INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 2019

10 April 2019

List of Cases:
No. 25

THE M/V "NORSTAR" CASE

(PANAMA *v.* ITALY)

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

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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,

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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").

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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

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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

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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

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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.

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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.

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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.

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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

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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.

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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.

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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;

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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

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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.

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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

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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.

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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.

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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".

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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".

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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

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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.

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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."

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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

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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

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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.

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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.

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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."

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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

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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)

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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)

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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

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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

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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

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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

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> 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,

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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."

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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

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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,

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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

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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,

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> 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.

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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

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> 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 *111 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

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> 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

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> 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:
> …

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> 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

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> 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

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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

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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,

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> 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:

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> 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

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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."

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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 <u>first and foremost</u> 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

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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.

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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

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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

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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

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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.

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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

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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.

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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.

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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

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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

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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.

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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.”

* * *

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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."

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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.

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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.

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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

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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.

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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

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> 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

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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.

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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.

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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.

* * *

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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.

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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

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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).

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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

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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.

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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

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> 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".

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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.

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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€).

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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.

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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

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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.

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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.

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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

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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

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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.

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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.

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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

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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."

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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.

* * *

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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

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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

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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

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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

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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

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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).

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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

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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

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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

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> 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

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> 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.

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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.

* * *

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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,

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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.

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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.

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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.

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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.

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DECLARATION OF JUDGE JESUS

I voted in favour of this Judgment because I am in full agreement with its conclusions and findings and I believe it is a good contribution to international jurisprudence, namely on issues relating to the freedom of navigation.

Regrettably, I do not share the reasoning and conclusions reached by the Tribunal concerning Panama's claim for compensation on account of wages paid to crewmembers after the arrest of the *M/V "Norstar"*. I felt compelled, therefore, to state my views thereon, on the following grounds:

Panama had claimed compensation for the wages paid until December 1998 to crewmembers, during the months that followed the seizure of the *M/V "Norstar"*, explaining that "since the labour contracts for the crew remained in effect even after the seizure of the vessel, the ship-owner continued to be liable for paying crew salaries". The Tribunal, in its wisdom, dismissed the claim for compensation as unfounded, on the basis that "the obligation of the owner in this regard was not contingent on whether or not a ship is arrested".

I agree with the Judgment when it states that "the obligation of the owner in this regard was not contingent on whether or not a ship is arrested". However, the shipowner entered into the labour contracts with the crew on the expectation that the ship would have generated resources to pay for crew wages from its operations. This expectation was frustrated by the arrest of the ship and, as a result, the owner lost revenues that could have been used to pay for the operations of the ship, including the crew salaries.

Contrary to the findings of the decision, there is a clear causal link between the arrest of the ship – which the Tribunal rightfully considered an international wrongful act committed by Italy – and the shipowner's loss of revenue that could have been used to pay the crew salaries had that arrest not taken place. A ship involved in maritime trade, as was the case of *M/V "Norstar"*, has to be seen as a commercial venture which, inter alia, involves assets, crews and other persons interested in its operations. The arrest or detention of the ship will certainly affect in a direct way all

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those involved in its operations, as they all depend on the revenues generated by the commercial venture with the ship at its centre.

It is evident to me that for a commercial venture of this nature to operate, the shipowner has to enter into a number of obligations including those arising from labour contracts with the crew. It is also known that labour contracts cannot be terminated overnight as workers need long-term salary protection. The shipowner was therefore expected to honour its contractual obligations with the crew. While I could agree to dismiss Panama's claim for compensation for crew salaries on the grounds that Panama may have failed to present sufficient evidence to substantiate its claim, I cannot agree with the reasoning of the Tribunal.

As the reasoning and conclusions of the Tribunal on this issue may have a negative impact on future cases, I felt that I should record through this short declaration my position on this issue. I am therefore of the view that there is a direct link between the arrest of the ship and the sudden loss of revenue which would have been used to pay for the crew salaries and, on this ground, Panama's compensation claim is well-founded.

(signed) José Luís Jesus

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DECLARATION OF JUDGE KELLY

This case was initiated before the Tribunal by an Application filed by Panama, by which it instituted proceedings against 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."

The Tribunal has passed judgment in two instances, the first with respect to the written preliminary objections under article 294, paragraph 3, of the United Nations Convention on the Law of the Sea ("the Convention") filed by Italy, and the second on the merits of the case.

In both instances, the Tribunal has, in my view, been very thorough in the application and interpretation of the Convention with respect to a very complex set of facts.

I have voted in favour of each and every Section of this Judgment. All sections are, of course, equally important as they are destined to address and adjudge the submissions made by each Party to this dispute. However, I consider it very important to highlight Sections V and VI of the Judgment, since they deal with the important issue of the application and interpretation of article 87 of the Convention in the context of the facts of this case.

The facts of this case are described by both Parties in their respective pleadings. However, the evidence provided by them was not clear enough and required a thorough examination by the Tribunal of all elements presented to it in order to arrive at a proper understanding of what this dispute was about.

The bone of contention in this case concerns, in my view, the different interpretation given by each Party to the relevant provisions of the Convention and the manner in which they should be applied, including the issues of the jurisdiction of the Tribunal and the admissibility of the application of the claimant State (Panama).

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The Convention enshrines a very delicate balance between the interests of flag Sates on the high seas directly associated with the freedom of navigation of ships flying their flag thereon, on the one hand, and the interests of coastal States related to their sovereignty, sovereign rights and jurisdiction over their internal waters, territorial sea and exclusive economic zone, on the other.

Activities of ships on the high seas are varied but specifically one of those activities, bunkering, has occasionally been the subject of disputes between coastal and flag States. This case relates to one such occasion.

I consider this Judgment to have properly clarified the scope and meaning of certain provisions of the Convention through their concrete interpretation and application to the facts of this case, especially those provisions relating to the freedom of navigation on the high seas and to the exclusive jurisdiction of the flag State on the high seas with respect to ships flying its flag, on the one hand, and the jurisdictional powers of coastal States concerning activities of ships, namely bunkering, on the other.

