar communicated the following to the Parties:

> At the request of the President, I wish to inform you that the matter was considered by the Tribunal on 15 March 2018.
>
> The Tribunal concluded that it cannot accept Panama's request to call upon Italy to provide evidence at this stage of the proceedings. Furthermore, the Tribunal cannot accept Panama's other requests contained in Part IV of the Memorial.
>
> The Tribunal takes note of the exchange of letters between the Parties, in particular the suggestion offered by Italy in its letter of 11 October 2017. The Tribunal encourages the Parties to continue their cooperation with respect to evidence.

39. Further to the Registrar's letter dated 28 March 2018, the Agent of Panama, on 10 April 2018, transmitted to the Registrar a note verbale dated 9 April 2018, issued by the Ministry of Foreign Affairs of Panama and addressed to the Tribunal, containing a list of documents in its file concerning the *M/V "Norstar"* case. On 4 May 2018, Italy transmitted to the Registrar a copy of a letter of the same date, addressed by the Agent of Italy to the Agent of Panama, containing a list of documents concerning the *M/V "Norstar"* that feature in Italy's file. In its letter, Italy stated that it was not prepared to share the documents contained in its list unconditionally but only intended to consider "specific and motivated requests by Panama". The Registrar transmitted Panama's communication to Italy on 11 April 2018 and Italy's communication to Panama on 18 May 2018. No further correspondence on the subject was communicated to the Registry.

40. The Rejoinder of Italy was duly filed on 13 June 2018 and a copy thereof was transmitted to Panama on the same day.

41. By letter dated 13 June 2018, transmitted electronically after the filing of the Rejoinder by Italy, the Agent of Panama submitted to the Registrar, with reference to articles 71 and 72 of the Rules, two documents consisting of Corrections to the Economic Report referred to in paragraph 31 and a "[l]etter sent by E-mail received by Inter Marine & Co. AS from Mr. Karsten Himmelstrup, Director, … Scanbio Marine Group AS (Scanbio)". On 14 June 2018, these

documents were communicated to the Agent of Italy for comments, if any, by 29 June 2018.

42. By letter dated 28 June 2018, the Agent of Italy communicated that Italy did not object to the production of these documents. In the said letter, the Agent of Italy stated, however, that Panama, "[b]y sending such new documentation on the day which marked the closure of the written proceedings", prevented Italy from challenging those documents in the written phase of the proceedings.

43. On 26 June 2018, the President of the Tribunal held telephone consultations with the Agents of the Parties to ascertain their views regarding the conduct of the case and the organization of the hearing.

44. By Order dated 20 July 2018, the President fixed 10 September 2018 as the date for the opening of the oral proceedings.

45. By note verbale dated 17 August 2018, the Italian Embassy in Berlin notified the Tribunal of the appointment of Mr Giacomo Aiello, State Attorney, as Co-Agent of Italy. On the same date, the Registrar transmitted a copy of the note verbale to the Agent of Panama.

46. The Agent of Italy, on 23 August 2018, and the Agent of Panama, on 24 August 2018, submitted information required under article 72 of the Rules regarding evidence which the Parties intended to produce.

47. By letter dated 23 August 2018, the Agent of Italy requested that Italy be allowed, pursuant to article 71, paragraph 1, of the Rules, to submit additional documents consisting of photographic evidence, which the Agent of Italy transmitted to the Tribunal on 29 August 2018. Pursuant to the said provision, the Registrar, by letter dated 30 August 2018, transmitted the photographic evidence to the Agent of Panama for comments by 4 September 2018. By communication dated 4 September 2018, Panama expressed its consent to Italy's submission of the photographic evidence.

48. On 31 August 2018, the Agent of Panama submitted additional documents consisting of a note verbale dated 27 August 2018 from the Ministry of Foreign Affairs of Panama addressed to the Registrar and a certification from the Panama Maritime Authority dated 29 August 2018 with respect to the *M/V "Norstar"*. By letter dated 3 September 2018, pursuant to article 71,

paragraph 1, of the Rules, the Registrar transmitted these documents to the Agent of Italy for comments by 6 September 2018. By letter dated 7 September 2018, Italy expressed its consent to the submission of these documents.

49. By letter dated 5 September 2018, the Agent of Italy submitted a written statement made by a naval expert for Italy, Captain Guido Matteini. In a letter dated 8 September 2018, the Agent of Panama informed the Tribunal that Panama did "not consent to the use of the written statement by the naval expert of Italy."

50. On 7 September 2018, the Agent of Panama and the Agent of Italy each submitted materials required under paragraph 14 of the Guidelines Concerning the Preparation and Presentation of Cases before the Tribunal.

51. In accordance with article 68 of the Rules, prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 6 and 7 September 2018.

52. On 9 September 2018, the President held consultations with representatives of the Parties to address a number of procedural matters pertaining to the oral proceedings. During the consultations, the President communicated to the Parties a list of questions which the Tribunal wished the Parties specially to address, in accordance with article 76, paragraph 1, of the Rules. These questions were as follows:

1. Could the Parties provide further information on the cargo on board the *M/V "Norstar"* at the time of seizure?
2. Could the Parties provide further information on the monitoring and maintenance works of the *M/V "Norstar"* after its seizure?

53. Written responses to the aforementioned questions were provided by the Agent of Panama by letter dated 21 September 2018, and by the Agent of Italy by letter of the same date. The Registrar transmitted these communications to the other Party for comments by 27 September 2018. On that date, each Party submitted comments to the answers provided by the other Party.

54. From 10 to 15 September 2018, the Tribunal held ten public sittings. At these sittings, the Tribunal was addressed by the following:

For Panama:

Mr Nelson Carreyó,
as Agent;

Mr Olrik von der Wense,
as Counsel;

Ms Mareike Klein,
Ms Miriam Cohen,
as Advocates;

For Italy:

Mr Giacomo Aiello,
as Co-Agent;

Mr Attila Tanzi,
as Lead Counsel and Advocate;

Ms Ida Caracciolo,
Ms Francesca Graziani,
Mr Paolo Busco,
as Counsel and Advocates.

55. At the public sittings held on 10 and 11 September 2018, the following witnesses and experts were called by Panama:

Mr Silvio Rossi, manager, *Rossmare International*, witness
(examined by Mr Carreyó, cross-examined by Mr Aiello, re-examined by Mr Carreyó);

Mr Arve Morch, president of the board of directors, *Intermarine*, witness
(examined by Ms Cohen, cross-examined by Mr Aiello and Mr Busco, re-examined by Mr Carreyó);

Mr Tore Husefest, former captain, *M/V "Norstar"*, witness
(examined by Ms Klein, cross-examined by Mr Aiello);

Mr Horacio Estribi, economic advisor to the Ministry of Finance of Panama, expert
(examined by Mr von der Wense, cross-examined by Mr Aiello, re-examined by Mr von der Wense).

56. At the public sittings held on 13 September 2018, the following experts were called by Italy:

Mr Vitaliano Esposito, retired judge and former Chief Public Prosecutor at the Supreme Court of Italy
(examined by Mr Aiello, cross-examined by Mr Carreyó and Ms Cohen);

Mr Guido Matteini, shipmaster and consultant in the field of commercial navigation
(examined by Mr Aiello, cross-examined by Mr von der Wense).

Messrs Esposito and Matteini gave evidence in Italian. Pursuant to article 85 of the Rules, the necessary arrangements were made for the statements of those experts to be interpreted into the official languages of the Tribunal.

57. In the course of their testimony, the following witnesses and experts replied to questions put by judges pursuant to article 76, paragraph 3, of the Rules: Mr Silvio Rossi responded to questions posed by Judge Kulyk and Judge *ad hoc* Treves; Mr Arve Morch responded to questions posed by Judge Lucky, Judge Heidar and Judge Kittichaisaree; Mr Horacio Estribi responded to questions posed by Judge Kittichaisaree; and Mr Vitaliano Esposito responded to questions posed by Judge Pawlak, Judge Heidar, Judge Kittichaisaree and Judge Lijnzaad.

58. During the hearing, the Parties displayed a number of exhibits on screen, including photographs and excerpts of documents.

59. Further to consultations held between the President of the Tribunal and the Parties on 14 September 2018, Panama, on 15 September 2018, submitted two additional documents, consisting of an article published on 7 August 1998 by

the Italian newspaper "*Il Secolo XIX*", and an "extract of appearance of Captain Tor Tollefsen before the prosecutor in Alicante". The Registrar transmitted the two additional documents to the Agent of Italy, in accordance with article 71, paragraph 1, of the Rules, for comments by 21 September 2018. By letter dated 21 September 2018, the Agent of Italy informed the Tribunal that Italy did not intend to challenge the production of these new documents.

60. The hearing was broadcast on the internet as a webcast.

61. Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and documents annexed thereto were made accessible to the public when the oral proceedings were opened.

62. In accordance with article 86, paragraph 1, of the Rules, the transcript of the verbatim records of each public sitting was prepared by the Registry in the official languages of the Tribunal used during the hearing. In accordance with article 86, paragraph 4, of the Rules, copies of the transcripts of the said records were circulated to the judges sitting in the case and to the Parties. The transcripts were also made available to the public in electronic form.

II. Submissions of the Parties

63. In paragraph 13 of its Application, Panama requested the Tribunal to adjudge and declare that:

1. Respondent has violated articles 33, 73 (3) and (4), 87, 111, 226 and 300 of the Convention;
2. Applicant is entitled to damages as proven in the case on the merits, which are provisionally estimated in Ten Million and 00/100 USDollars ($10,000,000); and
3. Applicant is entitled to all attorneys' fees, costs, and incidental expenses.

64. In paragraph 260 of its Memorial, Panama requested the Tribunal to find, declare, and adjudge:

> FIRST: that by ordering and requesting the arrest of the M/V Norstar, in the exercise of its criminal jurisdiction and application of its customs laws to bunkering activities carried out on the high seas, Italy has

thereby prevented its ability to navigate and conduct legitimate commercial activities therein, and that by filing charges against the persons having an interest on the operations of this Panamanian vessel, Italy has breached

1. the right of Panama and the vessels flying its flag to enjoy freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as set forth in article 87(1) and (2) and related provisions of the Convention; and
2. other rules of international law, such as those that protect the human rights and fundamental freedoms of the persons involved in the operation of the M/V Norstar;

SECOND: that by knowingly and intentionally maintaining the arrest of the M/V Norstar and indefinitely exercising its criminal jurisdiction and the application of its customs laws to the bunkering activities it carried out on the high seas, Italy acted contrary to international law, and breached its obligations to act in good faith and in a manner which does not constitute an abuse of right as set forth in article 300 of the Convention;

THIRD: that as a consequence of the above violations, Italy is responsible to repair the damages incurred by Panama and by all the persons involved in the operation of the M/V Norstar by way of compensation *provisionally* amounting to 13,721,918.60 USD plus 145.186,68 EUR with interest; and

FOURTH: That as a consequence of the intentional refusal by Italy to answer any of the communications it received from Panama concerning this matter, and by also intentionally delaying compliance with its own decision to timely release the M/V Norstar and ensure its maintenance (or pay compensation), while concealing this information from both its counterpart and the Tribunal, Italy has demonstrated ample evidence of its lack of good faith. As a result, Italy is also liable to pay the legal costs derived from this judicial action.

65. In paragraph 593 of its Reply, Panama requested the Tribunal to find, declare, and adjudge:

> FIRST: that by ordering and requesting the arrest of the M/V "Norstar", in the exercise of its criminal jurisdiction and application of its customs laws to bunkering activities carried out on the high seas, Italy has thereby prevented its ability to navigate and conduct legitimate commercial activities therein, and that by filing charges against the persons having an interest on the operations of this Panamanian vessel, Italy has breached
>
> 1. the right of Panama and the vessels flying its flag to enjoy freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as set forth in article 87(1) and (2) and related provisions of the Convention; and
> 2. other rules of international law that protect the human rights and fundamental freedoms of the persons involved in the operation of the M/V "Norstar";
>
> SECOND: that by knowingly and intentionally maintaining the arrest of the M/V "Norstar" and indefinitely exercising its criminal jurisdiction and the application of its customs laws to the bunkering activities it carried out on the high seas, Italy acted contrary to international law, and breached its obligations to act in good faith and in a manner which does not constitute an abuse of right as set forth in article 300 of the Convention;
>
> THIRD: that as a consequence of the above violations, Italy is responsible to repair the damages incurred by Panama and by all the persons involved in the operation of the M/V "Norstar" by way of compensation amounting to Twenty-six million four hundred ninety-one thousand five hundred forty-four U.S. dollars 22/100 (USD26.491.544.22) plus 145.186,68 EUR with simple interest; and
>
> FOURTH: That as a consequence of the specific acts on the part of Italy that have constituted an abuse of rights and a breach of the duty of good

> faith, as well as based on its procedural conduct, Italy is also liable to pay the legal costs derived from this judicial action.

66. In paragraph 323 of its Counter-Memorial, Italy made the following submissions:

> Italy requests the Tribunal to dismiss all of Panama's claims, either because they fall outside the jurisdiction of the Tribunal, or because they are not admissible, or because they fail on their merits, according to arguments that are articulated above.

67. In paragraph 226 of its Rejoinder, Italy made the following submissions:

> Italy requests the Tribunal to dismiss all of Panama's claims according to the arguments that are articulated above.

68. In accordance with article 75, paragraph 2, of the Rules, the following final submissions were presented by the Parties at the conclusion of the last statement made by each Party at the hearing:

On behalf of Panama:

> Panama requests the Tribunal to find, declare and adjudge:
>
> FIRST: that by *inter alia* ordering and requesting the arrest of the M/V "Norstar", in the exercise of its criminal jurisdiction and application of its customs laws to bunkering activities carried out on the high seas, Italy has thereby prevented its ability to navigate and conduct legitimate commercial activities therein, and that by filing charges against the persons having an interest on the operations of this Panamanian vessel, Italy has breached the right of Panama and the vessels flying its flag to enjoy freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as set forth in article 87(1) and (2) and related provisions of the Convention;
>
> SECOND: that by knowingly and intentionally maintaining the arrest of the M/V "Norstar" and indefinitely exercising its criminal jurisdiction

and the application of its customs laws to the bunkering activities it carried out on the high seas, Italy acted contrary to international law, and breached its obligations to act in good faith and in a manner which does not constitute an abuse of right as set forth in article 300 of the Convention;

THIRD: that as a consequence of the above violations, Italy is responsible to repair the damages suffered by Panama and by all the persons involved in the operation of the M/V "Norstar" by way of compensation amounting to TWENTY SEVEN MILLION NINE THOUSAND TWO HUNDRED AND SIXTY SIX US DOLLARS AND TWENTY TWO CENTS (USD 27,009,266.22); plus TWENTY FOUR MILLION EIGHT HUNDRED AND SEVENTY THREE THOUSAND NINETY ONE US DOLLARS AND EIGHTY TWO CENTS (USD 24,873,091.82) as interest, plus ONE HUNDRED AND SEVENTY THOUSAND THREE HUNDRED AND SIXTY EIGHT EUROS AND TEN CENTS (EUROS 170,368.10) plus TWENTY SIX THOUSAND THREE HUNDRED AND TWENTY EUROS AND THIRTY ONE CENTS (EUR 26,320.31) as interest.

FOURTH: that as a consequence of the specific acts on the part of Italy that have constituted an abuse of rights and a breach of the duty of good faith, as well as based on its procedural conduct, Italy is also liable to pay the legal costs derived from this case.

On behalf of Italy:

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

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

III. Factual background

69. The *M/V "Norstar"*, an oil tanker flying the flag of Panama, was owned by the Norwegian-registered company *Inter Marine & Co AS.* On 10 May 1998,

the *M/V "Norstar"* was chartered to *Nor Maritime Bunker*, a Maltese-registered company. From 1994 to 1998, the vessel was engaged in supplying gasoil to mega yachts in an area described by Panama as "international waters beyond the Territorial Sea of Italy, France and Spain" and by Italy as "off the coasts of France, Italy and Spain". The Italian-registered company *Rossmare International S.A.S.* acted as "bunkering brokers" therefor.

70. In 1997, the Italian fiscal police initiated an investigation into *Rossmare International S.A.S.* and the activities of the *M/V "Norstar"*. According to Italy, the investigation revealed "that the *M/V Norstar* was involved in the business of selling the fuel purchased in Italy in exemption of tax duties to a clientele of Italian and other EU leisure boats in the international waters off the coasts of the Italian city of Sanremo." In this connection, criminal proceedings were instituted against eight individuals, including the president and the managing director of *Inter Marine & Co AS*, the captain of the *M/V "Norstar"* and the owner of *Rossmare International S.A.S.*

71. On 11 August 1998, the Public Prosecutor at the Court of Savona, Italy, issued a Decree of Seizure against the *M/V "Norstar"*. According to the Decree, the Public Prosecutor considered that the vessel "as well as the oil product transported therein must be acquired as *corpus delicti* … and, notably, as they are the objects through which the investigated crime was committed." The Decree therefore ordered that "the above goods be seized".

72. With regard to the activities of *Rossmare International S.A.S.*, the Decree noted the following:

> As a result of complex investigations carried out it emerged that [ROSSMARE] INTERNATIONAL s.a.s. … sells in a continuous and widespread fashion, mineral oils … 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 to EU vessels.

73. With regard to the activities of the *M/V "Norstar"*, the Decree noted the following:

> It was also found that the mv NORSTAR positions itself beyond the Italian, French and Spanish territorial seas, mostly inside the contiguous vigilance zone and promptly supplies with fuel (so-called "offshore bunkering") mega yachts that are exclusively moored at EU ports. Thus, they willingly and consciously give the sold product a destination that differs from the one for which the tax exemption was granted …, while being fully aware that the product will certainly be subsequently introduced into Italian territory and that no statement for customs purposes is issued by the purchasers.

74. On 11 August 1998, the Office of the Prosecutor at the Court of Savona also sent a "Request for judicial assistance in criminal matters" to the Office of the Public Prosecutor of the Court of Palma de Mallorca (Spain) to "enforce the … Decree of Seizure" and to "question the current master of the vessel". The request was based upon articles 3, 4 and 15 of the European Convention on Mutual Assistance in Criminal Matters done at Strasbourg on 20 April 1959 and articles 49, 51 and 53 of the Convention implementing the Schengen Agreement of 14 June 1985 done at Schengen on 19 June 1990.

75. Following the request for judicial assistance, Spanish authorities in Palma de Mallorca seized the *M/V "Norstar"* on 25 September 1998 as stated in the "*Acta de inmovilización de una embarcación*" ("Report of the seizure of a vessel") prepared by the Spanish authorities. This document indicates that the vessel was "moored in the bay of La Palma".

76. By a Decree of 18 January 1999, the Public Prosecutor at the Court of Savona rejected a request made by the shipowner for the release of the *M/V "Norstar"*. The Public Prosecutor stated therein that "it is still necessary to hold the vessel for probative purposes, since there are still investigative exigencies related to potential recognition of the ship by those who unlawfully refuelled." A copy of the Decree of 18 January 1999 was forwarded to *Inter Marine & Co AS* by the Italian Embassy in Oslo, Norway, on 29 June 1999.

77. On 24 February 1999, the Judge of Preliminary Investigations of the Court of Savona, noting that the *M/V "Norstar"* was already subject to "probative seizure" ("*sequestro probatorio penale*"), also ordered its preventative seizure

("*sequestro preventivo*"). The Judge considered that "there are reasonable grounds to hold that the release of the confiscated goods to the availability of the persons … who jointly committed the alleged crime … may aggravate or prolong the consequences of the crime, or facilitate the commission of other crimes".

78. By letter dated 11 March 1999, the Public Prosecutor at the Court of Savona requested the Italian Embassy in Oslo, Norway, to inform the shipowner that the *M/V "Norstar"* could "be released upon payment of a bail, also through a guarantor, set at 250 million Italian lire". No such bail was paid, however, and the vessel remained under seizure. Panama states that "the owner of the M/V Norstar was unable to provide [the payment] as the long detainment had consequently led to a loss of all its source of income."

79. On 20 January 2000, indictments were issued by the Public Prosecutor at the Court of Savona against the individuals referred to in paragraph 70 and, in late 2002, the Court of Savona began its hearings in relation to these criminal proceedings.

80. In a judgment issued on 14 March 2003, the Court of Savona acquitted all persons accused by the Public Prosecutor "of the offences respectively charged". The Court stated, *inter alia*, that "whoever organises the supply of fuel offshore … does not commit any offence even though he/she is aware that the diesel fuel is used by leisure boaters sailing for the Italian [coasts]." In the same judgment, the Court of Savona also ordered that "the seizure of motor vessel Norstar be revoked and the vessel returned to" its owner.