The findings of the Tribunal with respect to the relevance of article 87 of the Convention in this case concern different issues that were the subject of conflicting allegations by the Parties. These findings constitute the basis upon which the Tribunal has established the existence of a breach of article 87, paragraph 1, of the Convention.

One of those issues is 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 ordered by the Italian Public Prosecutor at the Court of Savona. This issue concerns the different interpretation by the Parties of paragraph 122 of the Tribunal's Judgment on Preliminary Objections. The Tribunal, having noted that Italy interpreted paragraph 122 of its Judgment on Preliminary Objections as "excluding the actual arrest and detention of the *M/V "Norstar"*, concluded that "[t]his interpretation does not correctly reflect the Tribunal's decision on jurisdiction" (para. 117 of the Judgment).

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The Tribunal explained that, in its Judgment on Preliminary Objections, it considered that, given the reasons explicitly mentioned there, the dispute between the Parties included 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 stated that its "jurisdiction over the dispute, therefore, covers the arrest and detention of the *M/V "Norstar""* (para. 122 of the Judgment).

With respect to the relevance of article 87 of the Convention in connection with the dispute, the Tribunal refers to the following aspects of the case:

- Whether the Decree of Seizure and its execution concern activities conducted by the *M/V "Norstar"* on the high seas, alleged crimes committed in the territory of Italy, or both. The Tribunal indicated that

> [i]f the Decree of Seizure 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.
> (para. 153 of the Judgment)

The Tribunal examined extensively the arguments made by the Parties, and noted that, in the letter rogatory requesting the execution of the Decree of Seizure, the following elements were mentioned:

1. Marine gasoil was purchased exempt from taxes in Italian ports 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 observed that, while the first and the third elements may have taken place in Italian territory, the second element occurred outside the territorial sea of Italy, on the high seas.

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After a comprehensive examination of the Decree of Seizure and other relevant documents of the Italian judiciary, the Tribunal arrived at the following conclusion:

> 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.
> (para. 186 of the Judgment)

The Tribunal consequently concluded that "article 87 of the Convention may be applicable in the present case" and that "[w]hether 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".
(para. 187 of the Judgment)

With respect to this last finding, the Tribunal turned to the question as to whether article 87 of the Convention is applicable and, if so, whether Italy breached it.
The Parties had differing views concerning the applicability of article 87, paragraph 1, of the Convention. The Tribunal noted that their disagreement concerned the meaning and scope of the freedom of navigation under this provision, in particular,

> the location where the freedom of navigation is applicable; what acts constitute 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 Tribunal also noted that the Parties disagree on the question of the breach of the due regard obligation established in article 87, paragraph 2, of the Convention. But before considering this issue, the Tribunal recalled its findings, mentioned above, concerning paragraph 122 of the Judgment on Preliminary Objections and paragraph 187 of the present Judgment (on the merits).

Most significantly, the Tribunal also noted with regard to the abovementioned findings "that it does not question Italy's right to investigate and prosecute persons involved in alleged crimes committed in its territory". And it further noted that "[i]t is

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Italy's action with respect to activities of the *M/V "Norstar"* on the high seas that is the concern of the Tribunal" (para. 212 of the Judgment).

In the paragraphs that follow, the Tribunal referred to the implications derived from the legal status of the high seas as defined in article 87 of the Convention: the Tribunal noted that article 87 declares that the high seas are open to all States, proclaims the freedom of the high seas, and provides for the obligation of due regard in the exercise of that freedom.

The implications mentioned by the Tribunal are the following:

No State, save in exceptional cases, may exercise jurisdiction over a foreign ship on the high seas. The Tribunal noted that 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 exceptional cases provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas".

The Tribunal considered that the invalidity of claims of sovereignty over the high seas and the exclusive flag State jurisdiction on the high seas over ships flying its flag are inherent in the legal status of the high seas being open and free.

The Tribunal also considered that, in interpreting article 87 of the Convention, articles 89 and 92 of the Convention come into play and that, notwithstanding the fact that Panama did not invoke these provisions in its Application, the Tribunal is not barred from considering these provisions in determining whether article 87 was breached in the present case.

The Tribunal therefore found that bunkering activities fall within the freedom of navigation except – as was determined by the Tribunal in its Judgment in the *M/V "Virginia" G* case – that "bunkering of foreign vessels fishing in the exclusive economic zone is an activity that may be regulated by the coastal State" and that the competence of coastal States does not apply "to other bunkering activities, unless otherwise determined in accordance with the Convention".

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Furthermore, the Tribunal established that “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 found 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” (para. 219 of the Judgment).

With respect to the locus where the freedom of navigation applies, the Tribunal noted that, in accordance with the Convention, the navigational rights enjoyed by foreign ships differ in the various maritime zones contemplated in the Convention.

According to the Tribunal, “[f]reedom of navigation applies to the high seas and also in the exclusive economic zone pursuant to article 58, paragraph 1, of the Convention” (para. 220 of the Judgment).

The Tribunal noted that a State exercises sovereignty in its internal waters and that foreign ships have no freedom of navigation therein, unless conferred by the Convention. In this respect, the Tribunal clearly indicated that “to interpret the freedom of navigation as encompassing the right to leave port and gain access to the high seas would be inconsistent with the legal regime of internal waters”, thereby rejecting Panama’s claim to that effect.

Turning to the issue of what acts constitute a breach or violation of the freedom of navigation under article 87, the Tribunal stated that “any act of interference with the navigation of foreign ships” or “any exercise of jurisdiction over such ships on the high seas” constitutes a breach of the freedom of navigation.

The Tribunal further clarified this concept by determining that “even acts that do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation” including “acts falling short of enforcement action on the high seas could be relevant in terms of a breach of article 87 of the Convention”, as was recognized by Italy when it described the possibility of actions being carried out that might create what Italy calls a “chilling effect” (which it

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discarded as not having occurred in this case because the Decree of Seizure "was not known or knowable").

In the view of the Tribunal, whether or not a "chilling effect" occurs is of no consequence. The Tribunal clearly stated that, 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" (para. 224 of the Judgment).

The Tribunal further stated that "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" (para. 224 of the Judgment).

The Tribunal found that the principle of exclusive flag State jurisdiction on the high seas under article 87 "prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas". In this respect the Tribunal declared that it cannot accept Italy's argument that "extraterritoriality is not the test to assess a breach of article 87" (para. 225 of the Judgment).

The Tribunal also declared that Italy's central argument in this case (that since the Decree of Seizure was enforced not on the high seas but in internal waters of Spain, article 87 is not applicable, let alone breached) is not convincing. While recognizing that the locus of the enforcement is relevant for assessing the applicability and breach of article 87, it is not the sole criterion to be considered.

The Tribunal found that even when enforcement is carried out in internal waters, "article 87 may still be applicable and breached if a State extends its criminal and customs laws extraterritorially to activities of foreign ships on the high seas and criminalizes them", which, the Tribunal added, is precisely what Italy did in the present case.

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The conclusion arrived at by the Tribunal is that it found

> that article 87, paragraph 1, 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.
> (para. 226 of the Judgment)

In its final pronouncement made on this issue concerning the application and breach of article 87, the Tribunal stated that

> [i]n 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.
> (para. 230 of the Judgment)

I find that this part of the Judgment is most important and should be highlighted because through this process of analysing the facts of this case, as reflected in the documents and assertions by the Parties, the Tribunal has provided a thorough interpretation of the provisions of the Convention related to the freedoms of the high seas. In particular, the Tribunal dealt specifically with all aspects that may have blurred the proper understanding of the legal status of the high seas.

It has also sought to protect the delicate balance of interests enshrined in the Convention associated with the rights of flag and coastal States alike, which extend also to the different stakeholders that embark on activities on the high seas as well as in the maritime zones subject to the authority and jurisdiction of coastal States.

(signed) Elsa Kelly

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DÉCLARATION DE M. LE JUGE GOMEZ-ROBLEDO

1. La raison pour laquelle j'estime devoir présenter cette déclaration c'est parce qu'il me semble que l'arrêt aurait dû développer davantage le chapitre de la preuve en droit international, et que cette défaillance ne permet pas de comprendre dans la totalité le problème de la réparation demandé par la République du Panama.

2. Le prestigieux professeur Paul Foulquié faisait remarquer que si toutes les démonstrations pouvaient être appelés preuves toutes les preuves ne constituaient pas des démonstrations (…) Dans certains cas, pour prouver on se contente de produire un fait qui met fin au doute : nous avons là une preuve qui n'est pas démonstration.

3. En droit international, on le sait très bien, pour pouvoir mettre en jeu une responsabilité, il faut toujours prouver que le fait qui a causé un dommage soit lui-même imputable à l'État, et en plus, il doit être illicite vis-à-vis le droit international.

4. Il est évident qu'il ne peut y avoir de réparation que s'il y a un dommage, mais au même temps, il ne sera susceptible de réparation que le dommage lié au fait illicite par ce que l'on connaît comme « un lien de causalité », c'est-à-dire, que pour qu'il y ait réparation du préjudice, celui-ci doit être véritablement une conséquence du fait illicite (Bollecker-Stern).

5. La jurisprudence internationale a démontrée que le lien de causalité doit exister de façon claire entre le fait illicite et le dommage causé, en d'autres termes il doit être suffisamment prouvé.

6. Lorsqu'un certain fait doit normalement résulter d'un autre fait, il existe une présomption de causalité selon laquelle le second est lié par un lien de causalité au premier.

7. L'utilisation des présomptions de causalité fait donc appel à l'acquis de l'expérience qui permet de dégager ce qui résulte normalement d'un certain fait, ce

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qui est la suite logique d'un événement dans le cours normal des choses (*Navire « Virginia G » (Panama/Guinée-Bissau), arrêt, TIDM Recueil 2014,* par. 435-446).

8. D'après la jurisprudence la simple possibilité qu'un fait puisse être la cause d'un autre, i.e., une simple éventualité, n'est donc pas suffisante. Au contraire une « probabilité sérieuse » d'existence d'une liaison causale permet seulement de considérer cette dernière comme prouvé réellement.

9. Si le fait illicite cause la destruction d'un bateau, le dommage inévitable qui en résulte est la perte de la valeur du bateau (*dammum emergens*) (Dickson Car Wheel Comp. (Mexique/USA), R.S.A. IV., p. 669.691, juillet 1931), mais aussi des profits qu'il aurait « éventuellement » procurés s'il n'y avait pas eu de fait illicite (*lucrum cessans*).

10. On peut voir ainsi qu'un fait illicite peut, soit entrainer directement la perte d'une valeur qui était dans le patrimoine, soit empêcher directement une valeur d'entrer « éventuellement » dans le patrimoine; autrement dit, dans une telle hypothèse on sera, bel et bien, dans un rapport de causalité pur et classique (Projet d'Articles de la C.D.I. sur la Responsabilité des États. A.C.D.I. 1993, vol II, 2ème partie).

11. Aussi il est largement reconnu qu'un jugement d'un tribunal international est décidé sur un fondement normatif et sur un fondement de fait, autrement dit, les faits prouvés à l'appui des prétentions juridiques qui ont été alléguées au cours de la procédure.

12. Mais dans l'actualité, comme il est bien remarqué par la jurisprudence, le juge ne va pas s'attacher à la seule matérialité du fait qu'il considère, mais à la signification qu'il revêt au sein même du système juridique (J. Salmon).

13. Si l'on considère le mot preuve dans le langage quotidien, la preuve c'est ce qui montre la vérité d'une proposition, la réalité d'un fait, ou encore, ce qui démontre ou établit la vérité d'une chose.