81. On 18 March 2003, the Court of Savona transmitted to the Court of Palma de Mallorca "a certified copy of the operative part of the judgement issued by this Court on 14 March 2003 ordering that the motorship Norstar be released and returned to the company Intermarine A.S." The Court of Savona requested the Court of Palma de Mallorca to "execute the … release order and inform the custodian of the ship of the order" and to "check whether the property has really been taken back and send [the Court of Savona] the relevant record."

82. In a letter dated 21 March 2003, the Court of Savona informed *Inter Marine & Co AS* that "it ha[d] ordered the release of the M/V "Norstar" and

its restitution to" the owner. The letter also stated that, in accordance with Italian law, "the deadline to withdraw the vessel is thirty days from the date of receipt of this communication" and that, "[i]n case of non-withdrawal, the judge will order the sale." The letter from the Court of Savona was delivered to the shipowner first by registered mail dated 26 March 2003 and again on 2 July 2003 by the authorities of Norway, whose cooperation in the delivery of the documents had been sought by the Italian Ministry of Justice. However, the shipowner did not take possession of the *M/V "Norstar"*.

83. According to a letter dated 22 July 2003 from the captain of the Spanish Provincial Maritime Service of the Balearics addressed to Investigating Court No. 3 of Palma de Mallorca, a "document withdrawing the seizure and custody" of the *M/V "Norstar"* was issued on 21 July 2003. Panama states that the shipowner was not informed thereof and never received a copy of this document. A copy of the document was not made available to the Tribunal in the course of these proceedings.

84. The Public Prosecutor at the Court of Savona, on 18 August 2003, appealed against the judgment of the Court of Savona of 14 March 2003. The appeal was not made in relation to the vessel and was limited to the acquittal of seven of the eight individuals referred to in paragraph 70. On 25 October 2005, the Court of Appeal of Genoa, Italy, upheld the judgment delivered by the Court of Savona.

85. As stated by the Tribunal in its Judgment on Preliminary Objections of 4 November 2016,

> [o]n 6 September 2006, the Port Authority of the Balearic Islands, Spain, requested through the Court of Savona authorization to demolish the *M/V "Norstar"*. On 31 October 2006, the Court of Appeal of Genoa issued an order stating that the judgment of the Court of Savona of 13 March 2003 "has to be enforced" and that "there is no decision to be taken given that the destiny of the vessel, after having been given back to the party entitled, does not fall within the competence of this Court". On 13 November 2006, the Court of Appeal of Genoa transmitted a copy of its order of 31 October 2006 to the Port Authority of the Balearic Islands. (*M/V "Norstar"* (*Panama* v. *Italy*), *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 56, para. 47)

86. On 25 March 2015, the Port Authority of the Balearic Islands announced the public auction of the *M/V "Norstar"* in the official State bulletin. The base bid price for the auction was set at three thousand euros (€3,000). According to a press article provided by Panama, the vessel was bought by "a company dedicated to waste management … to convert it into scrap" and removed from port in August 2015.

IV. Rules of evidence

87. The Tribunal will first address issues relating to the rules of evidence. It notes that the Parties hold different views as to the rules of evidence applicable to the present case. The Tribunal thus considers it necessary to express its views on this question. In this regard, the Tribunal takes note of the two main points of contention between the Parties, namely the standard of proof applicable to the present case and the probative weight to be given to the witness and expert testimony in this case.

88. Panama submits that "as the Applicant in this case it has the legal burden to prove its claims, and it has done so both through written evidence as well as through the testimony of witnesses called by both Parties." In the view of Panama, "despite the considerable difficulties involved in the burden of proof after a lapse of 20 years, Panama has provided numerous documents in this process that are capable of proving the important facts."

89. Panama, however, requests that "the Tribunal take into account its difficulties in trying to obtain evidentiary documents located in either Italian or Spanish territory." Panama argues that "while it bears the burden to prove its case, Italy has failed to provide, in spite of the numerous requests from Panama, important documents and information that are under the control of Italy and that only Italy can access". Panama draws the Tribunal's attention to the fact that Panama requested Italy to give it access to its criminal proceedings files but Italy denied the request for the reason that Panama did not particularize the documents requested. According to Panama, it could not be specific about documents when it had had no opportunity to view the files. Referring to the international jurisprudence in this regard, including the *Corfu Channel* case, "Panama thus hopes that the Tribunal will adjust the standard of proof placed upon it".

90. Panama points out that "[t]he Rules of the Tribunal expressly provide, *inter alia*, in article 44 and article 72 and the following, that the parties may also provide evidence by witnesses or experts." Panama states that such evidence has an equal value to that of written documents. According to Panama,

> the testimonies of the witnesses called by Panama in this case, Mr Morch, Mr Rossi and Mr Husefest, were particularly strong evidence because the witnesses were directly involved in the events surrounding the "Norstar" and had extensive knowledge of the facts concerning the vessel and its activities.

Panama argues that the testimonies of those witnesses were "comprehensive, informative, and credible in every way."

91. For its part, Italy refers to "the generally recognized principle that evidence produced by the parties [must be] 'sufficient' to satisfy the burden of proof". Italy states that the principle applies to assertions of fact and their credibility, as well as to contentions of law and their reliability.

92. Italy argues that Panama advances a significant number of factual and legal contentions which are unsupported by a sufficient standard of proof. Italy further argues that "frequently where Panama cannot prove its assertions, it instead tries to shift the burden of proof onto the defendant." According to Italy, however, "Panama cannot shift the blame to Italy for its own failure to provide adequate evidence in this case." In this regard, Italy claims that Panama must bear the evidential consequences of its significant delay in commencing this case. In its view, it is not for Italy to provide Panama with all the evidence it needs to build its case. Italy also notes that it has made significant efforts to cooperate with Panama and respond reasonably to Panama's request for documents, including offering to provide a list of documents in its possession, so that Panama could submit a proper request for specific documents. However, Italy points out that Panama refused to take up this cooperative proposal.

93. Italy also submits that Panama cannot make up for its evidential failures through the oral testimony of self-interested witnesses. Italy challenges the strength of that oral evidence based on a well-established principle in international dispute settlement that "the evidence of individuals that have an interest in a case – and especially a financial interest – has less value than the evidence of those who do not have such an interest." In assessing the credibility of the witnesses, Italy asks the Tribunal to pay close attention to the fact that in the present case they have given evidence not to vindicate the legal interests of their home States, or perhaps not even of the flag State, but in order to obtain financial compensation for themselves.

* * *

94. The Tribunal notes that the Parties do not disagree that in the present case Panama bears the burden of proving its claims. However, they disagree as to the standard of proof that Panama has to meet in this case. The Parties further disagree on the probative value to be accorded to the testimonies of the witnesses and experts called.

95. The Tribunal notes, as stated in paragraph 24, that Panama, as part of its Memorial, filed a document entitled "Request for Evidence", in which it requested the Tribunal, *inter alia*, to order Italy to provide certified copies of files concerning the *M/V "Norstar"* allegedly held by different authorities of Italy. The Tribunal did not accept Panama's request, and instead encouraged the Parties to continue their cooperation with respect to evidence, taking note of the exchange of letters between them in this regard, in particular the suggestion offered by Italy that

> Italy would … be prepared to share a list of the documents that Italy's files contain, subject to conditions of reciprocity with Panama with respect to its own files. It would then consider a specific and qualified request from Panama … and reserves the right to make a similar request to Panama.

The Tribunal further notes that the Parties subsequently exchanged, through the Registrar, a list of documents in their respective files concerning the *M/V "Norstar"* case. However, no further action on this matter was taken.

96. In the view of the Tribunal, Italy's suggestion that it would consider a specific and qualified request for evidence from Panama is reasonable and would not have created an obstacle for Panama in making a request for evidence. The Tribunal notes that Panama nonetheless made no attempt to make any such request.

97. The Tribunal further notes that Panama instituted the proceedings against Italy before the Tribunal in 2015, 17 years after the arrest of the *M/V "Norstar"*. The lapse of time may have caused Panama difficulties in obtaining relevant evidence, but such difficulties stem from Panama's own decision.

98. The Tribunal is accordingly not persuaded by Panama's argument on the need to adjust the standard of proof placed upon it because of Italy's refusal of Panama's request for evidence.

99. Regarding witness and expert testimony, the Tribunal notes that in the present proceedings, the Parties called several witnesses and experts to prove their claims. The Tribunal will assess the relevance and probative value of their testimonies in this case by taking into account, *inter alia*: whether those testimonies concern the existence of facts or represent only personal opinions; whether they are based on first-hand knowledge; whether they are duly tested through cross-examination; whether they are corroborated by other evidence; and whether a witness or expert may have an interest in the outcome of the proceedings.

V. Scope of jurisdiction

100. The Tribunal will now consider matters relating to the scope of its jurisdiction in the present case. In this regard, it is to be recalled that the Tribunal had pronounced itself during the preliminary objections phase of this case on its jurisdiction to adjudicate the dispute and on the admissibility of Panama's Application.

101. The Tribunal recalls that, in its Judgment on Preliminary Objections, it found that articles 87 and 300 of the Convention were relevant to the present case.

102. In paragraph 122 of its Judgment on Preliminary Objections, the Tribunal observed that

> article 87 of the Convention, which concerns the freedom of the high seas, provides that the high seas are open to all States and that the freedom of the high seas comprises, inter alia, the freedom of navigation. The Decree of Seizure by the Public Prosecutor at the Court of Savona against the *M/V "Norstar"* with regard to activities conducted by that vessel on the high seas 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. Consequently, the Tribunal concludes that article 87 is relevant to the present case.
> (*M/V "Norstar"* (*Panama* v. *Italy*), *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 73, para. 122)

103. In paragraph 132 of the same Judgment, the Tribunal further stated:

> The Tribunal concluded in paragraph 122 that article 87 of the Convention concerning the freedom of the high seas is relevant to the present case. The Tribunal considers that the question arises as to whether Italy has fulfilled in good faith the obligations assumed by it under article 87 of the Convention. Therefore, the Tribunal is of the view that article 300 of the Convention is relevant to the present case.
> (*M/V "Norstar"* (*Panama* v. *Italy*), *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 74, para. 132)

104. In its Judgment on Preliminary Objections, the Tribunal, therefore, rejected the objections raised by Italy to its jurisdiction and found that it had jurisdiction to adjudicate upon the dispute.

105. In the said Judgment, the Tribunal rejected the objections raised by Italy to the admissibility of Panama's Application and found that the Application was admissible.

106. During the proceedings on the merits, however, the Parties raised new issues relating to the scope of the dispute, as defined by the Tribunal's Judgment on Preliminary Objections.

107. The issues pleaded by the Parties in this respect relate to (1) the scope of paragraph 122 of the Judgment on Preliminary Objections; (2) article 300 of the Convention; (3) the invocation of article 92 and article 97, paragraphs 1 and 3, of the Convention; and (4) the claim concerning human rights.

108. The Tribunal notes that the Parties disagree on these issues.

The scope of paragraph 122 of the Judgment on Preliminary Objections

109. The Tribunal will first deal with the question as to whether the dispute includes the arrest and detention of the *M/V "Norstar"* or is, rather, confined to the Decree of Seizure and the Request for its execution.

110. Italy states that Panama's continued attempts "to make this case about the arrest of the *"Norstar"* must fail". According to Italy, "it is the Decree of Seizure, together with the request for its execution, which are relevant acts to the present dispute." Italy further states that

> [m]eanwhile, the execution was carried out far from the high seas in Spain's internal waters and such acts cannot be attributed to Italy. In other words, the key event upon which Panama brought this claim in the first place is no longer relevant to this dispute.

111. Italy argues that Panama "had launched this case on the basis that the subject of the dispute, as Panama described in its Application, 'concerns a claim for damages against the Republic of Italy caused by an illegal arrest of the M/V "Norstar"'". Italy further argues that "[t]hat claim is no longer before the Tribunal."

112. Italy maintains that,

> [a]t paragraph 122 of its Decision of 4 November 2016, the Tribunal has curtailed the dispute between the Parties as concerning the question as to whether the Decree of Seizure and the Request for its Execution (*as opposed to the actual execution of the Decree*) may be seen as an infringement of Article 87 of the convention with regard to activities conducted by the *M/V Norstar* on the high seas.

113. Referring to paragraphs 122 and 132 of the Judgment on Preliminary Objections, Italy argues that the Tribunal's jurisdiction is "limited to determining the legality of Italy's Decree of Seizure and request for its execution under article 87 and article 300 of the Convention in relation to article 87."

114. Panama claims that, "in this case, the unlawful arrest and detention of M/V Norstar, a vessel flying Panama's flag, is the issue".

115. Panama contests Italy's position, arguing that "[i]t is not valid to raise a distinction whether the damages were caused by the Decree of Seizure, the request for its execution or by its actual enforcement" and that "Italy is responsible for all three phases of the arrest and thus for all damages caused by them to Panama."

* * *

116. The Tribunal recalls that, in paragraph 122 of its Judgment on Preliminary Objections, quoted in paragraph 102 above, it stated:

> The Decree of Seizure by the Public Prosecutor at the Court of Savona against the *M/V "Norstar"* with regard to activities conducted by that vessel on the high seas 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.
> (*M/V "Norstar"* (*Panama* v. *Italy*), *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 73, para. 122)

117. The Tribunal notes that Italy has interpreted paragraph 122 as excluding the actual arrest and detention of the *M/V "Norstar"*. This interpretation does not accurately reflect the Tribunal's decision on jurisdiction. While paragraph 122 does not explicitly refer to the actual arrest and detention of the *M/V "Norstar"*, it should be read in the context of, and together with, other relevant paragraphs of its Judgment on Preliminary Objections, in particular, paragraphs 86, 101, 165 and 167.

118. In determining the existence of a dispute between the Parties in its Judgment on Preliminary Objections, the Tribunal noted that, "as from 2001, a number of communications were sent to Italy *concerning the detention of the M/V "Norstar" and the question of compensation arising in this regard*"

(emphasis added by the Tribunal) (*M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016,* p. 44, at p. 66, para. 86). After examining those communications, the Tribunal concluded that "the existence of such a dispute can be inferred from Italy's failure to respond to the questions raised by Panama regarding *the detention of the M/V "Norstar"*" (emphasis added by the Tribunal) (*Ibid.*, at p. 69, para. 101).

119. The Tribunal wishes to observe that, from the beginning of the proceedings in this case, Panama has been clear about the subject of the dispute. When submitting the dispute to the Tribunal, Panama stated that its "Application concerns a claim for damages against the Republic of Italy caused by an illegal arrest of the mv Norstar, Panama flag, and of the oil products, therein in 1998".

120. The Tribunal also recalls that the question as to which State, Italy or Spain, is the proper respondent to the claim made by Panama in these proceedings was argued extensively during the preliminary objections phase of the case. In responding to this question, the Tribunal took the view that the Decree of Seizure and Italy's Request for its execution by Spain are intrinsically linked to and inseparable from the arrest and detention of the *M/V "Norstar"*. As the Tribunal explained in its Judgment on Preliminary Objections,

> the … facts and circumstances indicate that, while the arrest of the *M/V "Norstar"* took place as a result of judicial cooperation between Italy and Spain, the Decree of Seizure and the request for its enforcement by Italy were central to the eventual arrest of the vessel. It is clear that without the Decree of Seizure, there would have been no arrest.
> (*M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 83, para. 165)

121. The Tribunal went on further to state that

> the detention carried out by Spain was part of the criminal investigation and proceedings conducted by Italy against the *M/V "Norstar"*. It is Italy that adopted legal positions and pursued legal interests with respect to the detention of the *M/V "Norstar"* through the investigation and proceedings. Spain merely provided assistance in accordance with its

> obligations under the 1959 Strasbourg Convention. It is also Italy that has held legal control over the *M/V "Norstar"* during its detention.
> (*M/V "Norstar"* (*Panama* v. *Italy*), *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at pp. 83–84, para. 167)

122. It is clear from the above that the Tribunal, in its Judgment on Preliminary Objections, considered the dispute between the Parties to include not only the Decree of Seizure and the Request for its execution, but also the arrest and detention of the *M/V "Norstar"*. The Tribunal's jurisdiction over the dispute, therefore, covers the arrest and detention of the *M/V "Norstar"*.

Article 300 of the Convention

123. The Tribunal now turns to the question of the scope of its jurisdiction to deal with the dispute between the Parties concerning the interpretation or application of article 300 of the Convention.

124. In paragraph 132 of its Judgment on Preliminary Objections, the Tribunal stated that "the question arises as to whether Italy has fulfilled in good faith the obligations assumed by it under article 87 of the Convention. Therefore, the Tribunal is of the view that article 300 of the Convention is relevant to the present case" (*M/V "Norstar"* (*Panama* v. *Italy*), *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 74, para. 132).

125. In this regard, the Tribunal recalls that it stated in the *M/V "Louisa" Case* that

> it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when "the rights, jurisdiction and freedoms recognized" in the Convention are exercised in an abusive manner.
> (*M/V "Louisa"* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), *Judgment, ITLOS Reports 2013*, p. 4, at p. 43, para. 137)

The Tribunal further recalls its statement in the *M/V "Virginia G" Case* that

> it is not sufficient for an applicant to make a general statement that a respondent by undertaking certain actions did not act in good faith and acted in a manner which constitutes an abuse of rights without invoking particular provisions of the Convention that were violated in this respect. (*M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment, ITLOS Reports 2014*, p. 4, at p. 109, para. 398)

126. Both Parties agree that the jurisdiction of the Tribunal in the present case is limited to the alleged breach of article 300 in connection with article 87 of the Convention. However, they disagree on whether several claims made by Panama under article 300 are related to article 87 of the Convention.

127. Italy notes that the assessment of whether article 300 of the Convention has been breached has to be made only, and exclusively, from the perspective of article 87. According to Italy, "Panama makes a number of allegations of breach of good faith that do not relate in any way to Article 87." Italy argues that "Panama's attempts to have all of Italy's conduct, including before this Tribunal and in the course of domestic proceedings, subject to a good faith scrutiny, places its claim outside the jurisdiction of the Tribunal in the present dispute." Italy also argues that the question of its alleged abuse of rights is beyond the jurisdiction of the Tribunal in this case, as the Tribunal has limited the relevance of article 300 to the question as to whether Italy has fulfilled its obligations in good faith.

128. Panama submits that "[a]ll claims that Panama has made concerning Italy's bad faith and abuse of rights have emerged from the hindrance of the free navigation protected by article 87." According to Panama, "all of the Italian conduct leading up to and during the time that the arrest was in force was in violation of article 87, while its conduct since the arrest … [has] demonstrated a lack of good faith, thereby contravening article 300 of the Convention." Panama disagrees with Italy's argument that the question of abuse of rights is beyond the jurisdiction of the Tribunal in this case. In Panama's view, since the Tribunal did not specify either one of the two obligations of article 300, "the Tribunal must indeed consider both to be relevant."

* * *

129. The Tribunal recalls that in the present case it has jurisdiction to deal with the dispute between the Parties concerning the alleged breach of article 300 in connection with article 87 of the Convention. However, the Tribunal finds it difficult to determine at this stage whether Panama's claims concerning article 300 are related to article 87 without scrutinizing each of them. Therefore, the Tribunal will deal with the question as to whether it has jurisdiction over Panama's claims concerning good faith and abuse of rights under article 300 together with the examination of the question as to whether Italy has breached its obligations under that article at a later stage.

Invocation of article 92 and article 97, paragraphs 1 and 3, of the Convention

130. The Tribunal will now deal with the invocation of new articles by Panama, namely article 92 and article 97, paragraphs 1 and 3, of the Convention.

131. Panama, while recognizing that "[i]n the Preliminary Objections Judgment the Tribunal found that Articles 87 and 300 of the Convention were relevant to the dispute between Italy and Panama", argues that there are other provisions of the Convention that have been violated by Italy and that the fact that only articles 87 and 300 have been considered relevant to the present dispute does not preclude the Tribunal from considering other violations of international law closely related to these provisions. Panama submits that "[i]n this case, the violations that have occurred also fall under articles 92(1), 97(1) and 97(3) of the Convention."

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

133. Italy holds an opposite view. Referring to the Judgment on Preliminary Objections, Italy states that "[b]y deciding that only Articles 87 and 300 are relevant to the present dispute, the Tribunal limited its jurisdiction to the

assessment of whether either one of those provisions, or both, have been breached by Italy." Italy maintains that "Panama is precluded from enlarging the dispute before the Tribunal by making new claims in its Memorial that do not feature in its Application."

134. Italy further maintains that "[t]he question as to whether Articles 92, 97(1) and 97(3) have been violated … falls outside the jurisdiction of the Tribunal, as delimited by it in the context of incidental proceedings." Italy adds that

> Panama's new claims are neither implicit in Panama's application, nor arise directly from it. On the contrary, they are entirely autonomous claims, which engage provisions of the Convention not encompassed by Panama's application and which would transform the current dispute into "another dispute which is different in character".

* * *

135. The Tribunal notes that in its final submissions Panama did not refer to article 92 and article 97, paragraphs 1 and 3, of the Convention. The Tribunal is, therefore, of the view that it is not required to consider whether it has jurisdiction to deal with Panama's claims based on these articles.