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14. De prime abord, il semblerait que la force probatoire des différents moyens de preuve va permettre au juge de tenir pour vrais les faits établis par certains moyens de preuve. Mais en réalité les parties sont libres de choisir, car il ne semble pas qu'il existe aucune hiérarchie entre les différents procédés de preuve.

15. Les faits « notoires » sont parfois présentés comme des faits objectifs, mais d'après la pratique des États, la soi-disante notoriété d'un fait ne dispense pas de preuve en cas de protestation par la partie qui se le voit opposer. (Dans ce sens l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), arrêt, C.I.J. Recueil 1980*, p. 3/65.)

16. Au cas où de sérieuses doutes subsistent quant à ce qui peut être tenue pour vrai, ses allégations seront écartés; si la partie qui a la charge de la preuve ne parvient pas à faire la preuve de son allégation, la position adverse, le plus souvent, pourra être considérée comme étant vraie.

17. Dans ce sens la C.I.J. soutient « lorsque (la preuve d'un fait) n'est pas produite, une conclusion peut -être rejetée dans l'arrêt comme insuffisamment démontré » (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J Recueil 1984*, p. 392-444, p. 437).

18. Il n'y a aucun doute qu'il revient à chaque partie de prouver les faits et allégations qu'elle invoque à l'appui de ses prétentions (*onus probandi incumbit actori*).

19. La Cour dans son arrêt du 6 novembre 2003, doit « déterminer si les Etats-Unis ont démontré qu'ils avaient été victimes d'une agression armée de nature à justifier l'emploi qu'ils ont fait de la force au titre de la légitime défense; or c'est à eux qu'il revient de prouver l'existence d'une telle agression » (*Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2003*, p. 161, para. 57).

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20. Il va relever ainsi de l'obligation de la preuve, la démonstration de l'existence d'un fait, et en plus de son caractère illicite, de son imputabilité à l'État dont la responsabilité est recherchée, et du lien de causalité (J. Charpentier).

21. Mais il faut bien remarquer

> qu'établir ou ne pas établir la compétence n'est pas une question qui relève des parties: elle est du ressort de la Cour elle-même (…) il s'agit là d'une question de droit qui doit être tranchée à la lumière des faits pertinentes (…). Il en résulte qu'il n'y pas de charge de la preuve en matière de compétence.
> (*Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt, C.I.J. Recueil 1998*, p. 432-468, par. 37-38).

22. D'une façon générale les tribunaux internationaux ne peuvent pas admettre des moyens de preuve qui ne peuvent pas être soumis à un contrôle de leur authenticité et en se rapportant aux seuls faits pertinents au litige du cas d'espèce. C'est le bien fondé des allégations qui doit être prouvé auprès du juge.

23. Dans l'affaire du « *Monte Confurco »* le Tribunal international du droit de la mer a bien souligné qu'aucune limitation n'était imposée « à la latitude laissée au Tribunal pour prendre connaissance des faits litigieux et rechercher éléments de preuve lui permettant de se prononcer sur le bien-fondé des allégations formulées par les parties » (*« Monte Confurco » (Seychelles c. France), prompte mainlevée, arrêt, TIDM Recueil 2000*, p. 86, par. 74.).

24. Aussi il est évident que dans les juridictions internationales dont la force probante d'un moyen dépend en grande partie - mais pas seulement - du contexte des allégations présentées par les parties, il faut aussi savoir lesquels de moyens de preuve présentés doivent être considérés comme étant pertinents.

25. La Cour International de Justice dans l'affaire *Activités armées sur le territoire du Congo*, a souligné :

> sa tâche (…) n'est pas seulement de trancher la question de savoir lesquels (des moyens de preuve présentés) doivent être considérés comme pertinents; elle est aussi de déterminer ceux qui revêtent une valeur probante à l'égard des faits alléguées (…). Dans cette optique, elle

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> répertoriera les documents invoqués et se prononcera clairement sur le poids, la fiabilité et la valeur qu'elle juge devoir leur être reconnus. (*Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*, p. 1-104, para. 57 et 59)

26. Ceci dit, la valeur en droit d'une preuve peut dépendre de plusieurs éléments, mais a notre avis, et au-delà de sa pertinence, sa valeur principale va dépendre du « degré de certitude » qu'elle apporte au procès et ensuite et d'une manière plutôt parallèle de ce que l'on peut appeler son caractère de « fiabilité ».

27. Dans l'affaire de l'*Usine de Chorzów (fond, arrêt n° 13, 1928, C.P.J.I. série A n° 17*), le Contre-Mémoire polonais constate, au sujet des indemnités demandées par le Gouvernement allemand :

> C'est une règle généralement reconnue et, par une jurisprudence très nombreuse, érigée en principe, que dans les relations internationales, les Etats ne sont tenus de réparer que les dommages effectifs se présentant comme conséquence directe et inévitable du fait générateur de la responsabilité. Par conséquent, n'entrent pas en ligne de compte de la responsabilité les dommages indirects et consécutifs ou éloignées, c'est-à-dire les dommages que la doctrine et la jurisprudence anglo-saxonne comprennent sous la dénomination de « consequential damages », de plus, les préjudices auxquels d'autres causes encore ont contribué. (Contre-Mémoire de la Pologne, p. 156, C.P.J.I., compétence, fixation d'indemnités et fond ,16/XII/1927 ; 13/IX/1928)

28. Dans l'affaire du *Détroit de Corfou*, la Cour Internationale de Justice va être de l'avis que la preuve de la connaissance du mouillage par l'Albanie pouvait « résulter des présomptions de fait à condition que celles-ci ne laissent place à aucun doute raisonnable » (*Détroit de Corfou (Royaume-Uni c. Albanie), fixation du montant des réparations, arrêt, C.I.J. Recueil 1949*, p. 4-38, par. 18).