136. The Tribunal, nonetheless, finds it opportune, in the circumstances of the present case, to make a point of a general nature. The Tribunal is of the view that a distinction must be made between the question of its jurisdiction, on the one hand, and the applicable law, on the other. The Tribunal notes, in this regard, that article 293 of the Convention on applicable law may not be used to extend the jurisdiction of the Tribunal.

137. The Tribunal further notes that, while the provisions of the Convention which it relied on to establish its jurisdiction in the present case are articles 87 and 300, as decided in its Judgment on Preliminary Objections, the Tribunal, in interpreting and applying them to the facts of this case, is not precluded from applying other provisions of the Convention or other rules of international law not incompatible with the Convention, pursuant to article 293 of the Convention.

138. In this regard, it is to be noted that the Tribunal, in the present proceedings on the merits, is called upon to interpret and apply article 87 of the Convention, regarding Panama's freedom of navigation on the high seas. In order to assess what that freedom entails under the Convention, the Tribunal may have recourse to other provisions of the Convention pursuant to article 293. One such provision is contained in article 92 of the Convention, as regards the principle of exclusive jurisdiction of the flag State over its vessels on the high seas. Therefore, without prejudice to its decision to rely on articles 87 and 300 in establishing its jurisdiction in the present case, the Tribunal may have recourse to article 92 as applicable law. This is not the same as enlarging the scope of the dispute, the limits of which have been set by the Judgment on Preliminary Objections.

Claim concerning human rights

139. The next question to which the Tribunal will turn is Panama's claim concerning violations of human rights.

140. In this regard, the Tribunal notes that Panama, after the Judgment on Preliminary Objections, presented a claim concerning human rights violations by Italy. Panama raised this issue in its Memorial, requesting the Tribunal "to take into consideration human rights aspects, in particular procedural rights, when reviewing the actions of Italy", and it developed its arguments further in its Reply.

141. Panama contends that,

> by applying its customs laws and ordering and requesting the arrest of the M/V Norstar, Italy breached its international obligations concerning the human rights, fundamental freedoms, and the performance of the obligations of the persons involved or interested in the operations of the M/V Norstar and so did not conform to the due process of law. As the Tribunal has previously affirmed, "[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law."

142. Panama claims that "in view of the manner in which the order and request for the arrest of the Norstar and the persons interested in it occurred, as described in the Statement of facts, Italy contravened the internationally recognized human rights of those persons."

143. Italy argues that "Panama's claim does not fall within the jurisdiction of the Tribunal" and that, according "to article 287 of the Convention, the Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention." Italy further argues:

> Article 293 provides that, in exercising its jurisdiction under Article 287, the Tribunal shall apply the Convention and other rules of international law not incompatible with the Convention according to Article 293. While Panama refers to Article 293 of the Convention, it is apparent that its invocation of human rights provisions does not happen in the context of the definition of the law applicable by the Tribunal. On the contrary, Panama seeks to expand the jurisdiction of the Tribunal by requesting it to declare that Italy has breached other rules of international law, including human rights provision, independently of the Convention.

144. Italy contends that Panama's attempts to plead breaches of various human rights obligations, which it maintained in its written pleadings and "somehow in its oral pleadings", must fail. According to Italy, "the Tribunal has no jurisdiction to determine breaches of such obligations, which are contained in separate treaties that have their own enforcement regimes."

145. Italy asserts that Panama's reply to its argument is based on a fundamental confusion between the law that the Tribunal can apply to disputes under the Convention by virtue of article 293 and the extent of the jurisdiction of the Tribunal under article 288, paragraph 1, of the Convention.

* * *

146. The Tribunal observes that, while Panama, in the course of the written proceedings, extensively argued its claims regarding human rights violations by Italy, it did not, however, include those claims in its final submissions. The Tribunal, therefore, is not required to address those claims.

VI. Article 87 of the Convention

147. The Tribunal will now consider whether the Decree of Seizure, the Request for its execution and the arrest and detention of the *M/V "Norstar"* constitute a violation of article 87 of the Convention. Before proceeding to this question, the Tribunal needs to address the relevance of its Judgment on Preliminary Objections in determining whether there is a breach of article 87 of the Convention.

The Tribunal's Judgment on Preliminary Objections

148. The Parties hold different views as to the relevance of the Tribunal's Judgment on Preliminary Objections in determining whether there is a breach of article 87 of the Convention.

149. Panama, referring to paragraph 122 of the Judgment on Preliminary Objections, submits that

> the Tribunal observed that since article 87 provides that the high seas are open to all States and the freedom of the high seas comprises the freedom of navigation, the Decree of Seizure with regard to activities conducted by the M/V "Norstar" on the high seas may be viewed as an infringement of the rights of Panama under that provision.

In Panama's view, the Tribunal thereby tacitly rejected Italy's argument that the Tribunal's finding in the *M/V "Louisa" Case*, namely that article 87 cannot be interpreted in such a way as to grant the *M/V "Louisa"* the right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it, also applied to the *M/V "Norstar" Case*. Panama contends that "the Italian reasoning as to why article 87 should not be considered has not changed since the Tribunal made its 4 November 2016 Judgment confirming that article's relevance to this case."

150. Italy maintains that Panama has misconceived the meaning of paragraph 122 of the Judgment on Preliminary Objections, in which the Tribunal decided that article 87 of the Convention is relevant to the present dispute. According to Italy,

> [c]learly, the fact that a provision is relevant for the purposes of establishing the jurisdiction of the Tribunal does not equate to a finding that

such a provision has been breached. That is a matter reserved for the merits, namely for the present phase of the proceedings.

151. Italy contends that 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. Italy argues that "in light of the new evidence or the continued lack thereof, … nothing would prevent this Tribunal from adjudging and declaring, even at this merits stage, that article 87 is simply irrelevant to this case."

* * *

152. The Tribunal notes that the consideration of a preliminary objection may not prejudge any issue on the merits. As the International Court of Justice (hereinafter "ICJ") stated in the *Barcelona Traction* (*Preliminary Objections*) case, "the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits" (*Barcelona Traction, Light and Power Company, Limited* (*Belgium* v. *Spain*), *Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, at pp. 43–44). The Judgment on Preliminary Objections is not to be understood as determining any issue on the merits, including a breach of article 87 of the Convention.

The activities conducted by the *M/V "Norstar"*

153. The Tribunal will now consider the question as to whether the Decree of Seizure and its execution concern activities conducted by the *M/V "Norstar"* on the high seas, or alleged crimes committed in the territory of Italy, or both. If the Decree and its execution concern only alleged crimes committed in the territory of Italy, as maintained by Italy, article 87 of the Convention is not applicable. However, if they concern activities conducted by the *M/V "Norstar"* on the high seas, as maintained by Panama, article 87 may be applicable.

154. Panama submits that the Decree of Seizure related to activities performed on the high seas, that is, "bunkering activities of the *"Norstar"* in international waters", and that the Decree "clearly stated that the M/V "Norstar" was carrying out bunkering activities outside the territory of Italy, specifically on the high

seas." Panama contends that the activities for which the vessel was arrested were carried out on the high seas.

155. Panama maintains that "the arrest was made in the context of suspected criminal activity concerning 'bunkering' carried out by the M/V "Norstar" on the high seas", and that the bunkering operations had been considered part of the criminal acts that led to the arrest of the *M/V "Norstar"*.

156. In support of its position, Panama refers to relevant documents of the Italian judiciary, including the following paragraph in the Decree of Seizure:

> It was also found that the mv NORSTAR positions itself beyond the Italian, French and Spanish territorial seas, mostly inside the contiguous vigilance zone and promptly supplies with fuel (so-called "offshore bunkering["]) mega yachts that are exclusively moored at EU ports. Thus, they willingly and consciously give the sold product a destination that differs from the one for which the tax exemption was granted …, while being fully aware that the product will certainly be subsequently introduced into Italian territory and that no statement for customs purposes is issued by the purchasers.

157. Panama submits that the bunkering of gasoil by the *M/V "Norstar"* to other vessels, including those of other States, falls within the freedom of navigation and other internationally lawful uses of the sea related to that freedom and maintains that "Italy has now chosen to redefine the bunkering activities of the M/V "Norstar" as smuggling and tax evasion, even though its territorial line was not crossed by this vessel."

158. Panama states that the Decree of Seizure explicitly refers to the constructive presence doctrine as the basis for its jurisdiction. According to Panama, the meaning of constructive presence in this case is that the *M/V "Norstar"* was the mother ship, which operated on the high seas, and that the vessels bunkered by the *M/V "Norstar"*, returning to territorial waters of Italy, were the contact vessels because they came into contact with the coastal State's jurisdiction and were subject to hot pursuit. Panama contends that

> [t]he use of this doctrine in the Decree of Seizure in itself proves that the *"Norstar"* was not seized for activities in the territorial waters of Italy. There would have been no need to make explicit reference to the

> doctrine of constructive presence if the vessel was seized for activities in territorial waters, because there would be no element of transshipping, otherwise referred to as mother vessel and contact vessel.

159. Panama states that "[n]one of the M/V "Norstar"'s conduct mentioned by Italy in its Counter-memorial or described in the investigations by the Savona Public Prosecutor has ever been a crime." Panama contends that the Italian courts, both in Savona and Genoa, concluded that the bunkering activities carried out by the *M/V "Norstar"* were not a crime, thus acquitting it and the persons therein connected of the charges brought against them, "precisely because the vessel had been operating in international waters, rather than Italian custom territory."

160. Italy, on the other hand, submits that the Decree of Seizure was not adopted in the context of criminal proceedings concerning bunkering activities carried out by the *M/V "Norstar"* on the high seas, but rather in the context of proceedings concerning alleged offences that occurred within the Italian territory. Italy contends that the Decree "did not target the activities carried out by the *M/V Norstar* on the high seas, but rather crimes that the *Norstar* was alleged to have been instrumental in committing *within* the Italian territory."

161. Italy argues that neither the original investigation carried out by the Italian fiscal police nor the Decree of Seizure challenged the bunkering activity of the *M/V "Norstar"* and that it was arrested and detained not because of its bunkering activity but because it was the *corpus delicti* of an alleged series of crimes consisting essentially of smuggling and tax evasion.

162. In support of its position, Italy refers to relevant documents of the Italian judiciary. In particular, Italy maintains that the Decree of Seizure itself indicated that the alleged crimes were committed on the territory of Italy and refers in that context to the following statements in the Decree:

> 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 to EU vessels;
>
> ...
>
> [A]ctual contacts between the vessel that is to be arrested and the State coast were proved (by means of surveys and observations contained in navigation reports, as well as by means of documents acquired on the ground and through observation services), which implied infringements of the customs and tax legislation as a result of the previous sale of smuggled goods in the State territory.

163. Italy rejects Panama's assertion that the reference in the Decree of Seizure to the constructive presence doctrine and hot pursuit shows that the *M/V "Norstar"* was not seized for activities in the territorial sea of Italy. Italy contends that such reference did not form the operative part of the Decree, which was instead based on the prosecution of the alleged offences plainly committed in Italian territory. Italy adds that the fact of the matter is that the *M/V "Norstar"* was never arrested on the high seas and that,

> as far as hot pursuit is concerned, which was never carried out, by the way, this nonetheless indicates that any intention to arrest the *"Norstar"* on the high seas involved doing so in compliance with the right to hot pursuit under article 111 of UNCLOS.

164. Italy argues that the scope of its legislation, on which the Decree of Seizure was based, is "strictly territorial." Italy refers in this regard to article 6 of its Criminal Code:

> **Article 6**
> **Crimes committed in the territory of the State**
>
> 1. Whosoever commits a crime on the territory of the State shall be punished in accordance with the laws of Italy.

> 2. The crime is deemed to have been committed on the territory of the State when the action or omission that constitutes the crime occurred therein, wholly or in part, or the event that is a consequence of said action or omission has therein arisen.

165. Italy contends that

> those accused of the crimes in question were not acquitted because such crimes were not committed on the Italian territory; but rather because the judicial authorities found that the material elements of the crimes under consideration were not integrated by the conduct of the accused.

According to Italy, this was an acquittal on the merits. Italy argues that, 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.

* * *

166. The Tribunal notes that, in the letter rogatory requesting the execution of the Decree of Seizure, the operations relating to the *M/V "Norstar"* relevant to the present case consisted of the following elements:

(1) Marine gasoil was purchased exempt from taxes in Italian port and boarded on the *M/V "Norstar"*;
(2) The *M/V "Norstar"* bunkered mega yachts outside the territorial sea of Italy;
(3) The mega yachts returned to Italian port without declaring the possession of the product.

The Tribunal observes that, while the first and third elements may have taken place in the territory of Italy, the second element occurred outside the territorial sea of Italy, that is, on the high seas.

167. The Tribunal will now peruse the Decree of Seizure and other relevant documents of the Italian judiciary in order to determine whether the Decree and its execution concern alleged crimes committed in the territory of Italy, activities conducted by the *M/V "Norstar"* on the high seas, or both.

168. The Tribunal first turns its attention to the following parts of the Decree of Seizure:

> Having regard to the criminal proceedings file[d] 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 43/73 and Article 4(1)(f) of Law no. 516/82, *committed in Savona and in other ports of the State* during 1997.
>
> ...
>
> 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 to EU vessels;
>
> ...
>
> [A]ctual contacts between the vessel that is to be arrested and the State coast were proved ..., which *implied infringements of the customs and tax legislation as a result of the previous sale of smuggled goods in the State territory* ... (Emphasis added by the Tribunal)

169. It is clear from the above that the Decree of Seizure concerns alleged crimes committed in the territory of Italy. This is further supported by the Request issued by the Prosecutor of the Court of Savona to the Spanish authorities and other relevant documents of the Italian judiciary. For example, in its judgment, the Court of Savona states: "[I]t is up to domestic jurisdiction to establish whether goods have been introduced into a customs area or the territorial sea in breach of customs rules."

170. The Tribunal, having noted that the Decree of Seizure concerns alleged crimes committed in the territory of Italy, must decide whether, and to what

extent, it also concerns activities conducted by the *M/V "Norstar"* on the high seas.

171. The Tribunal now turns its attention to the following parts of the Decree of Seizure:

> It was also found that *the mv NORSTAR positions itself beyond the Italian, French and Spanish territorial seas*, mostly inside the contiguous vigilance zone and *promptly supplies with fuel* (*so-called "offshore bunkering*[*"*]) *mega yachts* that are exclusively moored at EU ports. Thus, they willingly and consciously give the sold product a destination that differs from the one for which the tax exemption was granted (with reference to products bought in Italy and Spain, which are then surreptitiously reintroduced into Italian, French, and Spanish customs territory), while being fully aware that the product will certainly be subsequently introduced into Italian territory and that no statement for customs purposes is issued by the purchasers.
>
> Having noted that *the seizure of the mentioned goods must be performed also in international* [*seas*]*, and hence beyond the territorial* [*sea*] and the contiguous vigilance zone, given that:
>
> …
>
> – … actual contacts between the vessel that is to be arrested and the State coast were proved … (so-called *"constructive or presumptive presence"*, pursuant to Articles 6 crim. code and *III Montego Bay Convention*, ratified by Law no. 689/94);
>
> – … *the repeated use of adjacent high seas by the foreign ship* was found to be exclusively aimed at affecting Italy's and the European Union's financial interests. (Emphasis added by the Tribunal)

172. These parts of the Decree of Seizure indicate that it concerns not only alleged crimes committed in the territory of Italy but also bunkering activities conducted by the *M/V "Norstar"* on the high seas. In particular, the mentioning that the seizure of the *M/V "Norstar"* must also be performed outside the territorial sea and the reference to constructive presence demonstrate that the Decree of Seizure targets the vessel's activities on the high seas.

173. This is further supported by other relevant documents of the Italian judiciary. In particular, the Request from the Prosecutor of the Court of Savona to the Spanish authorities, which was issued the same day, sheds light on the contents and the objective of the Decree. In the Request, the investigations by the Italian authorities are introduced in the following manner:

> Since September 1997, the *Nucleo di polizia tributaria of the Guardia di Finanza*, (law enforcement agency that is mainly in charge of finding and prosecuting tax and customs offences) of Savona *has been conducting thorough investigations into the phenomenon known as "offshore bunkering" of mega yachts close to the borders of Italy's territorial waters by oil tankers flying foreign flags*. (Emphasis added by the Tribunal)

174. The Request states that *Rossmare International S.A.S.* "exclusively operated abroad in the wholesale trade of fuels and lubricants destined to yachts". In the Request, a tax audit carried out by the Italian authorities is described as follows:

> Hence, on 1 September 1997 a tax audit on the mentioned company was carried out with the additional objective of checking the legality of the intermediation role for all tax purposes. *In particular, during the audit the offshore bunkering activity which took place in 1997 was reviewed. It was found that the activity was masterminded by ROSSI Silvio and was carried out with a fraudulent* modus operandi *... In the Summer of 1997 offshore bunkering was carried out through the Panamanian-flagged vessel "NORSTAR" ...* (Emphasis added by the Tribunal)

Further references to "offshore bunkering" are made in the Request.

175. The Tribunal notes that in the Request a further reference to activities of the *M/V "Norstar"* on the high seas is found in the following question that the judicial authorities of Spain are requested to ask the master of the vessel: "How many and which supplies of mineral oils did you perform for your ship in European Union ports or in international waters?"

176. The Tribunal's view that the Decree of Seizure and its execution concern both alleged crimes committed in the territory of Italy and activities conducted

by the *M/V "Norstar"* on the high seas is further supported by the following description of the *modus operandi* of the relevant activities in the Request:

> The bunkering operations took place as follows:
>
> a) NORSTAR loaded marine gas oil on four occasions in the ports of GIBRALTAR, LIVORNO, BARCELONA and, again, LIVORNO. Based on the documents, the oil products were purchased by the Norwegian companies "ARJA S.A." and "SCANDINAVIAN BUNKERING A.S." and sold by them to NORMARITIME BUNKER C.O. LTD in LA VALLETTA (MALTA) c/o BORGHEIM [SHIPPING] – SHIPBROKERS – P.O. Box 76 N-3140 BORGHEIM. Of those loading operations the ones that were carried out in the Italian port have been reconstructed precisely. In particular, on 28.06.1997 and 12.08.1997 NORMARITIME, through ROSSI Silvio (who claimed to be the agent of the latter and of BORGHEIM SHIPPING), purchased and loaded on M/V NORSTAR at the port of Livorno marine gas oil totalling about 1,844,000 litres, exempt from taxes as it was declared to be destined to the stores of that motor vessel;
> b) NORMARITIME BUNKER CO Ltd of La Valletta (Malta), by means of the motor vessel "NORSTAR", which was positioned close to the borders of the territorial waters off the Western Coast of Liguria, has thus traded in gas oil purchased exempt of domestic taxes and mainly destined to supply mega yachts flying European Union flags through the intermediation of ROSSMARE INTERNATIONAL SAS (which acted as a "collector" of all supply requests);
> c) The supplied product was invoiced by ROSSMARE INTERNATIONAL SAS – which in turn did not issue invoices to the various yacht owners – by means of fake invoices issued to the Norwegian company attesting to the sale of the good to shell companies with registered offices in so-called "tax havens" (such as Cayman Islands). Questioned on this issue, many of the yacht owners involved confirmed in their statements on the record that they had left the national port for the sole purpose of fuelling up, and that they immediately returned to the port without declaring the possession of the product.

Consistent with the above, on a sketch map provided in the Request, the *M/V "Norstar"* is positioned in "international waters".

177. The aforementioned description of the *modus operandi* indicates that the Decree of Seizure and its execution concern all three elements of the operations related to the *M/V "Norstar"* stated in paragraph 166. The Decree of Seizure and its execution therefore concern both alleged crimes committed in the territory of Italy and bunkering activities conducted by the *M/V "Norstar"* on the high seas. Moreover, the description indicates that the bunkering activities on the high seas form an integral part of the *modus operandi*.

178. The Tribunal will now address other relevant documents of the Italian judiciary which shed further light on the contents of the Decree of Seizure and its objective. The Criminal Offence Report Communication of the Italian fiscal police of Savona of 24 September 1998 addresses not only alleged crimes committed in the territory of Italy but also bunkering activities conducted by the *M/V "Norstar"* on the high seas. The Communication includes the following statements:

> On September 11th, [1997] a general tax audit was initiated against Rossmare International sas of Rossi Silvio located in Savona, Piazza Rebagliati 1/4, exclusively operating abroad in the wholesale trade of oils and lubricants for recreational crafts field, with the intent of verifying the compliance with the tax legislation implementation provisions.
>
> ...
>
> From the inspection activities carried out on the basis of the documentation it has emerged that the same company carries out international trading activities of oil products designed to supply recreational crafts.
>
> ...
>
> Said activities are conducted during the summer months also by means of a tanker that positions itself in international waters, about 20 miles from Sanremo's coast, with the intent to ... supply recreational crafts both European and not with tax-free fuel.

> ...
>
> The off-shore bunkering activities were conducted by means of the vessel known as **"NORSTAR" ex ["NORSUPPLY"]** flying the flag of Panama.
>
> ...
>
> The bunkering activities were carried out as follows:
>
> ...
>
> b) The Nor Maritime Bunker co Ltd of La Valletta (Malta) by means of the motor vessel "NORSTAR", traded the oil bought duty and VAT free off the coast of Sanremo, in international waters, in order to supply European recreational crafts, through the intermediary of ROSSMARE INTERNATIONAL Sas;
>
> ...
>
> The product was (then) boarded on the "NORSTAR" former "NORSUPPLY", transported in international waters off the coast of Sanremo and allocated as fuel supply for Community crafts that bought it without paying the duty borne by fuels intended for crafts, therefore implementing the crime of smuggling ...

179. Furthermore, the Decree Refusing the Release of Confiscated Goods by the Public Prosecutor at the Court of Savona of 18 January 1999 not only addresses alleged crimes committed in the territory of Italy but also bunkering activities conducted by the *M/V "Norstar"* on the high seas. In relation to the existence of a "*fumus commissi delicti*", the Decree states that "in particular, the motor vessel NORSTAR was stationed outside the Italian territorial waters, refueling yachts headed towards European ports".

180. This is further indicated in the following statements in the Decree:

> The existence of a link between the vessel and the coast of the State was demonstrated ... which implied a violation of customs and fiscal law due

> to the prearranged sale of smuggled goods on the territory of the State (so-called "constructive presence" pursuant to Article 6 of the Italian Criminal Code and 111 UNCLOS …);
>
> …
>
> The link, contemplated by the above international rule, unequivocally emerges from the investigations, as summarized above: the reiterated foreign ship's utilization of the high sea took place with the sole intent of damaging the financial interest of the State and of the EU.
>
> …
>
> The requirement for the application of such rule is that the mother-ship (*i.e.*: the ship to be captured) is working jointly with other vessels which are stationed within the contiguous zone; in the present case, the mother-ship was stationed in international waters for the criminal goal referred to above.

181. The judgment of the Court of Savona is also illustrative in this respect. The description of the alleged offences in the first part of the judgment includes the following:

> [S]pecifically Mr. ROSSI as owner of the company ROSSMARE INTERNATIONAL S.a.s. …, exercising activities of wholesale trade of petroleum and lubricating products, in particular engaged in supplying diesel fuel and lubricating oils to recreational vessels in international waters;
>
> …
>
> ALL OF THEM carrying out the following fraudulent actions: … they chartered the motor tanker in question from the company headed *de facto* by MORCH and anchored it a little beyond the territorial sea in order to regularly supply diesel fuel to recreational vessels, which subsequently landed solely in ports of the State or, in any case, in ports of EU Member States, thus knowingly providing a destination for the product sold.

182. The grounds of the judgment of the Court of Savona include the following statements:

> The essential elements of the conduct apparently consisted in the purchase of oil products in non-EU countries or in Italy and in other EU ports but under a customs-free regime, for such products to be then used to refuel ships or vessels outside Italian territorial waters.
>
> ...
>
> Mr. Rossi apparently saw to it that that ship was located in international waters close to the Italian territorial sea line, for it to be able to refuel vessels that would subsequently introduce the fuel in the territorial sea and inside the customs territory without making a declaration for customs purposes.
>
> In light of the above considerations, the purchase of fuel intended to be stored on board by leisure boats outside the territorial sea line and for its subsequent introduction into the territorial sea shall not be subject to the payment of import duties as long as the fuel is not consumed within the customs territory or unloaded on the mainland.
>
> Therefore whoever organises the supply of fuel offshore – it does not really matter whether this occurs close to, or far from, the territorial waters line – does not commit any offence even though he/she is aware that the diesel fuel is used by leisure boaters sailing for the Italian [coasts].
>
> In light of the above remarks, *before asserting any kind of criminal liability, a preliminary test is needed as to where the provision of supplies occurred because if it took place outside the line of territorial waters no one of the offences charged does actually exist.*
>
> As it came to light that the provision of supplies has always taken place offshore according to the Prosecution's arguments ..., the offences ... shall be regarded as unsubstantiated and consequently this leads to the defendants' acquittal. (Emphasis added by the Tribunal)

183. The Tribunal observes that the judgment of the Court of Savona not only addresses alleged crimes committed in the territory of Italy but also bunkering activities conducted by the *M/V "Norstar"* on the high seas. In fact, the Court's finding that the vessel's bunkering activities had taken place beyond the limits of the territorial sea was instrumental in its conclusion that no offences had been committed, the defendants being acquitted and the seizure of the *M/V "Norstar"* being revoked.

184. The Tribunal notes that the Appeal submitted by the Public Prosecutor against the judgment of the Court of Savona, dated 18 August 2003, also addresses not only alleged crimes committed in the territory of Italy but also bunkering activities conducted by the *M/V "Norstar"* on the high seas. The Appeal includes, for example, the following statements:

> The motor tankers therefore placed themselves beyond the Italian territorial waters, supplying regularly pleasure vessels that landed exclusively in EU harbours, thus giving willfully and consciously to the product they sold a destination different from the one for which they had obtained the tax exemption …
>
> [T]he assertion that anyone organizing the bunkering of pleasure vessels in the high seas does not commit an offence, although knowing that the pleasure vessels owners are directed to Italian ports, utterly and completely contradict the assertions that same judge made …

185. The Tribunal further notes that the judgment of the Court of Appeal of Genoa, which upheld the judgment of the Court of Savona, not only addresses alleged crimes committed in the territory of Italy but also bunkering activities conducted by the *M/V "Norstar"* on the high seas. In particular, the Court of Appeal states in its judgment:

> From all this follows that the purchase by recreational vessels of fuel intended to be used as ship's stores outside the limit of territorial sea and its subsequent introduction inside it does not entail any application of duties so long as the fuel is not consumed within the customs line or landed; that *no offence is committed by anyone who provides bunkering on the high seas*, even in full knowledge that the gasoil will be used by leisure boaters bound for Italian coast; that there is not any possibility

> of establishing the offence provided for, and punishable under, Article 40 I lit c. lit c) of Legislative Decree No. 504/95, *when the gasoil, which has been sold or transshipped on the high seas*, has been purchased under exemption from payment of the excise duty for being ship's stores (such goods are certainly to be considered foreign goods once the vessel has left the port, or once it has gone beyond the limit of territorial waters). (Emphasis added by the Tribunal)

186. In light of the foregoing, the Tribunal finds that the Decree of Seizure and its execution concern both alleged crimes committed in the territory of Italy and bunkering activities conducted by the *M/V "Norstar"* on the high seas. The Tribunal further finds that the evidence shows that the bunkering activities of the *M/V "Norstar"* on the high seas in fact constitute not only an integral part, but also a central element, of the activities targeted by the Decree of Seizure and its execution.

187. Consequently, the Tribunal concludes that article 87 of the Convention may be applicable in the present case. Whether article 87 is applicable and has been breached depends, *inter alia*, on how the freedom of navigation provided for in article 87 is to be interpreted and applied to the present case.

Article 87, paragraphs 1 and 2, of the Convention

188. The Tribunal now turns to the question as to whether article 87 of the Convention is applicable and, if so, whether Italy breached it.

189. While Panama contends that Italy breached article 87, paragraph 1, of the Convention, Italy claims that in the present case the provision is not applicable, let alone breached. In this regard, the Parties disagree on the meaning and scope of the freedom of navigation under article 87, paragraph 1, of the Convention. In particular, the Parties hold different views as to: the location where the freedom of navigation is applicable; what constitutes a breach of the freedom of navigation; and whether the freedom of navigation can be invoked to prohibit the extraterritorial application of criminal and customs laws of the coastal State to the high seas. The Parties further disagree on the relevance to the present case of the decisions of the Italian courts. Finally, the Parties disagree as to the breach of the due regard obligation provided for in article 87,

paragraph 2, of the Convention. The Tribunal will examine the arguments of the Parties on these issues *seriatim*.

190. As regards the scope of freedom of navigation, Panama submits that the freedom of navigation under article 87 of the Convention includes "all activities and rights ancillary to, related to, or contained within that freedom itself". In Panama's view, therefore,

> an activity which is compatible with the status of the high seas, and which involves no claim to appropriation with the rights of other States or the international seabed should be admitted unless prohibited by a specific rule of any provision in the Convention.

Panama submits that "the bunkering of gas oil by the M/V Norstar to other vessels, including those of other states, falls within the freedom of navigation".

191. Panama argues that a vessel enjoys the right to freedom of navigation "at all times, and everywhere, even when it is moored." According to Panama, the fact that a vessel is in port does not affect its right to enjoy the freedom of navigation, including "the freedom to sail towards the high seas." Panama submits that "[f]reedom of navigation means not only the right to traverse the high seas but also the right to gain access to it." For Panama, this freedom would mean little if vessels in port could not enjoy the same protection as those already on the high seas.

192. Panama points out the difference between the *M/V "Louisa" Case*, in which the Tribunal stated that article 87 of the Convention could not be interpreted in such a way that it granted the vessel which had been detained in the context of legal proceedings a right to leave the port and gain access to the high seas, and the case currently before the Tribunal. According to Panama, while the *M/V "Louisa"* was arrested for conduct within Spanish territorial waters, the arrest of the *M/V "Norstar"* arose from activities on the high seas. Panama contends that the relevance of article 87 must be based not on the locus of arrest but on the locus of the alleged conduct.

193. As to what constitutes a breach of the freedom of navigation, Panama argues that States' efforts to hinder the freedom of navigation enjoyed by other States are not restricted to interventions that actually take place on the high seas, but can also manifest themselves in the form of "efforts to unlawfully

arrest a vessel in port with the goal to preclude the vessel from returning to the high seas."

194. Panama contests Italy's view that article 87 of the Convention applies only if there is physical interference on the high seas, and does not apply if a vessel is arrested in port. According to Panama:

> The opposite extreme is if the coastal State orders the arrest of a vessel in a port for its activities carried out on the high seas, which in this case were completely lawful, and if this would not trigger a breach of article 87, because a violation of article 87 would encompass only arrests that have taken place on the high seas. It would mean, in fact, that a coastal State could circumvent article 87 on the freedom of navigation and be free to abuse its right to seize vessels for this purpose by waiting to arrest them in port.... That is the other extreme.

195. Panama asserts that the only activity which the *M/V "Norstar"* carried out was bunkering other vessels on the high seas. In Panama's view, therefore, Italy violated article 87 of the Convention by improperly arresting the vessel for carrying out lawful activities.

196. As for the exercise of extraterritorial jurisdiction, Panama states that "beyond its territory or territorial sea, a State does not have prescriptive or enforcement jurisdiction." According to Panama, article 87 of the Convention precludes Italy from extending the application of its customs law and regulations to the high seas. Panama observed that "[i]f a State could legislate and arrest another State's vessel for activities that occurred on the high seas, the concept of freedom of the high seas would become meaningless." Panama thus contends that

> Italy's exercise of its criminal and tax jurisdiction over the M/V Norstar through its order and request of arrest for lawful activities carried out on the high seas is in direct conflict with the exclusive jurisdiction of Panama as the flag state over that vessel in extraterritorial waters.

197. Panama further states that "[t]he principle of exclusive jurisdiction of Panama as the flag State is derived inter alia from articles 92 and 97(1) and (3) of the Convention." In Panama's view, therefore, by exercising its criminal

and tax jurisdiction for bunkering activities performed by Panama on the high seas, "Italy also breached Articles 92, 97(1) and (3) of the Convention."

198. Panama attaches importance to the decisions of the Italian courts. Panama notes that "the Tribunal of Savona ruled that the arrest of the *"Norstar"* was wrongful precisely due to the location of the vessel when it was bunkering." Panama also draws attention to the conclusion of the Court of Appeal of Genoa that "no offence is committed by anyone who provides bunkering on the high seas, even in full knowledge that the gas oil will be used by leisure boaters bound for Italian coast". Panama asserts that those decisions strongly support its case in this dispute, while refuting Italy's.

199. As for the breach of article 87, paragraph 2, of the Convention, Panama contends that the standard of due regard under that provision requires all States, in exercising their high seas freedoms, to consider the interests of other States and refrain from activities that interfere with the exercise by other States of their parallel freedom to do likewise. According to Panama, this provision does not distinguish between flag and coastal States and Italy is thus not exempt from it. By its wrongful conduct, Panama argues, "Italy has interfered unreasonably with the interests of Panama as the flag State with exclusive jurisdiction over M/V Norstar on the high seas."

200. For these reasons, Panama concludes that

> [t]he arrest ordered and requested by Italy in the exercise of its criminal jurisdiction and application of its customs regulations, breached the freedom of navigation accorded to vessels registered under the flag of Panama and, therefore, is not in conformity with the Convention.

201. Italy submits that "[f]reedom of navigation consists in the right of any State that the ships flying its flag sail through the high seas without interference from any other State, except for such restrictions established by UNCLOS or other rules of international law."

202. Italy does not contest Panama's claim that bunkering falls within the freedom of the high seas under article 87 of the Convention. Italy acknowledges that the offshore bunkering of gasoil is "a completely lawful activity under

Italian law." What Italy contests is Panama's claim that the Decree of Seizure concerned offshore bunkering activities on the high seas. On the contrary, Italy argues, what the Public Prosecutor was targeting were "several conducts put in place in the territory of Italy, its internal waters, and/or its territorial sea."

203. Italy objects to Panama's argument that the freedom of navigation is a right enjoyed by vessels regardless of where they are on the sea. In Italy's view, freedom of navigation is not a right enjoyed by States in all maritime zones, but rather on the high seas. Italy notes that "when the Decree of Seizure was enforced, the vessel was in Spanish internal waters and, therefore, it did not enjoy the right to the freedom of navigation under Article 87(1)". Italy also contests Panama's view that the freedom of navigation includes the freedom to gain access to the high seas. According to Italy, the Tribunal confirmed in the *M/V "Louisa" Case* that article 87 does not apply everywhere but applies only to the high seas and, under article 58 of the Convention, to the exclusive economic zone.

204. Italy rejects Panama's distinction between the *M/V "Louisa" Case* and the present one by noting that the focus of the prosecuting authorities in the present case was alleged crimes committed in Italy. Italy asserts that, apart from this fact, the distinction Panama tries to draw in terms of the location of the alleged crime is irrelevant because the freedom of navigation does not encompass "an absolute right to gain access to the high seas for any vessel." In addition, Italy claims that when the Decree of Seizure was issued and executed, the *M/V "Norstar"* had been continuously and uninterruptedly in Spanish internal waters and was not in a position to exercise any freedom of navigation. As a consequence, Italy argues, "no breach of Article 87(1) can have occurred *vis a vis* Panama."

205. As to what constitutes a breach of the freedom of navigation, Italy states that the typical situation in which the freedom of navigation would be violated is that in which "a State's interference with a foreign vessel's navigation on the high seas occurs by means of enforcement action, or some other kind of physical interference, with the movement of the ship". Italy further states that "[w]hile there may be circumstances in which conduct that falls short of enforcement action has the potential to breach Article 87(1), those are not

engaged by the facts of the present case." In Italy's view, "[f]reedom of navigation is first and foremost to be interpreted as freedom from enforcement actions."

206. During the hearing, Italy expanded its argument related to conduct that falls short of enforcement action. According to Italy, "an act that falls short of enforcement action may still become relevant from the perspective of article 87", when it produces some "chilling effect." In this regard, Italy takes, as an example, the instance 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." Italy suggests that if "a ship may self-restrain herself from crossing those areas of the sea where the extraterritorial legislation is applicable", this may be relevant in terms of article 87. Italy argues, however, that as the Decree of Seizure and the Request for execution were secret and not known or knowable, they were not able to produce any chilling effect on those that they targeted. In the present case, therefore, no interference with the navigation of the *M/V "Norstar"* on the high seas took place, and consequently there was no breach of article 87, paragraph 1, of the Convention.

207. Regarding the exercise of extraterritorial jurisdiction, Italy contends that extending prescriptive jurisdiction extraterritorially may be banned under other provisions of the Convention, for instance article 89, but certainly not from the perspective of article 87 of the Convention. In Italy's view, even assuming that it had extended the reach of its prescriptive jurisdiction extraterritorially, "without a concrete interference with freedom of navigation, this conduct would not be in breach of article 87." Italy further argues that other provisions of the Convention similarly protect ships on the high seas from extraterritorial exercise of jurisdiction by a coastal State, without the need for such exercise to determine interference with freedom of navigation. As an example of such provisions, Italy points to article 92 of the Convention.

208. Italy asserts that "extraterritoriality is not the test to assess a breach of article 87" of the Convention. According to Italy, article 87 does not concern territoriality or extraterritoriality, but rather "interference with navigation, as simple as that; and none happened here, in any, including the slightest, form."

209. Regarding the decisions of its courts, Italy first notes that the Decree of Seizure was never found unlawful by the Italian courts. Italy further notes that the Court of Savona did not say anything about the lawfulness of the Decree.

210. Italy also denies the relevance of those decisions to the present case. In Italy's view, the legality of the arrest of a vessel under article 87 of the Convention must be assessed on the basis of the requirements of article 87, that is to say, whether the arrest interfered with the ship's freedom of navigation, but not "under the prism of whether the alleged crimes were later found to have been actually committed". Italy thus observes that the arrest of a ship could be in violation of article 87 even if the alleged crimes were found to actually have occurred. By the same token, if the Italian courts had declared the Decree of Seizure unlawful under Italian law, this would not mean that international law had been breached. Italy submits that, if a State were 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 rights to investigate and prosecute crime."

211. Regarding the breach of article 87, paragraph 2, of the Convention, Italy notes that the obligation to have due regard for the rights of other States under that provision binds States that exercise their freedom of navigation under article 87, paragraph 1. Italy points out that it is Panama that invoked article 87, paragraph 1, of the Convention and the freedom of navigation in the present case, and that therefore any obligation of due regard under article 87, paragraph 2, of the Convention binds Panama, not Italy. Italy submits, therefore, that it has not violated article 87, paragraph 2, of the Convention.

* * *

212. The Tribunal will now proceed to determine whether article 87 of the Convention is applicable and has been breached in the present case. In this connection, the Tribunal recalls that it found, in paragraph 122, that its jurisdiction over the dispute covers not only the Decree of Seizure and the Request for its execution but also the arrest and detention of the *M/V "Norstar"*. The Tribunal further draws attention to its finding, in paragraph 186, that the Decree of Seizure and its execution concern both alleged crimes committed in the territory of Italy and bunkering activities conducted by the *M/V "Norstar"* on the high seas. The Tribunal wishes to note in this regard that it does not

question Italy's right to investigate and prosecute persons involved in alleged crimes committed in its territory. It is Italy's action with respect to activities of the *M/V "Norstar"* on the high seas that is the concern of the Tribunal.

213. Article 87 of the Convention reads:

Article 87
Freedom of the high seas

1. 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 this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

   (a) freedom of navigation;
   (b) freedom of overflight;
   (c) freedom to lay submarine cables and pipelines, subject to Part VI;
   (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
   (e) freedom of fishing, subject to the conditions laid down in section 2;
   (f) freedom of scientific research, subject to Parts VI and VIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

214. Article 87 of the Convention proclaims that the high seas are open to all States. It also proclaims the freedom of the high seas and provides for the obligation of due regard in its exercise.

215. In the view of the Tribunal, the legal status of the high seas has a number of implications. As the high seas are open to all States, no part thereof is subject to the sovereignty of any State. This notion is laid down in article 89 of

the Convention, which provides that "[n]o State may validly purport to subject any part of the high seas to its sovereignty."

216. The Tribunal notes that another corollary of the open and free status of the high seas is that, save in exceptional cases, no State may exercise jurisdiction over a foreign ship on the high seas. Freedom of navigation would be illusory if a ship – a principal means for the exercise of the freedom of navigation – could be subject to the jurisdiction of other States on the high seas. In its Judgment in *The Case of the S.S. "Lotus"*, the Permanent Court of International Justice stated:

> It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. *In virtue of the principle of the freedom of the sea, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them*. (emphasis added by the Tribunal) (*Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 25)

217. This principle is clearly reflected in article 92 of the Convention, which provides that "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas."

218. The Tribunal considers that the notions of the invalidity of claims of sovereignty over the high seas and of exclusive flag State jurisdiction on the high seas are inherent in the legal status of the high seas being open and free. When article 87 of the Convention is being interpreted, therefore, articles 89 and 92 of the Convention may be relied upon. The fact that Panama did not invoke article 92 in its Application does not bar the Tribunal from considering article 92 in determining whether article 87 of the Convention was breached in the present case.