29. Il n'est pas contesté que si la fiabilité d'un moyen de preuve est absent, le juge ne va pas le retenir.

30. Dans l'affaire du *Différend frontalier terrestre, insulaire et maritime* de 1992, la Cour Internationale de Justice va dénier toute force probatoire à une carte géographique en tant qu'elle était dépourvue de la précision et qualité technique requise, son échelle étant trop petite pour prouver ce qu'elle prétendait établir

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(*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant)), arrêt, C.I.J. Recueil 1992*, p. 351-618, para. 550).

31. Dans les circonstances propres au cas d'espèce la République du Panama a demandé inter/alia des dommages-intérêts pour le *lucrum cessans*, c'est-à-dire, pour le manque à gagner correspondant à la durée d'origine de la charte-partie ; le manque à gagner correspondant à la possibilité de renouvellement de la charte-partie (première et deuxième année et après la deuxième année) et le calcul du montant majorité des intérêts au taux annuel de 8%; 6% et 3% ; remboursement du versement des salaires comme une perte supplémentaire, majorité des intérêts; dommages-intérêts correspondant aux honoraires des avocats de plusieurs cabinets; redevances et taxes dues à l'Autorité maritime de Panama, et Portuaire de Palma de Majorque; dommages-intérêts au titre de la perte de la cargaison; préjudice subi par l'affréteur correspondant au *lucrum cessans* ; préjudice moral et matériel causé aux personnes physiques; réparation du préjudice causé par des souffrances et stress psychologique (*pretium doloris*).

32. Le total des dommages-intérêts demandé par la République de Panama au titre de la réparation des préjudices causés était d'un montant de 27 009 266, 22 dollars des Etats-Unis, plus intérêts de 24 873 091, 82, et 170 368,10 euros, plus intérêts de 26 320, 31 euros.

33. Mais c'est justement dans ce domaine où la quasi-totalité du système de la preuve en droit international fait défaut de manière significative. La République du Panama n'a été pas capable, à l'exception de la perte du « *Norstar* », d'apporter de moyens probantes au-delà d'une preuve raisonnable, pure et simple. Les dommages allégués par le Panama n'étaient liés par un lien de causalité de façon claire, nette et suffisamment établis.

34. Aussi la présentation de plusieurs documents n'a pas pu être soumise à un contrôle de leur authenticité et partant de la solidité des informations.

35. On a pu rencontrer aussi des pièces qui n'avaient pas de la part du Panama, la fiabilité et la valeur requises dans tout système de preuve en droit.

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36. Le Tribunal s'est borné à constater que les accusations portant sur les dommages et la réparation n'avaient pas été solidement établies sur le plan juridique du droit international, autrement dit, que la République du Panama ne s'était pas acquittée de la charge de la preuve qui lui incombait.

(signé) Alonso Gomez-Robledo

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DECLARATION OF JUDGE KITTICHAISAREE

1. I have voted in favour of the present Judgment because I concur with the Tribunal's reasons concerning the principal issues raised by the Parties to the present dispute. Nevertheless, I deem it appropriate to express my view on two crucial international legal issues left untouched by the Tribunal. The first concerns the enforcement jurisdiction of the port State against a foreign vessel in the context of this case. The second relates to the obligation to promptly notify the flag State after the arrest or detention of a vessel flying its flag.

Enforcement jurisdiction of the port State against a foreign vessel

2. One undisputed fact is that Italy deliberately waited until the *M/V "Norstar"* was in a Spanish port before it requested Spain to execute the Decree of Seizure issued by Italy. Spain complied with Italy's request despite the fact that the *M/V "Norstar"* had not committed, and was not committing, an offence against Spanish law and Panama, the flag State, was not party to the Schengen Agreement of 14 June 1985 or the 1959 Strasbourg Convention binding on Italy and Spain.

3. Italy submits in its Counter-Memorial that when the Decree of Seizure against the *M/V "Norstar"* was issued and its Request for execution transmitted to the Spanish Authorities, as well as when the Decree of Seizure was enforced, the vessel was in Spanish internal waters and, therefore, did not enjoy the right to freedom of navigation under article 87, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea[1] ("the Convention"). Italy also contends that, according to the case law of this Tribunal, the freedom of navigation enshrined in article 87, paragraph 1, cannot be interpreted to mean that a vessel is protected against coastal States' measures that prevent it from leaving a port in order to gain access to the high seas.[2] Italy reiterated this position during the oral hearing on the merits of this case.[3]

[1] Para. 75 of Italy's Counter-Memorial.
[2] Ibid, para. 97.
[3] ITLOS/PV.18/C25/6, p. 23, ll. 42–47 and p. 24.

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4. Under the Convention, ports situated within internal waters are subject to the sovereignty of the coastal State.[4] This rule of customary international law is affirmed by the International Court of Justice ("ICJ") in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v*. United States of America), Merits*, holding that ports lying within internal waters are subject to the sovereignty of the coastal State, and, as such, the coastal State may regulate access to its ports.[5]

5. Although there is no provision under the Convention specifically limiting the sovereignty of a State over its internal waters and its jurisdiction therein in a way similar, for example, to articles 2, paragraph 3, article 21, article 27, article 28, article 56, paragraph 2, and article 97, paragraph 3, of the Convention as regards the jurisdiction of the coastal State in other maritime zones, the port State may not have unlimited jurisdiction over vessels flying the flag of another State owing to other applicable rules of international law, including customary international law and applicable treaties.

6. In this respect, a number of international legal scholars are of the view that the port State merely has the right of denial of access to its port rather than a right to exercise enforcement jurisdiction by prosecuting and penalizing violations that do not have an effect in the territory of the port State since that right still pertains to the flag State.[6] The only exception is, arguably, where the port State is authorized by internationally agreed rules binding on itself and the flag State of the foreign vessel visiting its port to take enforcement measures against the vessel.[7]

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[4] Articles 2, paragraph 1, article 8, paragraph 1, and article 11 of the Convention.
[5] ICJ Reports 1986, p. 14, at p. 111, para. 213.
[6] See, e.g., R. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Leiden: Martinus Nijhoff 2004), pp. 335–7; D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press 2009), pp. 2, 276–7; Arron N. Honniball, "The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?" (2016) 31 *Int'l J Marine & Coastal Law* 499, 524–9. According to Ted L. McDorman, "Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention" (1997) 28 *Journal of Maritime Law & Commerce* 305, at 313: "[A]ctivities of vessels on the high seas are governed exclusively by the law of the vessel's flag. *Prima facie*, arrival of a foreign vessel in port does not alter this situation."
[7] Bevan Marten, "Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation" in Henrik Ringbom (ed.), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Leiden/Boston: Brill 2015) pp. 103–139, at pp. 109–112, 124–5, 131–2.

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7. Article 218, under Part XII (Protection and Preservation of the Marine Environment), is the only provision of the Convention that specifically addresses enforcement by the port State against a foreign vessel visiting its port. Article 218 reads in its pertinent part:

> Article 218 Enforcement by port States
>
> 1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State *in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference*.
>
> 2. No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings.
>
> 3. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag State for investigation of such a violation, irrespective of where the violation occurred.
>
> (Emphasis added)

8. Independently of the visiting foreign vessel's violation of applicable international rules and standards established through the competent international organization or general diplomatic conference, "… in some rare circumstances, a State might be able to rely on the effects doctrine or the protective/security principle as a basis for extraterritorial jurisdiction, perhaps in relation to pollution events or security issues respectively."[8] However, the facts of the present case do not show how Spain could rely on the effects doctrine or the protective/security principle to

[8] Ibid, p. 125. On the effects doctrine, see *Case of the S.S. Lotus (France* v. *Turkey)* 1927 PCIJ Rep. Series A/ No. 10 at p. 23. An oft-cited case in support of the protective/security principle is the English House of Lords' Judgment in *Joyce v. DPP* [1946] AC 347.

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exercise enforcement jurisdiction against the *M/V "Norstar"*, particularly since the vessel had not committed and was not committing any offence against Spanish law.

9. The 2009 Port State Measures Agreement to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing ("PSMA") of the Food and Agriculture Organization of the United Nations ("FAO") does not go as far as permitting the port State to take enforcement measures against foreign vessels without the consent of the flag State.

10. Articles 7, 8, and 9 of the PSMA require each Party to designate ports to which a vessel may request entry pursuant to the PSMA, determine whether the vessel has engaged in illegal, unreported, and unregulated fishing ("IUU") fishing or fishing-related activities in support of such fishing, and then decide whether to authorize or deny entry of the vessel into its port exclusively for the purpose of inspecting it and taking other appropriate actions in conformity with international law which are at least as effective as denial of port entry in preventing, deterring and eliminating IUU fishing and fishing-related activities in support of such fishing. Where there is sufficient proof that a vessel that is in the port of a party to the PSMA for any reason has engaged in IUU fishing or fishing-related activities in support of such fishing, the party shall deny such vessel the use of its ports for landing, transhipping, packaging, and processing fish and for other port services including, inter alia, refuelling and resupplying, maintenance and dry-docking.

11. Where a vessel has entered one of its ports, article 11 of the PSMA obliges a party to deny – pursuant to its laws and regulations and consistent with international law, including the PSMA – the vessel the use of the aforesaid port services if the party finds, inter alia, that the vessel does not have a valid and applicable authorization to engage in fishing or fishing-related activities required by its flag State or a coastal State in respect of areas under the national jurisdiction of that State; the party receives clear evidence that the fish on board was taken in contravention of applicable requirements of a coastal State in respect of areas under the national jurisdiction of that State; the flag State does not confirm within a reasonable period of time, at the request of the port State, that the fish on board was taken in accordance with applicable requirements of a relevant regional fisheries management

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organization; or the party has reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or fishing-related activities in support of such fishing.

12. Article 20 of the PSMA obligates the *flag State* party to the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Species Fish Stocks ("FSA") to require vessels entitled to fly its flag to cooperate with the port State in inspections carried out pursuant to the PSMA. Where, following port State inspection, a *flag State* party to the FSA receives an inspection report indicating that there are clear grounds to believe that a vessel entitled to fly its flag has engaged in IUU fishing or fishing-related activities in support of such fishing, it shall immediately and fully investigate the matter and shall, upon sufficient evidence, *take enforcement action* without delay in accordance with its laws and regulations and report the outcome to other parties to the FSA, relevant port States and, as appropriate, other relevant States, regional fisheries management organizations, and the FAO on actions it has taken in this regard.

13. Owing to the insistence of the European Union, China, Japan, the Republic of Korea, and Poland during the drafting of the FSA, article 23 of the FSA deliberately avoids using the term "port State enforcement" or reference to the power of the port State to detain or prosecute the vessel.[9] Phrased differently, the port State may only resort to the right of denial of access to its port and its port services rather than a right to exercise its enforcement jurisdiction against the vessel.[10]

14. In the present dispute, at the request of Italy pursuant to the Schengen Agreement of 14 June 1985, Spain, in its capacity as a port State, exercised enforcement jurisdiction over a ship flying the flag of Panama. Pursuant to article 1, paragraph 1, of the 1959 Strasbourg Convention, "[t]he Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention,

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[9] Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, pp. 77–78.
[10] Ibid, pp. 335–7.

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the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party." However, while the offences in question were alleged by Italy to have been committed within Italy's jurisdiction, they were not alleged to have been committed within the jurisdiction of Spain, the port State that took enforcement measures against the vessel.