219. The Tribunal will now examine whether bunkering on the high seas falls within the freedom of navigation. In this regard, the Tribunal notes that the Parties do not dispute the lawfulness of such an activity on the high seas. The Tribunal recalls its findings in the *M/V "Virginia G" Case* that, while "the bunkering of foreign vessels engaged in fishing in the exclusive economic zone is an activity which may be regulated by the coastal State concerned", the

coastal State does not have such competence "with regard to other bunkering activities, unless otherwise determined in accordance with the Convention" (*M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at p. 70, para. 223). In the view of the Tribunal, bunkering on the high seas is part of the freedom of navigation to be exercised under the conditions laid down by the Convention and other rules of international law. The Tribunal, therefore, finds that the bunkering of leisure boats carried out by the *M/V "Norstar"* on the high seas falls within the freedom of navigation under article 87 of the Convention.

220. The next question the Tribunal will examine is that of the locus where the freedom of navigation applies. The Convention provides for an elaborate regime of navigation. Navigational rights enjoyed by foreign ships differ in the various maritime zones. Freedom of navigation applies to the high seas and also to the exclusive economic zone pursuant to article 58, paragraph 1, of the Convention.

221. The Tribunal notes that a State exercises sovereignty in its internal waters. Foreign ships have no right of navigation therein unless conferred by the Convention or other rules of international law. To interpret the freedom of navigation as encompassing a right to leave port and gain access to the high seas would be inconsistent with the legal regime of internal waters. The Tribunal, therefore, cannot accept Panama's claim that the freedom of navigation under article 87 of the Convention includes a right to "sail towards the high seas" and that a vessel enjoys such freedom even in a port of the coastal State.

222. The Tribunal now turns to the question of what acts could constitute a breach of the freedom of navigation under article 87 of the Convention. As no State may exercise jurisdiction over foreign ships on the high seas, in the view of the Tribunal, any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties. It goes without saying that physical or material interference with navigation of foreign ships on the high seas violates the freedom of navigation.

223. However, even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation. In this regard, the Tribunal notes that Italy recognizes the possibility

that acts falling short of enforcement action on the high seas could be relevant in terms of a breach of article 87 of the Convention, if such acts produce some "chilling effect". However, Italy argued that no chilling effect was produced in the present case because the Decree of Seizure was not known or knowable.

224. In the view of the Tribunal, it does not matter whether or not a chilling effect is produced. Regardless of such effect, any act which subjects activities of a foreign ship on the high seas to the jurisdiction of States other than the flag State constitutes a breach of the freedom of navigation, save in exceptional cases expressly provided for in the Convention or in other international treaties. Thus Italy's application of its criminal and customs laws to bunkering activities of the *M/V "Norstar"* on the high seas could in itself, regardless of any chilling effect, constitute a breach of the freedom of navigation under article 87 of the Convention.

225. The Tribunal already stated, in paragraphs 216, 217 and 218, that the principle of exclusive flag State jurisdiction is an inherent component of the freedom of navigation under article 87 of the Convention. This principle prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas. The Tribunal, therefore, cannot accept Italy's arguments that article 87 is not concerned with territoriality or extraterritoriality but rather with interference with navigation and that extraterritoriality is not the test to assess a breach of article 87. On the contrary, if a State applies its criminal and customs laws to the high seas and criminalizes activities carried out by foreign ships thereon, it would constitute a breach of article 87 of the Convention, unless justified by the Convention or other international treaties. This would be so, even if the State refrained from enforcing those laws on the high seas.

226. Italy's central argument in this case is that, since the Decree of Seizure was enforced not on the high seas but in internal waters, article 87 of the Convention is not applicable, let alone breached. The Tribunal does not find this argument convincing. The Tribunal acknowledges that the locus of enforcement matters in assessing the applicability or breach of article 87. It does not follow, however, that the locus of enforcement is the sole criterion in this regard. Contrary to Italy's argument, even when enforcement is carried out in internal waters, article 87 may still be applicable and be breached if a State extends its criminal and customs laws extraterritorially to activities of foreign

ships on the high seas and criminalizes them. This is precisely what Italy did in the present case. The Tribunal, therefore, finds that article 87, paragraph 1, of the Convention is applicable in the present case and that Italy, by extending its criminal and customs laws to the high seas, by issuing the Decree of Seizure, and by requesting the Spanish authorities to execute it – which they subsequently did – breached the freedom of navigation which Panama, as the flag State of the *M/V "Norstar"*, enjoyed under that provision.

227. The Tribunal now turns to the question as to whether the decisions of the Italian courts have any bearing on the present case.

228. The Tribunal notes that its task in this case is to decide whether Italy, through the Decree of Seizure against the *M/V "Norstar"* and its execution, acted in conformity with its obligations toward Panama under the Convention. The task of the Italian courts, on the other hand, was to decide whether the alleged crimes of smuggling and tax fraud were committed under Italian law. These two tasks are separate and independent of each other. The decisions of the Italian courts that no crimes were committed under Italian law do not necessarily mean or imply that the arrest of the *M/V "Norstar"* was unlawful under the Convention.

229. The Tribunal acknowledges, however, that the decisions of the Italian courts may help elucidate the facts of the present case. As stated by the Permanent Court of International Justice in the *Case concerning Certain German Interests in Polish Upper Silesia*:

> From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.
> (*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19)

230. In light of the foregoing, the Tribunal concludes that Italy, through the Decree of Seizure by the Public Prosecutor at the Court of Savona against the *M/V "Norstar"*, the Request for its execution, and the arrest and detention of the vessel, breached article 87, paragraph 1, of the Convention.

231. The next issue which the Tribunal will address concerns Panama's contention that Italy breached the obligation of due regard under article 87, paragraph 2, of the Convention. This provision imposes an obligation of due regard upon a State in its exercise of the freedom of the high seas. The present dispute is concerned with Panama's exercise of the freedom of navigation with respect to its vessel, the *M/V "Norstar"*. There is no dispute related to Italy's exercise of the freedom of navigation. Accordingly, there can be no question of Italy's breach of the obligation of due regard. The Tribunal, therefore, finds that article 87, paragraph 2, of the Convention is not applicable in the present case.

VII. Article 300 of the Convention
Link between article 300 and article 87 of the Convention

232. The Tribunal will now turn to Panama's claims concerning article 300 of the Convention.

233. The Tribunal recalls that it stated in paragraph 132 of its Judgment on Preliminary Objections that "the question arises as to whether Italy has fulfilled in good faith the obligations assumed by it under article 87 of the Convention. Therefore, the Tribunal is of the view that article 300 of the Convention is relevant to the present case" (*M/V "Norstar"* (*Panama* v. *Italy*), *Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 74, para. 132).

234. The Tribunal has already stated in paragraph 126 that, while the Parties agree that the jurisdiction of the Tribunal in the present case is limited to the alleged breach of article 300 in connection with article 87 of the Convention, they disagree as to whether claims made by Panama under article 300 are related to article 87.

235. Before proceeding to examine each of Panama's specific claims, the Tribunal will deal with the Parties' arguments as to the connection between articles 87 and 300 of the Convention.

236. Panama contends that "Italy has not fulfilled the obligations assumed by it under article 87 of the Convention, thereby invoking article 300." Panama further contends that "[a]ll claims that Panama has made concerning Italy's bad faith and abuse of rights have emerged from hindrance of the free navigation

protected by article 87." According to Panama, "[i]f Italy had not impeded the right of the M/V "Norstar" to freely navigate with its order of arrest, none of the charges alleging a breach of good faith would have been brought."

237. Panama argues that "it is crucial to use the concept of good faith to interpret article 87 and link it with article 300 of the Convention." Panama asks the Tribunal to "interpret article 87 in a broad manner, in light of the principle of *effet utile*, so as to recognize a material breach of article 87 in light of the concept of good faith when addressing the particular situation of the MV "Norstar"." In this regard, Panama refers to decisions of the Tribunal and the ICJ as well as scholarly works to substantiate its argument.

238. Italy asserts that a number of allegations which Panama makes concerning breach of good faith do not relate in any way to article 87 of the Convention. Italy refutes Panama's view that "Italy has breached Article 300 with regard to Article 87, *because* it has breached Article 87." According to Italy,

> [i]f Panama were correct that violating a provision of UNCLOS equals to not fulfilling in good faith the obligations assumed under that provision, the illogical consequences would be that a violation of Article 300 would occur any time a State acts in contravention to the Convention.

In Italy's view, such conclusion is not tenable.

239. Italy submits that "[e]stablishing a link between Article 87 and Article 300 requires ascertaining first that Article 87 has been violated and then, if this violation has occurred in breach of Article 300." As to Panama's claim that article 87 should be interpreted in a broad manner in light of *effet utile* so as to recognize a material breach of article 87 in light of good faith, Italy argues that "[i]t is not the purpose of article 300 of the UNCLOS to provide hermeneutical standards, and therefore.... this notion of good faith cannot be used to create links between Article 87 and Article 300." As to the principle of *effet utile*, Italy refers to the Report of the International Law Commission (hereinafter "the ILC") on the work of its Eighteenth Session, 4 May to 19 July 1966, which stated that "the maxim [*ut res magis valeat quam pereat*] does not call

for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty".

* * *

240. Article 300 of the Convention reads:

Article 300
Good faith and abuse of rights

> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of rights.

241. As stated by the Tribunal in the *M/V "Louisa" Case*, article 300 of the Convention cannot be invoked on its own. Therefore, a State Party claiming a breach of article 300 must first identify "the obligations assumed under this Convention" that are not fulfilled in good faith or "the rights, jurisdiction and freedoms recognized in this Convention" that are exercised in an abusive manner. The State Party then has to establish a link between its claim under article 300 and "the obligations assumed under this Convention" or "the rights, jurisdiction and freedoms recognized in this Convention".

242. In the present case, Panama claims that Italy has not fulfilled in good faith the obligations assumed by it under article 87 of the Convention and exercised its rights recognized in the same provision in an abusive manner. Therefore, it is incumbent upon Panama to establish a link between its claims and article 87. The Tribunal will examine whether Panama has established such a link with respect to each of its claims in the next section.

243. The Tribunal cannot accept Panama's argument that a breach of article 87 of the Convention necessarily entails the breach of article 300 of the Convention. For a breach of article 300, Panama not only has to prove that article 87 has been violated but that it has been violated in breach of good faith, as bad faith cannot be presumed and has to be established.

244. Nor can the Tribunal accept Panama's contention that article 87 of the Convention should be interpreted broadly in light of the principle of *effet utile*. The Tribunal does not consider that *effet utile* is relevant in the present context. In interpreting article 87, the Tribunal sees no reason to depart from the general rule of treaty interpretation reflected in article 31 of the Vienna Convention on the Law of Treaties.

245. The Tribunal will now proceed to examine each specific claim made by Panama concerning article 300 of the Convention. As stated in paragraph 129, the Tribunal will deal with the question as to whether Panama's claims fall within its jurisdiction and, if so, whether Italy breached article 300 of the Convention.

Good faith

246. Panama makes several claims alleging breach of the good faith obligation by Italy under article 300 of the Convention. Panama enumerates the following actions in this regard:

1. Delaying the arrest, thus involving both acquiescence and estoppel.
2. Waiting until the M/V "Norstar" had left the high seas and entering the territory of a third State, before executing the arrest.
3. Executing a premature order for the arrest as a precautionary measure.
4. Intentionally refusing to reply to the numerous communications from Panama concerning this case.
5. Continuously withholding relevant information.
6. Mischaracterizing the locus of the activities for which the vessel was arrested, thereby violating the rule that no one may set himself in contradiction to his own previous conduct.
7. Blaming others, including the ship-owner and Spain, for its own negligent actions such as

    7.1. keeping the M/V "Norstar" under its absolute jurisdiction and control for an excessive period, rather than promptly taking positive steps to return it; and
    7.2. concerning its maintenance; and, finally,

8. Maintaining that article 87(2) is only binding on Panama violating the rule that no one can derive an advantage from his own wrong.

247. Italy argues that, "out of all the conducts that Panama claims are evidence of Italy's bad faith in breach of Article 300, only two bear a possible connection with Article 87" and hence fall within the jurisdiction of the Tribunal in the present case:

(a) First, that even if Italy had long known that the *M/V Norstar* was active in the bunkering activities, Italy waited until 1998 to arrest the vessel;
(b) Second, that Italy waited until the *M/V Norstar* was in the port of Palma to arrest the vessel, so as to make the arrest easier.

Timing of the arrest of the M/V "Norstar"

248. Panama contends that Italy knew that the *M/V "Norstar"* carried out bunkering activities on the high seas "from 1994 to 1998", but did not take any steps to criminally prosecute this activity during those four years. According to Panama, Italy's decision to suddenly treat bunkering as a crime in 1998 reflects a lack of good faith.

249. Panama views the delay by Italy in considering the bunkering activities of the *M/V "Norstar"* as crimes as tacit recognition that such conduct was licit. Therefore, Panama invokes acquiescence and estoppel.

250. Italy, on the other hand, maintains that the *M/V "Norstar"* was not arrested and detained because of the bunkering activities that it was carrying out on the high seas but rather because it was allegedly part of a criminal plan concerning the commission of the crimes of tax evasion and smuggling in Italian territory. Italy explains that the *M/V "Norstar"* was arrested in 1998 because only then did the investigative activities of the Italian fiscal police suggest its involvement in the abovementioned crimes. According to Italy, "[i]f anything, Panama's argument only demonstrates that the bunkering activities of the *M/V Norstar* were not as such of concern to the Italian authorities and proves the diligent attitude of its investigative authorities."

* * *

251. The Tribunal is of the view that acquiescence and estoppel, invoked by Panama, are not applicable in the present case as their requirements are not met. The Tribunal further notes that Panama has not shown any evidence of bad faith in Italy's conduct. Mere delay in itself is not evidence of bad faith. The fact that the *M/V "Norstar"* was arrested only in 1998, although it had been carrying out bunkering activities in the area concerned since 1994, cannot be considered a breach of good faith under article 300 of the Convention. The Tribunal, thus, rejects Panama's claim in this regard.

Location of the arrest of the M/V "Norstar"

252. Panama asserts that Italy breached article 300 of the Convention with regard to article 87 of the Convention because it waited until the *M/V "Norstar"* was in a foreign port in order to arrest it.

253. Panama argues that Italy's assertion that its decision to arrest the *M/V "Norstar"* in a port in Spain was necessary so as not to breach article 87 of the Convention is not supported by any evidence, as the Decree of Seizure itself provided for the possibility of the *M/V "Norstar"* being arrested on the high seas.

254. Consequently, Panama asserts that Italy's decision to arrest the vessel in the internal waters of a third State, while knowing that arresting it on the high seas constituted a violation of the freedom of navigation, was not in good faith.

255. Italy contends that it waited until the *M/V "Norstar"* was in a port before arresting it because, aside from the exceptional conditions provided in the Convention that authorize a coastal State to exercise enforcement jurisdiction on the high seas, arresting a ship on the high seas is always illegal, regardless of whether the coastal State has "a legitimate title to exercise jurisdiction".

256. Italy explains that "the Decree of Seizure mentioned the possibility of arresting the ship on the high seas, had the conditions for a hot pursuit been met. Since they were not met, the ship was rightly arrested in port."

257. Italy asserts that,

> [g]iven the circumstances of the case, the arrest of the M/V "Norstar" could only be legal in areas where article 87 did not apply or in areas where exceptions to article 87 applied. Far from being suggestive of bad faith, Italy's *modus operandi* only shows respect for the fundamental principles of the Convention.

* * *

258. The Tribunal is of the view that Panama has failed to prove lack of good faith on the part of Italy in this regard. The arrest of the *M/V "Norstar"* in a Spanish port cannot *per se* be considered a breach of good faith under article 300 of the Convention. The Tribunal thus rejects Panama's claim.

Execution of the Decree of Seizure

259. Panama argues that the arrest of the *M/V "Norstar"* was premature and enforced without the final and definitive approval of the Italian judicial authorities. Panama notes that, while the Decree of Seizure and the Request for its execution were issued on 11 August 1998, the Italian fiscal police transmitted its findings on the investigation regarding the *M/V "Norstar"* to the Public Prosecutor only on 24 September 1998.

260. According to Panama,

> precautionary or interim measures may be ordered only if it has been established that they are, one, justified *prima facie* in fact and in law (i.e. *fumus boni iuris and fumus commissi delicti*), and that they are urgent (i.e., *periculum in mora*). In addition, *periculum in mora* implies that there had to be a risk of imminent and irreparable harm to the interests of an arresting State, to be avoided by means of an arrest as a precautionary measure.

261. Panama argues that "Italy has not demonstrated any *periculum* nor any risk of suffering serious and irreparable damage", since the vessel was allowed to operate for four years prior to its arrest. Even if the interpretation of Italian

customs laws had given rise to concerns regarding the possible commission of a crime in this case, such concerns would not have constituted a probable cause for seizure.

262. Italy responds by arguing that the adoption of the Decree of Seizure was neither premature nor unjustified. According to it, the purpose of the Decree was to secure evidence assessing the commission of a crime by certain individuals through the *M/V "Norstar"*. In this regard, Italy quotes its national law and several decisions of its Supreme Court to clarify that seizure for probative purposes does not require clear and unequivocal evidence of the guilt of those accused of a crime.

263. Italy notes that the Public Prosecutor can decide when there is enough information and evidence to adopt a measure such as a decree of seizure. Italy further notes that investigations concerning the *M/V "Norstar"* had been ongoing for several months when the Decree of Seizure was adopted. In the view of Italy, therefore, "the adoption of a very well-motivated decree can hardly be considered premature, illegal, unwarranted or in bad faith."

264. Italy also points out that Panama's own Code of Criminal Procedure provides for the possibility to issue a decree of seizure of the same nature for probative purposes.

* * *

265. The Tribunal notes that Panama's claim that Italy executed the Decree of Seizure prematurely or in an unjustified manner relates to Italy's domestic laws and procedures. In the Tribunal's view, Panama has failed to establish a link between this claim and article 87 of the Convention. The Tribunal accordingly finds that Panama's claim falls outside the scope of its jurisdiction.

Lack of communication

266. Panama asserts that it made seven attempts to communicate with Italy concerning the *M/V "Norstar"*, yet all of them were unsuccessful. Panama contends that, by intentionally keeping silent when confronted with the claim

that article 87 of the Convention had been breached, Italy acted in a manner contrary to its duty of good faith.

267. Panama argues that

> [t]he refusal of Italy to admit that it was forestalling exchanges regarding the *M/V "Norstar"* has placed Panama in a very disadvantageous position. If Panama had known this, it could have taken other measures to avoid wasting time and money in the belief that negotiations were still possible.

268. Italy contends that its conduct in its exchanges with Panama prior to and during these proceedings is a matter that is unrelated to the question as to whether Italy has fulfilled in good faith the duty to respect Panama's freedom of navigation under article 87 of the Convention.

269. Italy further contends that,

> had Panama wanted to argue that Italy has acted in bad faith by not replying to Panama's communications, it should have done so by linking article 300 of the Convention to the obligations set out by article 283. However, it has not done so, and it is too late to do so now.

Italy argues that it has "behaved consistently, has never given to Panama the impression that an agreement was within reach. By remaining silent, Italy has rejected Panama's settlement proposals, and it has done so throughout."

270. In Italy's view, Panama's claim in this regard, therefore, "falls outside the jurisdiction of the Tribunal".

* * *

271. The Tribunal is of the view that Panama has failed to establish a link between its claim of bad faith on the part of Italy because of its lack of engagement prior to and during these proceedings and article 87 of the Convention. The Tribunal accordingly finds that Panama's claim falls outside the scope of its jurisdiction.

Withholding information

272. Panama contends that Italy has always been opposed to disclosing all the documents concerning the criminal proceedings against the *M/V "Norstar"*. As a result, according to Panama, Italy has withheld vital information relevant to the present case. In this regard, Panama refers to letters from the Service of Diplomatic Litigation, one dated 4 September 1998, informing the Italian Prosecutor of the non-existence of a contiguous zone, and another dated 18 February 2002 which expressly refers to the claim for damages by the agent of Panama. These documents, Panama alleges, were disclosed by Italy only in 2016.

273. Panama argues that, by withholding relevant information, Italy breached its duty to cooperate in the resolution of this dispute and therefore failed to act in good faith.

274. Italy denies that it has acted in bad faith or been uncooperative in the context of the present proceedings. Italy asserts that it has even taken the initiative of proposing that the Parties share a list of the documents from their respective files.

* * *

275. The Tribunal is of the view that the conduct of the Parties prior to or during the proceedings before it regarding disclosure of information or documents, or lack thereof, is not linked to article 87 of the Convention. The Tribunal accordingly finds that Panama's claim in this regard falls outside the scope of its jurisdiction.

Contradictory reasons to justify the Decree of Seizure

276. Panama requests the Tribunal to hold Italy in breach of its obligation to act in good faith for the contradictory reasons it used to justify the Decree of Seizure.

277. In this regard, Panama argues that, while Italy asserts that the arrest of the *M/V "Norstar"* was executed within the internal waters of Spain for the reason that its arrest on the high seas would amount to a breach of article 87 of the Convention, Italy also based the Decree of Seizure on the constructive

presence doctrine, which is applicable only to seizures on the high seas. According to Panama, this is a clear contradiction.

278. Panama also argues that, once the Court of Savona had held that the *M/V "Norstar"* conducted its business outside territorial waters, it is "inconsistent, then, for Italy to subsequently allege otherwise, as it has in its Counter-memorial, that the arrest was enforced for a 'crime that it was suspected of having committed in Italy.'"

279. Accordingly, Panama requests

> the application of the principle of *non concedit venire contra factum proprium* because, if Italy had originally stated that the *M/V "Norstar"*'s conduct had taken place outside its territorial waters, no offences were actually committed. The law forbids Italy to now argue in direct opposition to the conduct it itself had stated was responsible for this case being brought before the Tribunal.

* * *

280. The Tribunal notes that Italy has not responded directly to Panama's arguments.

281. The Tribunal is of the view that Panama has failed to establish a link between its claim regarding contradictory reasons and article 87 of the Convention. The Tribunal accordingly finds that Panama's claim falls outside the scope of its jurisdiction.

Duration of detention and maintenance of the M/V "Norstar"

282. Panama claims that "the M/V "Norstar" was detained for an inordinate period of time … and that the vessel was kept, in effect, incommunicado under Italy's control and authority over the years. This can only be considered as a betrayal of good faith."

283. Panama argues that,

> [d]espite knowing that the M/V "Norstar" was wrongfully arrested and that the arrest violated the freedom of navigation governed by article 87, Italy did not take any operative measures to promptly return the vessel to

> its owners or to Panama as the flag State.... On the contrary, Italy allowed the M/V "Norstar" to decay for such an unreasonable period that, ultimately, it had to be sold in public auction as scrap.

284. Panama contends that Italy completely abandoned its duty to provide for the maintenance of the vessel in order to prevent its decay. According to Panama,

> [a]s the court having jurisdiction, the Savona Tribunal should have ... promptly taken the appropriate steps to preserve the ship and other property that was on board during the time of the arrest, as well as to pay for port fees, fuel, victualling, and other necessaries of the ship and crew. However, this was not done.

285. Therefore, in the view of Panama, it is entirely justified in describing Italy's actions, both during the period between 1998 and 2015 and in the course of these proceedings, as being conducted in bad faith.

286. Italy asserts that the present case

> is not about the detention; it is about the Decree of Seizure, and the request for its execution.... The length of the detention, therefore, which is a matter that concerns the execution of the Decree of Seizure, and of the other measures against the "Norstar", fall outside the limited question as to whether the Decree of Seizure and the request for execution as such are in breach of article 87.

287. Italy argues that it did not detain the *M/V "Norstar"* for an unreasonable period of time. According to Italy, the vessel was arrested on 25 September 1998 and, on 11 March 1999, it was released subject to payment of a bond and could have been collected, but it was not. Italy notes that, thereafter, the vessel was definitively released on 14 March 2003 and the authorities in Spain were requested to inform the custodian of the vessel that it should be released. Italy further notes that the shipowner was also duly informed on 2 July 2003. In the view of Italy, therefore, it should not bear the consequences of a lack of basic diligence of the shipowner in pursuing its interests.

* * *

288. The Tribunal has found in paragraph 122 that its jurisdiction over the dispute covers the arrest and detention of the *M/V "Norstar"*. The Tribunal considers that Panama's claim relating to the duration of detention and maintenance of the *M/V "Norstar"* is linked to article 87 of the Convention.

289. The question the Tribunal has to determine is whether Italy has not fulfilled in good faith its obligations under article 87 of the Convention. The Tribunal notes in this regard that the Public Prosecutor at the Court of Savona released the *M/V "Norstar"* conditionally in March 1999 and that the Court of Savona ordered its unconditional release on 14 March 2003. The Tribunal is of the view that Panama has failed to establish that Italy did not act in good faith. The Tribunal therefore rejects Panama's claim.

Article 87, paragraph 2, of the Convention

290. Panama argues that the obligation to have due regard for the interests of other States under article 87, paragraph 2, of the Convention binds all States.

291. Panama further argues that Italy's contention that article 87, paragraph 2, of the Convention is only binding on Panama and not Italy is further evidence of its lack of good faith.

292. Italy maintains that,

> [i]n the context of the present dispute, it is Panama, in its capacity as Claimant, that invokes Article 87 and the freedom of navigation that it protects; as such, it is to Panama that the obligation contained in Article 87(2), is addressed, and not to Italy.

* * *

293. The Tribunal has already stated in paragraph 231 that article 87, paragraph 2, of the Convention is not applicable in the present case for the reason that it is Panama, not Italy, which is subject to the obligation of due regard. Therefore, the issue of a breach of article 300 does not arise in this respect.

Abuse of rights

294. Panama contends that Italy has exercised its jurisdiction in a manner that constitutes an abuse of rights. According to Panama,

> Italy wrongly applied its domestic laws outside its territory in relation to lawful and legitimate bunkering activities conducted on the high seas. It acted in bad faith and abused its rights when it maintained the detention of M/V Norstar for an unreasonably long period of time, despite the judgments of its own courts unequivocally affirming that Italy was wrong in bringing criminal charges against those interested in its operation.

295. Panama further contends that Italy violated article 300 of the Convention

> because it did not comply with its international obligation of due regard for the interest of other States in their exercise of the freedom of the high seas as Panama, by wrongfully ordering and requesting the arrest of the M/V Norstar and by the improper application of its customs laws to it.

296. Panama argues that,

> when Italy decided to arrest the M/V "Norstar" without having finished a full investigation as to whether such a seizure was justified, the premature response on its part represented an absence of the good faith needed to protect the rights of ships from other flag States to freely navigate in international waters.

According to Panama, the result has been a violation "of those rights to the extent that not only is article 87 of the Convention of relevance, but article 300 is, also."

297. Panama also argues that Italy, as a coastal State, abused its right, enshrined in article 21 of the Convention, to legally prevent the infringement of its customs or fiscal regulations by foreign ships which enter its territorial sea. For this proposition it relies on the principle *sic utere jure tuo alienum non laedas*. According to Panama,

> Italy exercised its given right to issue its Decree of Seizure, due to an alleged infringement of custom and fiscal laws yet it did so for an end which differs from that for which the right has been created since such right was created to apply to *territorial seas* only … the Decree of Seizure targeted activities carried out on the high seas and, therefore, beyond Italy´s territorial jurisdiction.

298. Italy maintains that Panama's claim concerning an abuse of rights under article 300 of the Convention is not within the scope of the jurisdiction of the Tribunal in the present case. It refers to paragraph 132 of the Judgment on Preliminary Objections in which the Tribunal held that "the question arises as to whether Italy has fulfilled in good faith the obligations assumed by it under article 87 of the Convention. Therefore, the Tribunal is of the view that article 300 of the Convention is relevant to the present case" (*M/V "Norstar"* (*Panama* v. *Italy*)*, Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 74, para. 132).

299. Italy argues that article 300 of the Convention is not relevant in its entirety. Italy contends that article 300 is comprised of two distinct components, good faith and abuse of rights, and that only the good faith component is covered by the present dispute.

300. Italy further argues that Panama invokes article 300 of the Convention as a stand-alone provision and fails to provide a link with any provision of the Convention that it alleges Italy has violated in exercising rights or jurisdictions under the Convention. According to Italy, "the only way in which Article 300 could be linked with freedom of navigation under Article 87 would be if a State, in exercising the freedom of navigation under 87, abused the rights of other States" under article 87, paragraph 2.

301. Italy submits that this clearly does not apply in the present case, in which it is Panama that is invoking rights under article 87, paragraph 1, of the Convention, not Italy. Italy notes that it is not entitled to any right under article 87 in this case and therefore it cannot have abused any right.

302. As regards Panama's claims based on article 21 of the Convention, Italy asserts that this article is not part of the present dispute as determined by the Tribunal, and therefore does not fall within its jurisdiction in the present case.

* * *

303. The Tribunal notes that, although reference is made only to good faith in paragraph 132 of its Judgment on Preliminary Objections, it does not exclude any claim of abuse of rights from its jurisdiction. The Tribunal is of the view that the second element of article 300 of the Convention, i.e., abuse of rights, is closely related to good faith. Therefore, the Tribunal does not consider that paragraph 132 of its Judgment limits its jurisdiction to the good faith component of article 300.

304. The Tribunal will now proceed to examine whether Italy has exercised its rights under the Convention in a manner which would constitute an abuse of rights.

305. The Tribunal has already stated, in paragraph 265, that Panama's claim regarding the premature and unjustified execution of the Decree of Seizure is not linked to article 87 of the Convention and therefore falls outside the scope of its jurisdiction in the present case.

306. The Tribunal finds that Panama's claim regarding article 21 of the Convention falls outside the scope of its jurisdiction.

307. The Tribunal stated, in paragraph 231, that article 87, paragraph 2, of the Convention is not applicable in the present case. Therefore, there can be no question of abuse of rights under article 300 of the Convention in connection with this provision.

308. In light of the foregoing, the Tribunal concludes that Italy did not violate article 300 of the Convention.

VIII. Reparation

309. In light of its finding in paragraph 230 that Italy has breached article 87, paragraph 1, of the Convention, the Tribunal will now turn to the issue of reparation.

310. In its final submissions, Panama requests the Tribunal to

> find, declare and adjudge:
>
> ...
>
> that as a consequence of the above violations, Italy is responsible to repair the damages suffered by Panama and by all the persons involved in the operation of the M/V "Norstar" by way of compensation amounting to TWENTY SEVEN MILLION NINE THOUSAND TWO HUNDRED AND SIXTY SIX US DOLLARS AND TWENTY TWO CENTS (USD 27,009,266.22); plus TWENTY FOUR MILLION EIGHT HUNDRED AND SEVENTY THREE THOUSAND NINETY ONE US DOLLARS AND EIGHTY TWO CENTS (USD 24,873,091.82) as interest, plus ONE HUNDRED AND SEVENTY THOUSAND THREE HUNDRED AND SIXTY EIGHT EUROS AND TEN CENTS (EUROS 170,368.10) plus TWENTY SIX THOUSAND THREE HUNDRED AND TWENTY EUROS AND THIRTY ONE CENTS (EUR 26,320.31) as interest.

311. According to Panama, restitution in kind is not possible in this case "due to the deteriorated situation of the M/V Norstar and the long time that has elapsed." It also states that "due to the debts of the ship owner to the Port Authority of Palma, Majorca, the Norstar was sold in public auction, thereby making it impossible to go back to the *status quo ante*."

312. Consequently, Panama asserts that "monetary compensation is now the most reasonable form of assuring a full reparation" and it "shall include all the economically quantifiable (material and non-material, or moral) damage."

313. Italy rejects Panama's request for compensation.

314. Italy argues that, "[i]n order to establish the existence of a right to compensation, it is necessary for a Claimant to prove the existence of a causal link (*lien de causalité*) between the wrongful act complained of and the injury suffered." In this regard, it relies on article 31, paragraph 1, of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC at its Fifty-third Session in 2001 (hereinafter "ILC Articles on State Responsibility").

315. Italy states that "[t]he existence of the causal link between the unlawful conduct and the injury is not to be lightly presumed" and that "the damage for which compensation can be sought must be direct consequence of the wrongful conduct of a respondent."

* * *

316. The Tribunal has expressed its view concerning the rules on reparation under international law. In the *M/V "SAIGA" (No. 2) Case*, the Tribunal stated:

> It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47).
> (*M/V "SAIGA" (No. 2)*, (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment, ITLOS Reports 1999*, p. 10, at p. 65, para. 170; recalled also in *M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment, ITLOS Reports 2014*, p. 4, at p. 116, para. 428)

317. The Tribunal notes in this regard article 1 of the ILC Articles on State Responsibility, which states that "[e]very internationally wrongful act of a State entails the international responsibility of that State", and recalls its observation in the *M/V "Virginia G" Case* that "article 1 of the ILC Draft Articles on State Responsibility also reflects customary international law" (*M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment, ITLOS Reports 2014*, p. 4, at p. 117, para. 430).

318. The Tribunal points out that the ILC Articles on State Responsibility, in article 31, paragraph 1, further provide: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." In this regard, the Tribunal wishes to recall that its Seabed Disputes Chamber, in the Advisory Opinion of 1 February 2011, stated that article 31, paragraph 1, of the ILC Articles on State Responsibility is part of customary international law (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 62, para. 194).

319. In the *M/V "SAIGA" (No. 2) Case*, the Tribunal noted that reparation may take various forms under international law:

> Reparation may be in the form of "restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination" … Reparation may take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred.
> (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 65, para. 171)

320. The Tribunal finds that, owing to the loss of the *M/V "Norstar"*, restitution in kind is now materially impossible in the present case.

321. The Tribunal notes that, in light of the above findings in paragraph 230 and pursuant to the rules on reparation under international law, Italy as the State responsible for an internationally wrongful act is under an obligation to compensate for damage caused by its breach of article 87, paragraph 1, of the Convention.

322. The Tribunal will now consider the issue of entitlement to compensation for damage suffered. In the *M/V "SAIGA" (No. 2) Case*, the Tribunal held:

> In the view of the Tribunal, Saint Vincent and the Grenadines is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation.

> (*M/V "SAIGA"* (*No. 2*) (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment, ITLOS Reports 1999*, p. 10, at p. 65, para. 172)

In the *M/V "Virginia G" Case*, the Tribunal stated:

> Panama in the present case is entitled to reparation for damage suffered by it. Panama is also entitled to reparation for damage or other loss suffered by the *M/V Virginia G*, including all persons and entities involved or interested in its operation …
> (*M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment, ITLOS Reports 2014*, p. 4, at p. 118, para. 434)

323. In the present case, the Tribunal follows its jurisprudence. In the view of the Tribunal, Panama is entitled to compensation for damage suffered by it as well as for damage or other loss suffered by the *M/V "Norstar"*, including all persons involved or interested in its operation.

Causation

Causal link

324. Panama submits that "damages started accruing from the very moment that the vessel was not allowed to leave port" and that the "prolonged detention of the Norstar should have consequences in terms of the quantification of the compensation."

325. Panama claims that "[t]he lost profits resulting from the detention of the M/V 'Norstar' and its consequential inability to conduct further business, as well as all of the damages caused to the persons connected therewith have one and only one root cause: the arrest enforcement."

326. With respect to Italy's challenge to the causal link between the damage claimed and the alleged wrongful act, Panama argues that one of the "test questions" in this regard shall be whether damage would have occurred if Italy had not ordered and requested the arrest of the *M/V "Norstar"*.

327. Panama asserts that "Italy's application of its customs laws as the basis to order and request the arrest of the M/V Norstar was the *sine qua non* cause of

its unlawful conduct" and that "[w]ithout such an order the responsibility and claim for damages would have not ensued."

328. Panama further contends that "the ultimate demise of the ship is clearly a direct consequence of the arrest and subsequent detainment" and that, if not for the unlawful arrest of the *M/V "Norstar"*, all the taxes and fees owed to the Panama Maritime Authority would have been paid on time and the natural persons connected therewith would not have been subject to the criminal proceedings which have entailed expenses and legal fees.

329. Italy asserts that "any damage that Panama claims to have suffered … would not derive from the Decree of Seizure or from the Request for Execution as such, but rather *from the actual enforcement of the order of arrest*."

330. Italy, therefore, considers that if the Tribunal

> should find that the Decree of Seizure and the Request for its execution as such (e.g. rather than the execution of the arrest) constitute a breach of Article 87, … the remedy should be a declaratory judgment finding the illegality of those acts, but not the awarding of *any* damage, since no damage ensued from the Decree of Seizure or the Request for Execution.

331. Italy further maintains that there is no causal link between the mere existence of the Decree of Seizure and the Request for execution, and any of the damage Panama claims to have suffered. Italy contends that, "[u]ntil the Decree of Seizure was actually executed, it did not deploy any effect at all on Panama[,] nor on its freedom of navigation, nor as regards any damage that it may have suffered."

332. Italy submits that "[i]t is for Panama, if it seeks compensation of alleged direct damages, to prove how the connection between Italy's conduct and those damages can be said to be direct."

* * *

333. In its consideration of the question of the causal link between the wrongful act of Italy and damage suffered by Panama, the Tribunal refers to

article 31, paragraph 1, of the ILC Articles on State Responsibility, which states that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." The Tribunal further refers to its jurisprudence in the *M/V "Virginia G" Case*, in which it emphasized the requirement of a causal link between the wrongful act committed and damage suffered. It stated:

> In the view of the Tribunal, only damages and losses related to the value of the gas oil confiscated and the cost of repairing the vessel are direct consequences of the illegal confiscation.
>
> ...
>
> With reference to the other claims made by Panama ... the Tribunal concludes that Panama in this respect does not satisfy the requirement of a causal nexus between the confiscation of the *M/V Virginia G* and the claims made.
>
> ...
>
> [T]he Tribunal considers that not all damage repaired in respect of which Panama claims compensation satisfies the requirement of a causal link with the confiscation of the vessel.
> (*M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at pp. 118–120, paras. 435, 439, 442)

334. In the present case, the Tribunal is guided by the jurisprudence noted above when examining Panama's claims for compensation for damage caused by the wrongful act of Italy. The Tribunal thus points out that only damage directly caused by the wrongful act of Italy is the subject of compensation.

335. The Tribunal concluded in paragraph 230 that Italy breached article 87, paragraph 1, of the Convention, not only through the Decree of Seizure and the Request for its execution but also through the arrest and detention of the *M/V "Norstar"*. Therefore, compensation covers damage directly caused by the arrest and detention of the *M/V "Norstar"*.

Interruption of the causal link

336. Before proceeding to assess the claims made by Panama for each category of damage, the Tribunal will address the question as to whether the causal link between the wrongful act of Italy and the injury suffered by Panama was interrupted after the arrest of the *M/V "Norstar"*.

337. Panama denies Italy's contention about its failure to retrieve the *M/V "Norstar"* in 1999 and again in 2003, noting that "there is no evidence that either the shipowner or Panama had ever declined to take back the vessel in either instance."

338. Panama argues that the owner was unable to provide a bond or other security in order to release the *M/V "Norstar"* in 1999, "as the long detainment had consequently led to a loss of all its source of income" and it "had no other ships to compensate".

339. Panama contends that earlier, when another vessel, the *M/V "Spiro F"*, was arrested, the owner of the *M/V "Norstar"* feared that the *M/V "Norstar"* could be arrested as well and turned to a bank to obtain a guarantee in case of arrest, but "[t]he bank announced by fax dated 16 September 1998 that this was not possible."

340. Panama claims that,

> even if the owner had the financial means to post the bond, this payment would not have been reasonable because once the M/V "Norstar" had been released after posting the bond, it would probably have been arrested again at the next opportunity doing its business.

341. In Panama's view, the shipowner was entitled to exercise the option to refuse to post a bond and therefore did not break the causal link in 1999 by doing so.

342. Panama also states that,

> since the arrest of the M/V "Norstar" was unlawful, Italy had the duty to release the M/V "Norstar" without any consideration or security. The

> demand for a bond for the release of a vessel which was not allowed to be arrested, was therefore unlawful, regardless of its amount.

343. Panama admits that the shipowner was notified of the judgment of the Court of Savona of 14 March 2003, which "ordered 'that the seizure of motor vessel Norstar be revoked and the vessel returned to INTERMARINE A.S. and the caution money released'", by registered mail dated 26 March 2003 and later through the authorities of Norway on 2 July 2003.

344. Panama, however, argues that the shipowner should not have been expected to take possession of the *M/V "Norstar"* in 2003, five years after the seizure, as the vessel had not received the necessary maintenance work and had not been the subject of the corresponding mandatory surveys.

345. Panama maintains that "[a]lthough the Italian courts ordered the release of the M/V "Norstar", this decision was never executed, nor has Italy taken any further steps to comply with it". Panama claims that neither the shipowner nor the flag State had ever been contacted to discuss any steps to be taken to retrieve the vessel.

346. Panama argues that

> simply informing the shipowner 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 *M/V "Norstar"* at the disposition of the shipowner so that he could appraise its condition through the intermediation of a competent authority.

347. According to Panama, "it was Italy, and not the shipowner or Panama who had the responsibility to maintain the vessel after its arrest" but "Italy has never shown any acknowledgment of the surveys required for the M/V "Norstar" to maintain its class and, thereby, should be held to account for this oversight."

348. Italy maintains that, "[i]f a causal link is established between Italy's conduct and the damages invoked by Panama, such causal link is not uninterrupted but rather has been broken by the owner of the *M/V Norstar*'s own conduct." It adds that "[c]ase law and scholarly opinions are consistent in

requiring that not only a causal link must exist between a certain conduct and the injury suffered, but also that such link must be *uninterrupted*."