15. In its letter rogatory, Italy asked Spain to "1) Immediately enforce the following Decree of Seizure, issued by [the Court of Savona], of the motor vessel *NORSTAR*, as the prosecuted case concerns *facts punishable under the law of both States* and aimed at affecting the economic interests of the European Union [of which Spain is a Member State]."[11] This might have reassured Spain that Italy's request fulfilled the condition of double criminality for the purpose of mutual legal assistance in criminal matters to be rendered by Spain to Italy. Nonetheless, the fact remains that: (a) Italy sought the arrest of the *M/V "Norstar"* for the alleged crimes of smuggling and tax fraud committed under the criminal and customs laws of Italy, as identified in the Decree of Seizure number 1155/67/21, dated 11 August 1998; and (b) no offence had been or was being committed against Spain, the port State requested by Italy to exercise its enforcement jurisdiction against the *M/V "Norstar"*.[12]

16. Spain is not a party to the present dispute before the Tribunal, and the Tribunal has held in its Judgment on the Preliminary Objections that Spain was not an indispensable party since it was Italy that caused Spain to take the measures to the detriment of Panama.[13] Consequently, in paragraph 221 of today's Judgment, the Tribunal has been careful in its response to Italy's submission as reproduced in paragraph 3 of this Declaration of mine. According to the Tribunal, since a State exercises sovereignty in its internal waters, "[f]oreign ships have no right of navigation therein unless conferred by the [1982] Convention or other rules of international law", and "[t]o interpret the freedom of navigation as encompassing the 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

[11] Emphasis added.
[12] See, e.g., paras. 39 and 44 of Italy's Counter-Memorials.
[13] Judgment on the Preliminary Objections, paras. 162–5, 166–9, 173–5.

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claim that the freedom of navigation under article 87 of the [1982] Convention includes a right to 'sail towards the high seas' and that a vessel enjoys such freedom even in port of the coastal State". The Tribunal then reasons, in paragraph 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*. (Emphasis added)

It should be noted that the Tribunal's focus is on the freedom of navigation under article 87, and not on the legality or otherwise of the exercise of enforcement jurisdiction by Spain, the port State in the present case, *vis-à-vis* a vessel flying the flag of Panama, which is party to neither the 1959 Strasbourg Convention nor the Schengen Agreement of 14 June 1985. Moreover, nowhere in this Judgment does the Tribunal state categorically that foreign ships are subject to complete jurisdiction, both prescriptive and enforcement, of the port State.

17. Panama maintains that Italy breached article 300 of the Convention with regard to article 87 thereof because Italy waited until the *M/V "Norstar"* was in a foreign port in order to arrest it. In paragraph 258 of this Judgment, the Tribunal summarily rejects Panama's claim. According to the Tribunal, Panama has failed to prove lack of good faith on the part of Italy in this regard, and that 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". I go along with this conclusion by the Tribunal for two main, related reasons. First, holding Italy in breach of article 300 would not make any difference to the final outcome of the case, including on the amount of compensation for the loss of the *M/V "Norstar"*. Second, the carefully chosen phrase

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"*per se*" ensures that a breach of article 300 has to be considered in its overall context and a single act or conduct may not be decisive *per se*.

18. On the whole, the Tribunal is wise in the present Judgment to avoid postulating that a port State has unlimited sovereignty and jurisdiction to take enforcement measures against a foreign vessel voluntarily in its port.

The obligation to promptly notify the flag State

19. Paragraphs 266–271 of this Judgment deal with Panama's submission that it made seven attempts to communicate with Italy concerning the *M/V "Norstar"*, yet all of them were unsuccessful, and that, by intentionally keeping silent when confronted with the claim that article 87 of the 1982 Convention had been breached, Italy acted in a manner contrary to its duty of good faith. For its part, Italy explained it did not respond to Panama's communications because it believed—and Italy accepted this belief was legally wrong since 31 August 2004—that the requests from Panama were coming from individuals not authorized to represent Panama.[14] It is not clear from the facts presented to the Tribunal by the Parties when, if ever, Italy officially notified Panama as the flag State of the *M/V "Norstar"* of the arrest or detention of this vessel. Panama's Memorial only states that on 24 September 1998, Spain, at the request of Italy, executed the arrest of the vessel while she was in the Bay of Palma, Majorca,[15] and that an application by the vessel's owner for the release of the vessel "was refused by Italy, who on 18 January 1999 offered the release thereof against a security …".[16]

20. There are two provisions of the 1982 Convention specifically addressing the duty to promptly notify the flag State of the exercise of jurisdiction over a vessel flying its flag. Article 27, under the heading "Criminal jurisdiction on board a foreign

[14] E.g., para. 99 of Italy's Rejoinder.
[15] Para. 22 of Panama's Memorial.
[16] Ibid, para. 28. See also para. 44 of the Judgment (Preliminary Objections) and paras. 75 and 76 of the present Judgment. Italy states that the seizure took place on 25 September 1998, whereas Panama states that it took place on 24 September 1998. This discrepancy might have been owing to the time difference—it was 25 September 1998 in Spain, but 24 September 1998 in Panama.

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ship" in Section 3 (Innocent Passage in the Territorial Sea) of Part II (Territorial Sea and Contiguous Zone), provides:

> In the cases [where the coastal State exercises criminal jurisdiction on board a foreign ship passing through the territorial sea of that coastal State], the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

21. Article 73, under the heading "Enforcement of laws and regulations of the coastal State" in Part III (Exclusive Economic Zone), stipulates in paragraph 4: "In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed." The Tribunal has noted in *"Camouco" (Panama* v. *France), Prompt Release, Judgment,* that

> there is a connection between paragraphs 2 and 4 of article 73, since absence of prompt notification may have a bearing on the ability of the flag State to invoke article 73, paragraph 2 that arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security, and article 292 on prompt release of vessels and crews in a timely and efficient manner.[17]

22. Articles 27 and 73, paragraph 4, of the 1982 Convention are not applicable to the situation of the *M/V "Norstar"*, which was already in a Spanish port at the time of its being subject to enforcement measures. A question may be raised as to whether, besides the obligations specifically imposed by articles 27 and 73, paragraph 4, the State taking enforcement measures against a foreign vessel has a general obligation to promptly notify the flag State of the vessel.