349. Italy claims that Panama's conduct has broken any causal link that may have existed between Italy's alleged acts and the damage suffered in 1999, when the owner of the *M/V "Norstar"* failed to retrieve the vessel, despite the decision by the Italian judicial authorities to release the vessel upon the posting of a reasonable bond, or, in any event, in 2003, when the owner of the *M/V "Norstar"* failed to retrieve the vessel after the judgment of the Court of Savona, which ordered its unconditional release.

350. Italy asserts that the damage Panama claims to have suffered is the direct consequence of the shipowner's choice not to pay a bond.

351. Italy maintains that,

> in January 1999, the Public Prosecutor of the Tribunal of Savona accepted the request of the owner of the *M/V Norstar* to have the vessel released [and] made the release conditional upon the payment of a security of 250 million liras (about 145,000$ or 125,000€).

Italy contends that, in making the release of the vessel conditional upon the posting of a bond, the Prosecutor acted "in conformity with the principles of international and domestic law."

352. In the view of Italy, the amount of the bond was entirely reasonable and significantly lower than what is normally required in the context of criminal proceedings involving the arrest of a foreign vessel, and the bond corresponded to less than 25 per cent of the value of the *M/V "Norstar"* declared by Panama.

353. Responding to Panama's argument that the shipowner was unable to provide the bond due to the fact that the "long detainment had consequently led to a loss of all its [*sic*] source of income", Italy notes that Panama's statement is not supported by any evidence as to the actual financial status of the owner of the *M/V "Norstar"* and states that, "[i]n any event, considerations as to the reasons why the owner chose not to pay the bond do not detract from the objective reasonableness and legality of such bond."

354. Italy considers as entirely unsubstantiated Panama's claim that "once the M/V 'Norstar' had been released after posting the bond, it would probably have been arrested again at the next opportunity doing its business" and therefore sees no need to address it.

355. Italy further states that, without prejudice to its earlier arguments that the causal link, if any, was broken in 1999,

> failure by the ship-owner to retrieve the vessel after the Judgment of the Tribunal of Savona on 13 March 2003 would constitute yet another interruption of the causal connection between the arrest of the *M/V Norstar* and the damages complained of by Panama.

356. Italy notes that, in 2003, the Court of Savona

> ordered the release from seizure and the unconditional and immediate return of the *M/V Norstar*; transmitted the order of release to the Spanish authorities and requested them to inform the custodian of the vessel of the release of the ship; requested the Spanish Authorities to ensure the actual return of the vessel to the ship-owner and then to send confirmation of the release to the Italian authorities.

357. Italy maintains "that the ship-owner had been made aware a number of times that the vessel could have been collected, and yet did not act upon Italy's communications." In support of its view, Italy refers to three communications regarding the release:

> the first through the Spanish judicial authorities and the custodian of the *"Norstar"* on 18 March 2003 …; the second directly by registered letter dated 21 March 2003, sent by the Italian judicial authorities to Mr Morch, who confirmed receipt of the communication on 26 March 2003, as Panama acknowledges in its Reply; finally, the third communication was received by Mr Morch on 2 July 2003, through the Norwegian Ministry of Justice.

358. In response to Panama's claim that the shipowner could not have taken possession of the *M/V "Norstar"*, since it had not received the necessary maintenance and could not have left the port of Palma de Mallorca, Italy argues that it was not for Italy to carry out the maintenance of the *M/V "Norstar"* or

to update the ship's class certificate and designation. According to Italy, a custodian was appointed for this purpose and any alleged failure to take due care of the ship is not to be blamed on Italy.

359. Italy rejects Panama's claim that it had a "duty to take the necessary, positive and effective steps to enforce this [release] order and place the *M/V "Norstar"* at the disposition of the shipowner so that he could appraise its condition through the intermediation of a competent authority," arguing that the existence of such duty would go beyond the reasonable standards contained in due process principles.

360. Italy submits that "when the Tribunal of Savona gave its judgment on the return of the vessel to the owner of the *"Norstar"*, and once that decision had been communicated to Spain, the Italian judiciary had exhausted all its jurisdiction in the matter."

361. Thus, Italy concludes that after the judgment of the Court of Savona on 14 March 2003, the *M/V "Norstar"* was collectable, no more under seizure, ready to be delivered, and its detention came to an end. Therefore, in the view of Italy, any damage suffered by Panama thereafter has not been caused by the conduct of Italy, but rather by the conduct of the owner of the *M/V "Norstar"*.

* * *

362. The Tribunal will first consider whether the causal link was interrupted in 1999. It notes that on 11 March 1999, the Court of Savona requested the Italian Embassy in Oslo "to inform the shipping company *Inter Marine*" that the *M/V "Norstar"* could "be released upon payment of a bail, also through a guarantor, set at 250 million Italian lire."

363. The Tribunal considers that the release of a vessel upon the posting of a bond or other security does not provide for the unconditional return of the arrested vessel and thus does not constitute the cessation of the internationally wrongful act. Therefore, the Tribunal finds that the causal link was not interrupted in 1999.

364. The Tribunal will now consider whether the causal link was interrupted in 2003 when the Court of Savona in its judgment of 14 March 2003 ordered

that "the seizure of motor vessel Norstar be revoked and the vessel returned [to its owner] and the caution money released".

365. In the view of the Tribunal, the *M/V "Norstar"* was unconditionally released from detention by the judgment of the Court of Savona of 14 March 2003 and therefore the internationally wrongful act ceased as from the date of that judgment.

366. The Tribunal notes that the appeal of the Public Prosecutor at the Court of Savona of 18 August 2003 was not made in relation to the vessel and thus did not affect the unconditional release of the *M/V "Norstar"*.

367. The Tribunal points out that Panama does not contest that the shipowner received an official communication from the Court of Savona regarding its judgment of 14 March 2003 both by registered mail dated 26 March 2003 and later through the authorities of Norway on 2 July 2003.

368. In the view of the Tribunal, as of 26 March 2003, the owner of the *M/V "Norstar"* must have been aware of the judgment of the Court of Savona. However, the owner did not collect the vessel and there is no evidence that it made any attempt to do so.

369. Concerning Panama's assertion that the shipowner could not collect the *M/V "Norstar"* owing to the lack of maintenance during its detention, the Tribunal observes that the issue of maintenance of the ship in the Port of Palma de Mallorca should be distinguished from the issue of taking possession of the ship after its release. In the view of the Tribunal, taking possession of a vessel means the restoration of the actual control over the vessel to the owner, regardless of its condition. The Tribunal therefore cannot accept Panama's argument that the shipowner could not collect the *M/V "Norstar"* because of the lack of maintenance during its detention.

370. In light of the foregoing, the Tribunal concludes that the causal link between the wrongful act of Italy and damage suffered by Panama was interrupted on 26 March 2003. The Tribunal accordingly finds that any damage that may have been sustained after 26 March 2003 was not directly caused by the arrest and detention of the *M/V "Norstar"*.

Duty to mitigate damage

371. Italy submits that,

> [s]hould the Tribunal find that the ship-owner's conduct has not interrupted the causal link …, his conduct needs nevertheless to be taken into account from the perspective of contributory fault and duty to mitigate, for the purposes of the quantification of the damages invoked by Panama.

372. According to Italy, it is a well-established principle of international law that, in the quantification of the compensation, consideration must be given to the contribution of the victim to the injury. In this regard, Italy refers to article 39 of the ILC Articles on State Responsibility.

373. Italy claims that the owner of the *M/V "Norstar"* has contributed by its conduct to the causation of the damage and, in any event, has failed to mitigate any damage that may have been caused, in particular due to its failure: to pay in 1999 the reasonable security required by the Italian Prosecutor; to use domestic judicial remedies in order to review the conditions of the bond; to avail itself of the "prompt release procedure under Article 292 of the Convention … to try and secure the immediate release of the *M/V Norstar*"; or to retrieve the vessel in 2003, "after its unconditional release by the Tribunal of Savona."

374. In response, Panama argues that "Italy has … failed to identify any specific negligent act or omission on the part of the captain or the owner of the M/V "Norstar"".

375. Panama further argues that "[a]ccording to the Rules of the Tribunal, in order to allow Panama to defend itself against both of the above claims, *i.e.* contributory fault and duty to mitigate, Italy should have clearly identified these as counter-claims." In the view of Panama such counter-claims are "procedurally inviable and therefore inadmissible; and … are legally unsubstantiated."

376. Panama contends that by stating that Panama contributed to the damage, Italy is tacitly acknowledging that "damages did accrue because without

damages having been caused, no counter-claim of contributory fault could have been invoked."

377. Italy invokes "contributory negligence and the duty to mitigate damages as defences to counter Panama's claim on the amounts of damages allegedly due from Italy to Panama." Consequently, Italy disagrees with Panama's characterization of its arguments in this regard as counter-claims. Referring to the jurisprudence of the ICJ, Italy stresses that it is neither making any claim against Panama, nor trying to broaden the scope of the dispute or invoking any provision that Panama would have breached but "simply advancing its defence on Panama's claim regarding damages."

378. Italy denies that, by invoking contributory fault, it is admitting that damage has been caused by Italy to Panama and notes that it is simply articulating arguments in the alternative, as is customary in litigation. Italy maintains that, if any other line of defence should fail and the Tribunal finds that damage has occurred, "these are also the consequence of Panama's own negligent conduct."

379. Italy adds that the owner of the *M/V "Norstar"* failed to resort to any available remedy under domestic law to seek redress of any damage allegedly suffered in connection with the arrest and detention of the *M/V "Norstar"*, pointing out that "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."

380. Italy also submits that

> Panama waited 18 years before commencing these proceedings. While the Tribunal found that Panama's claim was not time barred due to extinctive prescription, the late commencement of these proceedings should at least bear on the quantification of the damages sought by Panama under the principles of contributory fault and duty to mitigate.

* * *

381. The Tribunal notes that Italy does not make any counter-claim against Panama but rather invokes the duty of Panama to mitigate any damage it may have suffered.

382. The Tribunal recalls that the ICJ stated in the *Gabčíkovo-Nagymaros Project* case that

> an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.
> (*Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), *Judgment, I.C.J. Reports 1997*, p. 7, at p. 55, para. 80)

383. In the view of the Tribunal, the fact that the shipowner did not post the bond required by the Italian prosecutor or seek other remedies available to it under Italian law could be taken into account, as appropriate, in the assessment of the damage suffered by Panama in the present case. However, as shown below, those claims for damages where this would have been applicable are rejected on other grounds.

384. Having found that the causal link was interrupted on 26 March 2003, the Tribunal does not consider it necessary to address the arguments of the Parties concerning the duty to mitigate thereafter.

Compensation

385. The Tribunal notes that the Parties disagree as to the amount of compensation and on whether all the specific categories of damage for which compensation is claimed have been caused by the wrongful act of Italy.

386. As noted in paragraphs 68 and 310, in its Final Submissions Panama requests the Tribunal "to find, declare and adjudge" that Italy is responsible for repairing the damage suffered by Panama and by all the persons involved in the operation of the *M/V "Norstar"* by way of compensation amounting to US$ 27,009,266.22, plus US$ 24,873,091.82 as interest, and €170,368.10 plus €26,320.31 as interest.

387. Panama claims that

> damages should include the market value of the vessel (including cargo), the loss of profits (actual and future), the financial damage to the ship owner and charterer, the pain and suffering of all persons wrongfully prosecuted and being deprived or dispossessed of property, the expenses incurred for representation by legal counsel in Italy, Panama and Hamburg, the registration fees owed to the Panama Maritime Authority, and all the expenses incurred until the filing of the Application.

388. In support of its claim, Panama submitted to the Tribunal documents in which specific claims were categorized according to the various losses, damage and costs incurred as a result of the arrest and detention of the *M/V "Norstar"*. Panama filed reports, including the Economic Report of 13 June 2018, and called Mr Horacio Estribí, economic advisor to the Ministry of Finance in Panama, as expert.

389. In response to the above claims of Panama, Italy draws the attention of the Tribunal to the fact that Panama's quantification of its "pecuniary claims rests on a series of vague and generic statements, and the affirmation of certain facts, which patently fall below the evidentiary threshold required in international litigation." Italy adds that "Panama's assessment fails to meet any standard of neutrality" and that, rather, "it seems guided by the aim of inflating at all costs the sums allegedly due to it by Italy."

390. In the view of Italy, "[t]he modalities through which Panama quantifies its claim fall short of the necessary standard of proof, and … Panama has not discharged the burden placed on it by rules on evidence." In this context, Italy relies on the jurisprudence of the ICJ in the *Military and Paramilitary Activities* case, where the Court held that, ultimately, "it is the litigant seeking to establish a fact who bears the burden of proving it".

391. Italy contends that several categories of damage claimed by Panama on behalf of the persons involved in the operation of the *M/V "Norstar"* "are not tied by a direct link of causality to Italy's conduct" or to its alleged breach of the Convention. According to Italy, if such connection exists, it "would be so remote as to not constitute the required 'proximate and natural consequences' of Italy's actions."

392. Italy however accepts that

> [t]he damages that would bear a direct connection to Italy's conduct, out of all the damages claimed by Panama, would be only the direct damages concerning the loss of the vessel on the part of the owner of the *M/V Norstar*; and the damages stemming from the loss of the cargo suffered by the charterer.

* * *

393. The Tribunal notes that the question to be addressed is what damage Panama sustained as a result of the wrongful act of Italy. In addressing this question, the Tribunal will evaluate, among others, the evidence submitted by the Parties concerning the specific categories of damage claimed by Panama, taking into account its statement relating to the rules of evidence in paragraphs 94 to 99.

Loss of the M/V "Norstar"

394. Concerning damages related to the loss of the ship, Panama asserts that, at the time of the seizure, the *M/V "Norstar"* was a seaworthy, legally manned, DNV-classed oil tanker in a very good condition, valued at US$ 625,000.00. Panama claims that as a consequence of the seizure, the lack of maintenance and the auctioning off of the vessel, it is a total loss for the owner and, therefore, damages must be estimated in the full amount of US$ 625,000.00, plus interest since the day following the seizure. According to the Economic Report of 13 June 2018, the amount of interest is US$ 1,016,670, resulting in a total amount of damages under this category of US$ 1,641,670.

395. In support of its claim of the value of the *M/V "Norstar"*, Panama provided a copy of a fax sent on 1 April 2003, containing a "Statement of Estimation of Value" by *C.M. Olsen A/S*, dated 4 April 2001. Panama admits that *C.M. Olsen A/S* "may have not investigated [the M/V "Norstar"] immediately before the Statement of Estimation of Value in 2003." However, Panama argues that *C.M. Olsen A/S* knew the ship very well since the shipbrokers had seen the photographs of the ship before its detention and inspected it before the conclusion of the charter contract in May 1998. In the view of Panama, "by providing such

a standard of evidence, the burden of proof now shifts to the respondent to prove that this assessment was wrong."

396. Responding to Italy's contention that the *M/V "Norstar"* was already in a bad physical condition at the time of its arrest in 1998, Panama, relying on the testimonies of the witnesses, Mr Morch, Captain Husefest and Mr Rossi, states that the *M/V "Norstar"'* was a fully operational and well-functioning ship and that the "Statement of Estimation of Value" "is *prima facie* evidence of the seaworthy condition of the vessel." During the hearing, Mr Morch stated that the photographs of the *M/V "Norstar"* which Panama had filed in the Reply showed "the clean and good condition of the vessel."

397. Panama denies that the *M/V "Norstar"* was abandoned at the time of seizure, citing the "Report on the seizure of a vessel" (no. 2640/1998) in relation to the *M/V "Norstar"*, issued by the Spanish authorities on 25 September 1998, which indicates that the captain was living on the vessel. Panama further points out that the "Report on the seizure of a vessel" does not record the bad physical condition of the *M/V "Norstar"* at that time.

398. Panama contests alleged reports of the bad condition of the chains aboard the *M/V "Norstar"*, the broken anchor of the starboard, the breakdown of one of the main generators and the lack of any fuel on the vessel. It refers to the testimony of Mr Morch, who stated that the new anchor chain had been purchased the year before the arrest and changed under the supervision of Captain Husefest. He further stated that during the detention, the *M/V "Norstar"* "was refused to enter the port because the port authorities said it had dangerous cargo on board", meaning the gasoil on board.

399. Panama maintains that since the *M/V "Norstar"* was under the jurisdiction and control of Italy from the moment of seizure,

> it is unreasonable to ask the flag State to provide evidence about the vessel's condition when all indicators of such evidence, such as the log book, the engine log book, the crew list, and any list of goods on board … have been withheld from both Panama and the shipowner even after the arrest was revoked.

400. Panama argues that, as the "seizing State", Italy "should have meticulously appraised the property after subjecting it to … a forceful action" and the absence of such survey "shall not prejudice any of the claims concerning the vessel or other person therewith connected."

401. Italy claims that, at the time of seizure, the *M/V "Norstar"* was not in good condition but "in a state of abandonment and dismay", unfit for navigation. In support thereof, Italy relies on the article "News regarding the *M/V Norstar* arrest" of 8 August 2015, which was included in the Memorial of Panama, and on a fax from *Transcoma Baleares*, a service provider in the port, dated 7 September 1998, sent to the Spanish Port Authorities in Palma de Mallorca, which "records the bad condition of the chains aboard; the broken anchor of the starboard; the breakdown of one of the main generators; the lack of any fuel."

402. Italy contests the value of the *M/V "Norstar"* at the time of the arrest suggested by Panama and argues that the estimation put forward in the document of *C.M. Olsen A/S* is inaccurate and disproportionate, and cannot discharge Panama's burden of proof because it is entirely based on an estimation made in April 2001, almost three years after the arrest of the *M/V "Norstar"*, without any physical inspection of the ship or examination of its class records.

403. Italy also disputes the probative value of the photographs of the *M/V "Norstar"* produced by Panama, pointing out that the photographs are not dated and that "it is impossible to ascertain at what point of the life of the *M/V Norstar* they were taken, or in what context."

404. In response to Panama's claim that Italy should have properly surveyed the *M/V "Norstar"* at the time of seizure and prepared an appropriate document, Italy argues that it was not its task to draw up an inventory of the items on board the *M/V "Norstar"* and "since it was Spain that enforced the arrest order, it was up to Spain to draw up such an inventory."

405. As mentioned in paragraph 56, Italy called Mr Matteini, a sea captain and member of the national register for experts for naval evaluation, as an expert in the present case. He assessed the value of the *M/V "Norstar"* at the time of the arrest as being approximately €250,000. Mr Matteini admitted that it had not been possible for him to inspect the *M/V "Norstar"* and that he had to use normal estimates usually applicable in such circumstances. He stated:

"[B]ased on available data, I decided what the dry weight of the vessel was, considering the different materials – ferrous, non-ferrous, plastics – and then I calculated the average price – and these are market prices – also taking into account labour that is required for this." Italy asserts that the assessment by its expert also considered all the technical updates and adjustments which would have been required for the *M/V "Norstar"* in accordance with relevant international conventions.

* * *

406. In the view of the Tribunal, the loss of the *M/V "Norstar"* was directly caused by the wrongful act of Italy. The Parties disagree as to the condition and value of the *M/V "Norstar"* at the time of its arrest.

407. The Tribunal will first deal with the question as to the condition of the *M/V "Norstar"*. The Parties have presented conflicting assertions concerning the seaworthiness of the *M/V "Norstar"* at the time of arrest, relying on documentary and testimonial evidence of uncertain probative value.

408. The Tribunal notes that there is no record of the bad physical condition of the *M/V "Norstar"* at the time of its arrest in the "Report on the seizure of a vessel", issued by the Spanish authorities on 25 September 1998. The Report indicates that the Captain "resides in the mv "Norstar"" and that "it is possible to locate him at the vessel where he lives". In the view of the Tribunal, this confirms that the *M/V "Norstar"* cannot be considered in a state of abandonment at the time of its arrest.

409. The Tribunal further notes that the information referred to in the press article "News regarding the M/V Norstar arrest" of 8 August 2015 and the fax from *Transcoma Baleares* has not been corroborated by other evidence and can be disputed on the basis of the content of the "Report on the seizure of a vessel".

410. The Tribunal, therefore, finds that there is insufficient evidence to conclude that the *M/V "Norstar"* was not seaworthy at the time of the arrest. The Tribunal, however, notes that the Parties do not dispute the fact that in 2003, when the vessel was released, the *M/V "Norstar"* was in a dire state and not seaworthy.

411. The Tribunal now turns to the question of the value of the *M/V "Norstar"* at the time of its arrest. In the circumstances of the present case, the Tribunal has to deal with this question on the basis of its assessment of the documentary and testimonial evidence, in particular the two estimates made available to it by the Parties.

412. The Tribunal notes that the "Statement of Estimation of Value" by *C.M. Olsen A/S*, sent by fax on 1 April 2003, was dated 4 April 2001, that is, about two and a half years after the arrest of the *M/V "Norstar"*. Furthermore, Panama concedes that the estimation itself was carried out without any physical inspection of the vessel and its class records, and that the last time *C.M. Olsen A/S* had inspected the ship was before 10 May 1998, more than four months prior to its arrest in the port of Palma de Mallorca. *C.M. Olsen A/S* acknowledges that the estimation was given on the assumption that "the vessel is entertained under a minimum 4 years timecharter at a rate of US Dollar 2.850 ... pd/pr for the first year and with natural/normal escalation for each additional year and that the Charterers can present reasonable cred[i]bility"; that the equipment of the *M/V "Norstar"* was stated to be in good working order; that the vessel had been maintained in a condition normal for its age and type; that the class had been maintained without recommendation; and that the vessel had valid national and international trading certificates.

413. In the view of the Tribunal, the above assumption is not supported by sufficient evidence in the present case. The Tribunal also takes note of the statement of *C.M. Olsen A/S* that "this assessment of value is reasonably accurate, although it is a[n] estimation and not an expression of facts." *C.M. Olsen A/S* added:

> Any person or company who wishes to have a more accurate estimation ought to inspect the vessel and her class records in order to make sure that the relevant information given is correct. C M Olsen A/S repudiate any responsibility by presentation of this estimation of value.

414. The Tribunal observes that the estimate of the value of the *M/V "Norstar"* presented by Mr Matteini, the expert called by Italy, like that of *C.M. Olsen A/S*, was made without physical inspection of the vessel. The Tribunal notes, however, that Mr Matteini's estimate, unlike that of *C.M. Olsen A/S*, makes no assumption for the profitability of the operations of the *M/V "Norstar"* in assessing its value. The Tribunal further notes that Mr Matteini's testimony was

duly tested through cross-examination. Moreover, the Tribunal sees no reason to believe that he has an interest in the outcome of the present proceedings.

415. In considering the differences between the two estimates of the value of the *M/V "Norstar"*, the Tribunal notes that the estimate of *C.M. Olsen A/S* is based on the profitability of the operations of the *M/V "Norstar"*. However, as seen in paragraphs 431 to 433, Panama failed to establish the loss of profits to be generated by the operations of the *M/V "Norstar"*.

416. In light of the foregoing, the Tribunal relies on the estimate of Mr Matteini regarding the value of the *M/V "Norstar"* at the time of its arrest.

417. The Tribunal concludes that in the circumstances of this case the amount of US$ 285,000 – the equivalent of the amount of Mr Matteini's estimate referred to in paragraph 405 – shall be compensated to Panama for the loss of the *M/V "Norstar"*. The Tribunal will consider the issue of interest after assessing Panama's claims for compensation under other categories of damage.

Loss of profits of the shipowner

418. Panama also claims monetary compensation for lost profits, stating:

> As a result of the seizure of the M/V Norstar, her owner was unable to earn any further charter income. Pursuant to Clause 21 (a) (v) of the charter party agreement, the vessel has been "off-hire" since the date of the seizure. Therefore, by virtue of the seizure of the M/V Norstar, the owner has suffered damage in the amount of lost profits.

419. Panama submits that it is a well-recognized principle that the claimant is entitled to compensation for profits it would have collected, were it not for the wrongful act, and thus loss of profits (*lucrum cessans*) may be awarded as damages.

420. Panama suggests that "[i]n calculating this loss of revenue, the charter hire which was agreed in the charter contract must be taken as a basis" and

that "the charter hire up to June 1999 amounted to 2,850.00 USD per day and this subsequently increased by 5% each year."

421. Panama further suggests that the charter party would have been performed until the end of its term (26 June 2003) and that the charterer would have extended the contract twice exercising the option of renewal for one year (until 26 June 2005). Panama contends that still "it would have been likely that, subsequent to the termination of the charter party in … 2005, the M/V Norstar would have been chartered again and that further profits would have accrued." In this connection, Panama also contends that the option of two one-year contract extensions had been verbally agreed between the parties concerned.

422. According to the Economic Report of 13 June 2018, the total amount claimed by Panama as the loss of revenue to the shipowner is US$ 42,856,882, consisting of a principal sum of US$ 22,851,900 and interest in the amount of US$ 20,004,981.

423. In response to Italy's objection that "Panama essentially fails to deduct from the revenues generated by the ship-owner all costs directly or indirectly stemming from the operation of the *M/V Norstar*", Panama notes that the costs, for which the owner would have been liable, crew wages and other crew-related expenses, the costs for lube oil, freshwater, stores, provisions, communication expenses, insurance, management, off-hire days for repairs, maintenance and docking, have been deducted from the revenue.

424. Italy disagrees with both the justification of the compensation and the amount of the owner's lost revenue claimed by Panama as a result of the alleged wrongful act of Italy.

425. Italy argues that in addition to having failed to prove the existence of any causal link between Italy's conduct and its lost profits, Panama has also failed to provide any objective quantification of the profits allegedly lost. In Italy's opinion, Panama's projected profits are "entirely speculative", based on events that are, at best, uncertain and affected by a serious exaggeration of the estimated profits that the *M/V "Norstar"* was able to generate.

426. Italy contends that Panama has not produced a single invoice, document or other piece of evidence in support of this category of damage and "has at times to rely on the argument that written evidence was erroneous, so as to try and demonstrate its claims on loss of profits."

427. Italy notes that Panama's claim for loss of profits is based only on the charter contract and argues that "Panama attaches no evidence in support of its statement and Italy has not been able to locate proof of either the charter contract of 10 May 1998 or of the delivery of 20 May".

428. Italy also submits that speculations put forward by Panama about the extension of the charter contract until 2010, "while the contract clearly provided for a 5-year duration, renewable for one year, that is until June 2004", are not admissible.

429. Italy asserts that Panama overestimates the potential use of the *M/V "Norstar"*, "a 32-year old vessel at the time of seizure, which, accordingly, required frequent maintenance" and periodic dry-docking, both being the obligations of its owner.

430. Italy also maintains that "Panama is … unjustly applying interest to loss of potential revenue incurring twice in double recovery."

* * *

431. The Tribunal notes that article 36, paragraph 2, of the ILC Articles on State Responsibility provides: "The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

432. The Tribunal further notes that in the present proceedings Panama failed to provide information, documents or supplementary invoices relating to possible revenues and expenses of the shipowner associated with the operations of the *M/V "Norstar"* in order to substantiate its claim for loss of profits.

433. The Tribunal concludes that since Panama failed to establish the loss of profits by the shipowner, its claim for compensation under this category cannot be upheld.

Continued payment of wages

434. Panama asserts that after the seizure of the *M/V "Norstar"*, the owner had to pay crew wages until the end of December 1998, without being able to finance these charges through charter income. It therefore claims the amount of US$ 19,100.00 with interest at the rate of 8 per cent, payable from 1 January 1999.

435. In response to Italy's arguments that no direct causal link exists between Panama's alleged loss and Italy's conduct, Panama submits that since the labour contracts for the crew remained in effect even after the seizure of the vessel, the shipowner continued to be liable for paying crew salaries, and that Italy therefore bears the responsibility for compensation.

436. Italy argues that "[n]ot being able to pay the wages of employees is not a natural consequence of the arrest of a ship" and that the independent character of the labour contracts "demonstrate[s] that no causal link exists between the Decree of seizure and the alleged 'damage'".

437. Italy adds that no evidence is provided concerning the existence of the labour contracts, the amount of the wages or the payments made.

* * *

438. Concerning payment of the crew wages, the Tribunal notes that the obligation of the owner of the *M/V "Norstar"* in this regard is the subject of the labour contracts and is not contingent on whether or not a ship is arrested. Thus, it is not damage caused by the arrest of the *M/V "Norstar"*. The Tribunal, therefore, finds Panama's claim for compensation under this category unfounded.

Payment due for fees and taxes

439. Panama claims compensation for fees and taxes for the *M/V "Norstar"*, which the owner owes to the Panama Maritime Authority, in the amount

of US$ 122,315.20 "as itemized in a Certification from the Panama Maritime Authority dated 30 March 2017" with interest in the amount of US$ 171,546, as referred to in the Economic Report of 13 June 2018. The amount was later increased, according to the Certificate of the Panama Maritime Authority of 29 August 2018, to US$ 135,111 (by September 2018) and to US$ 136,899 (by December 2018).

440. Panama argues that the amount represents an additional loss for the owner, "which must also be reimbursed by Italy", and the causal link arises from the fact that the owner could, without the seizure of the *M/V "Norstar"*, have paid the fees and taxes to the Panama Maritime Authority in a timely fashion from the charter income, as it had done before 1998.

441. In the view of Panama, it is also possible that the Palma Port Authority might charge fees for the period from August 1998 "up until the auction in 2015, when the M/V Norstar lays in the port of Palma, Majorca" and, therefore, since Italy has caused these costs by virtue of the unlawful seizure of the *M/V "Norstar"*, it would have to pay these costs as part of its compensation for damage. Although Panama admits that the owner has not been notified as to whether and in what amount the Palma Port Authority will assess these charges against the owner and the damage cannot be quantified precisely at this time, it maintains that "the owner may assert the claim of equitable indemnity" and require Italy to pay all the charges which the Palma Port Authority could impose in relation to the *M/V "Norstar"*. Thus, Panama requests the Tribunal "to include in its judgment the obligation of Italy to indemnify the owner as required."

442. Italy asserts that the absence of a causal link between Italy's conduct and the damage claimed in this regard by Panama is manifest. It points out that "[w]ere the *M/V Norstar* never seized, the shipowner would have had to pay the fees nonetheless" because the fees due to the Panama Maritime Authority are not linked to the economic activity of a ship but to the fact that "a particular ship is registered in the Panamanian ship registry."

* * *

443. Concerning Panama's claim for compensation for fees and taxes due to be paid by the owner of the *M/V "Norstar"* to the Panama Maritime Authority, the Tribunal observes that payments of these fees and taxes are not additional expenses of the owner since they are incurred as a result of the standard procedure of registration of ships in Panama, and therefore are not caused by the arrest of the *M/V "Norstar"*. The Tribunal also considers that Panama failed to substantiate its claim with regard to fees that may be imposed by the Palma Port Authority on the owner of the *M/V "Norstar"*. Consequently, the Tribunal rejects Panama's claim.

Loss and damage to the charterer of the M/V "Norstar"

444. Panama contends that at the time of the seizure, the *M/V "Norstar"* had on board a cargo of 177,566 tonnes of gasoil valued at US$ 612 per tonne, thus totalling US$ 108,670.39, and that Italy "must reimburse the value of the gas oil as of the date of the seizure, plus 8% interest on the amount with effect from that date." According to the Economic Report of 13 June 2018, the amount of interest is US$ 176,771, resulting in a total claim under this category of US$ 285,441. As a proof of the amount of fuel on board, Panama submits an e-mail report sent on 27 May 2001 by Mr Emil Petter Vadis, managing director of the *Intermarine A.S.* at that time.

445. Panama also claims compensation for the loss of profits of the charterer for the period from "the time of the seizure on 24 September 1998 up to the end of the seven-year term (25 June 2005)" for the total amount, according to the Economic Report of 13 June 2018, of US$ 6,438,646, consisting of a principal sum of US$ 3,080,547 and interest in the amount of US$ 3,358,098.

446. Italy contends that "the damages allegedly suffered by the charterer are so remotely linked to the violations that Panama claims to have suffered due to the conduct of Italy, that no causal link can be established between such conduct and the losses."

447. Italy contests Panama's claim that fuel was loaded on board the *M/V "Norstar"* at the time of its seizure, pointing out that the "Report of the seizure of a vessel" issued by the Spanish authorities on 25 September 1998 does not indicate that any fuel was loaded on board the vessel when it was seized. Italy also challenges the objectivity and credibility of the e-mail sent by Mr Vadis,

for whom Panama is also claiming reparations for material and non-material injury in this case. According to Italy, his e-mail merely gives a list of probable buyers and the total number of litres of gasoil/fuel supposedly loaded in Algeria at a time which is not specified, and allegedly on board the ship when it was detained, without any accompanying receipt or invoice or documentary evidence that the indicated clients were supplied with gasoil/fuel in the summer of 1998. Italy adds that the date of the e-mail, 27 May 2001, almost three years after the arrest of the *M/V "Norstar"*, "casts further doubts on the document", which is not a contemporaneous document but rather had been created after the arrest of the vessel, in the context of a request for damages.

* * *

448. Having examined the evidence in the present case, the Tribunal finds that Panama failed to substantiate the existence of the cargo of gasoil on board the *M/V "Norstar"* at the time of its arrest. Accordingly, the Tribunal rejects Panama's claim for compensation concerning cargo on board.

449. The Tribunal notes that Panama failed to produce any evidence in support of specific losses suffered by the charterer. The Tribunal finds that a causal link with the wrongful act of Italy in these circumstances cannot be assumed. The Tribunal, therefore, rejects Panama's claim for compensation for loss of profits by the charterer.

Material and non-material damage to natural persons

450. Panama claims compensation for pain and suffering to several persons having an interest in the operation of the *M/V "Norstar"*, in particular for "significant psychological stress and expense[s] … to engage lawyers in their defense in the criminal proceedings", in the amounts as mentioned in the Economic Report of 13 June 2018.

451. Italy argues that

> there is no causal connection between the criminal proceedings instituted against the individuals mentioned in Panama's Memorial, and the alleged violation by Italy of Article 87 of the Convention. Proceedings

against those individuals would in any event have been carried out, quite apart from the question of the seizure of the *M/V Norstar*.

* * *

452. The Tribunal notes that the criminal proceedings before the Italian courts would have been carried out even if the *M/V "Norstar"* had not been arrested and are not part of the case before the Tribunal. The Tribunal considers that Panama's claim for compensation under this category does not meet the requirement of a causal link between the wrongful act of Italy and damage allegedly suffered by Panama. Accordingly, the Tribunal rejects this claim of Panama.

Interest

453. Panama claims

> an interest rate of 8% applied to the value of the gas oil, a lower rate of 6% for the vessel, and a rate of 3% for compensation for pain and suffering and psychological damage due to the wrong prosecution of the persons interested in the operation of the vessel.

454. In response, Italy argues that "Panama's definition of the interest rate is unreasonable and disproportionate."

* * *

455. With regard to interest on damages, the Tribunal recalls its statement in the *M/V "SAIGA" (No. 2) Case*: "The Tribunal considers it generally fair and reasonable that interest is paid in respect of monetary losses, property damage and other economic losses. However, it is not necessary to apply a uniform rate of interest in all instances" (*M/V "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment, ITLOS Reports 1999*, p. 10, at p. 66, para. 173).

456. The Tribunal further recalls its statement in the *M/V "Virginia G" Case*:

> [T]he interest rate ... should be based on the average US Dollar LIBOR (London Interbank Offered Rate) interest rate of 0.862 per cent for the

> period 2010 to 2013 plus 2 per cent ... compounded annually. It shall run from 20 November 2009, the date of the confiscation of the gas oil, until the date of the present Judgment.
> (*M/V "Virginia G"* (*Panama/Guinea-Bissau*), *Judgment, ITLOS Reports 2014*, p. 4, at p. 120, para. 444)

457. The Tribunal notes that article 38 of the ILC Articles on State Responsibility states:

Article 38
Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

458. The Tribunal further notes that, in its commentary to this article, the ILC observed that "[t]here is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable. In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome" (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 109, para. 10).

459. The Tribunal has already found that only the loss of the *M/V "Norstar"* has to be compensated in the present case. The Tribunal considers that the award of interest under that category of damages is warranted by the circumstances of this case.

460. In the view of the Tribunal, the interest with regard to the amount of compensation for the loss of the *M/V "Norstar"* should be based on the average yearly US dollar LIBOR (London Interbank Offered Rate) rate of 2.7182 per cent, compounded annually and payable from 25 September 1998 until the date of the present Judgment.

461. The Tribunal recalls that, in paragraph 417, it concluded that the amount of US$ 285,000 shall be compensated to Panama for the loss of the vessel.

462. In light of the foregoing, the Tribunal decides to award Panama compensation in the amount of US$ 285,000 with interest at the rate of 2.7182 per cent, compounded annually and payable from 25 September 1998 until the date of the present Judgment.

IX. Costs

463. Panama requests the Tribunal to order that Italy should pay all its legal expenses with regard to the proceedings related to the arrest and detention of the *M/V "Norstar"*, in particular legal fees "for Abogados Bufete Feliu, Palma de Majorca", "for the period between the arrest and the application made before the International Tribunal for the Law of the Sea" as well as "in relation to the procedure before the Tribunal", in the amounts, according to the Economic Report of 13 June 2018, of US$ 102,401 and €140,571.

464. Panama argues that in the present case there are sufficient reasons for the Tribunal to consider departing from the general rule of article 34 of its Statute and deciding that "the legal costs of defending the rights of Panama and of all persons involved in the operation of the M/V Norstar should be entirely borne by Italy."

465. Italy objects to the request of Panama, observing that it "leaves it to the wisdom of the Tribunal to decide whether Italy's conduct in the *M/V Norstar* case is of such outrageous gravity as to require a departure from the established case law of the Tribunal."

466. Italy also argues that not only expenses related to the proceedings before the Tribunal but also other legal expenses invoked by Panama apparently "relate to the present case before the ITLOS" and "[a]s such they would also fall in the same category of costs under Article 34 of the rules of the Tribunal". It points out that the Tribunal has never departed from the general rule set out in that article.

* * *

467. The rule on costs in proceedings before the Tribunal, as set out in article 34 of its Statute, is that each party bears its own costs, unless the Tribunal decides otherwise.

468. In the present case, the Tribunal sees no reason to depart from the general rule that each party shall bear its own costs.

X. Operative provisions

469. For the above reasons, the Tribunal

(1) By 15 votes to 7,

Finds that Italy violated article 87, paragraph 1, of the Convention.

IN FAVOUR: *President* PAIK; *Judges* NDIAYE, JESUS, LUCKY, KATEKA, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE; *Judge* ad hoc EIRIKSSON;

AGAINST: *Judges* COT, PAWLAK, YANAI, HOFFMANN, KOLODKIN, LIJNZAAD; *Judge* ad hoc TREVES.

(2) Unanimously,

Finds that article 87, paragraph 2, of the Convention is not applicable in the present case.

(3) By 20 votes to 2,

Finds that Italy did not violate article 300 of the Convention.

IN FAVOUR: *President* PAIK; *Judges* JESUS, COT, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON;

AGAINST: *Judges* NDIAYE, LUCKY.

(4) By 15 votes to 7,

Decides to award Panama compensation for the loss of the *M/V "Norstar"* in the amount of US$ 285,000 with interest at the rate of 2.7182 per cent, compounded annually and payable from 25 September 1998 until the date of the present Judgment.

IN FAVOUR: *President* PAIK; *Judges* NDIAYE, JESUS, LUCKY, KATEKA, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE; *Judge* ad hoc EIRIKSSON;

AGAINST: *Judges* COT, PAWLAK, YANAI, HOFFMANN, KOLODKIN, LIJNZAAD; *Judge* ad hoc TREVES.

(5) By 19 votes to 3,

Decides not to award Panama compensation with respect to its other claims, as indicated in paragraphs 433, 438, 443, 448, 449 and 452.

IN FAVOUR: *President* PAIK; *Judges* JESUS, COT, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Judges* ad hoc TREVES, EIRIKSSON;

AGAINST: *Judges* NDIAYE, LUCKY, BOUGUETAIA.

(6) Unanimously,

Decides that each Party shall bear its own costs.

Done in English and in French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this tenth day of April, two thousand and nineteen, in three copies, one of which will be placed in the archives of

the Tribunal and the others transmitted to the Government of the Republic of Panama and the Government of the Italian Republic, respectively.

(*signed*)
JIN-HYUN PAIK
President

(*signed*)
PHILIPPE GAUTIER
Registrar

Judge JESUS, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(*initialled*) J.L.J.

Judge KELLY, availing herself of the right conferred on her by article 125, paragraph 2, of the Rules of the Tribunal, appends her declaration to the Judgment of the Tribunal.

(*initialled*) E.K.

Judge GÓMEZ-ROBLEDO, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(*initialled*) A.G.-R.

Judge KITTICHAISAREE, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(*initialled*) K.K.

Judge ad hoc TREVES, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(*initialled*) T.T.

Judge NDIAYE, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(*initialled*) T.M.N.

Judge LUCKY, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(*initialled*) A.A.L.

Judges COT, PAWLAK, YANAI, HOFFMANN, KOLODKIN and LIJNZAAD and *Judge* ad hoc TREVES, availing themselves of the right conferred on them by article 30, paragraph 3, of the Statute of the Tribunal, append their joint dissenting opinion to the Judgment of the Tribunal.

(*initialled*) J.-P.C.
(*initialled*) S.P.
(*initialled*) S.Y.
(*initialled*) A.H.
(*initialled*) R.K.
(*initialled*) E.L.
(*initialled*) T.T.