23. Since Panama has not specifically raised this issue of prompt notification before the Tribunal, the Tribunal does not address it. As the Tribunal held in the *M/V "Louisa"* case:

> 143. In this context, the Tribunal wishes to draw attention to article 24, paragraph 1, of its Statute. As noted earlier, this provision states, *inter alia*,

[17] *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000*, p.10 at pp. 29–30, para. 59.

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> that when disputes are submitted to the Tribunal, the "subject of the dispute" must be indicated. Similarly, by virtue of article 54, paragraph 1, of the Rules, the application instituting the proceedings must indicate the "subject of the dispute". It follows from the above that, while the subsequent pleadings may elucidate the terms of the application, they must not go beyond the limits of the claim as set out in the application. In short, the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character.[18]

24. It is hoped that the Tribunal will have an opportunity to directly address these two important issues in the future, so that the balance between the rights and obligations of States Parties to the 1982 United Nations Convention on the Law of the Sea can be duly safeguarded.

(*signed*) Kriangsak Kittichaisaree

[18] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4.

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DECLARATION OF JUDGE *AD HOC* TREVES

1. Together with Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad, I have signed a Joint Dissenting Opinion to the present Judgment. I fully share the arguments set out therein explaining our vote against the key paragraphs of the operative part of the Judgment. In the present Declaration I would like to draw from the present case some lessons for the future, especially in light of the fact that the *M/V "Norstar"* case is the first in which the Tribunal has been called on to decide on preliminary objections.

2. The Judgment has to be seen together with the Judgement on Preliminary Objections of 4 November 2016.[*] The latter Judgment based its decision affirming jurisdiction on the finding that the Decree of seizure and the Request for its execution issued by the Prosecutor of the Court of Savona "*may be viewed* as an infringement of the rights of Panama under article 87" and that "article 87 *is relevant* to the present case" (para. 122, emphasis added). The terms "may be" and "relevant" show hesitation in the Tribunal. In particular, "relevant" is a vague term, too vague to be the basis of a judgment affirming jurisdiction. Prudence, and also a correct assessment of the implications of the reference to article 87, would have, at least, suggested that the objections of Italy were not to be considered of an exclusively preliminary character.

3. The imprecise and questionable argument accepted in the judgment on jurisdiction had an echo in the merits phase. The meaning of the Judgment on Preliminary Objections was discussed as Parties diverged on the interpretation of its paragraph 122 and tried to lead the Tribunal to reconsider matters of jurisdiction. More notably, the asserted "relevance" of article 87 led the Tribunal to find that the article was indeed applicable and had been violated, losing sight of the fact that, with the decision so adopted, it casts doubt on the international legitimacy of the exercise of State sovereignty in prosecuting alleged crimes committed in the territory of the State and in securing control of an *instrumentum criminis* in internal waters far from

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[*] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016,* p. 44.

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the high seas. Moreover, the Tribunal was led to examine claims for damages for recovering the vessel, whilst there were mechanisms available under Italian law.

4. The lesson for the future is that preliminary objections is a blunt instrument that should be used with prudence by the parties and by the adjudicating bodies. The party rising the objection risks being confronted with a binding decision affirming jurisdiction or admissibility and taken without considering all aspects of the case. The judge affirming his jurisdiction by rejecting the objection risks finding himself with his hands tied in deciding the case once all arguments and materials have been submitted and discussed.

5. These observations, of course, do not mean that well-founded preliminary objections do not have a useful function, especially for the purpose of economizing on judicial activity. They simply support the idea that the standard for assessing jurisdiction in deciding preliminary objections should be sufficiently high. This applies not only to the standard for deciding, with the binding effect of a judgment, to uphold the preliminary objection, thus denying the existence of jurisdiction or the admissibility of the claim, but also to the decision to reject the preliminary objection and thus affirm the existence of jurisdiction or the admissibility of the claim.

6. The judge deciding on preliminary objections cannot rely on the low standard of *prima facie* assessment of jurisdiction he may resort to when deciding on a request for provisional measures. If the high standard to be adopted leads the judge to consider that a decision to affirm his jurisdiction might constrain his assessment in the settlement of the dispute on the merits, he should consider attentively the alternative set out in article 97, paragraph 66, of the Rules of the Tribunal (corresponding to article 79, paragraph 9, of the Rules of the International Court of Justice (hereinafter "ICJ")) declaring that "the objection, in the circumstances of the case, does not possess an exclusively preliminary character." This seems particularly opportune in cases before the Tribunal because, unlike what is provided in the Rules of the ICJ, its Rules require that preliminary objections be in all cases

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submitted within 90 days from the institution of proceedings, i.e., before the materials and arguments set out in the Memorial have become available.

(signed) Tullio Treves

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[Translation by the Registry]

SEPARATE OPINION OF JUDGE NDIAYE

I have voted in favour of the Judgment as I am in agreement with the grounds set out by the Tribunal in respect of the main question, according to which the Decree of Seizure, the Request for its execution and the arrest and detention of the *M/V "Norstar"* constitute a breach of article 87, paragraph 1, of the Convention, but on a number of grounds going beyond those set out in the Judgment of the Tribunal. In my view, the Judgment could have examined precisely the relevance of the article in question and the rules governing its applicability in the circumstances in resolving the dispute before the Tribunal. Thus, after addressing the question of subject-matter jurisdiction (I), consideration will be given briefly to the applicable standard of proof (II) in the case at issue, before moving on to reparation (III).

I. JURISDICTION

For an international court or tribunal, jurisdiction designates the competence, [authority] or legal capacity to examine a request and to adjudicate on its merits (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956*, p. 77, at p. 87).

It is thus a power to hear, examine and decide on a dispute based on international law which requires the parties to the dispute to accept that jurisdiction.

The parties disagree in particular on subject-matter jurisdiction in this case with regard to the object of the Decree of Seizure and the other related legal instruments.

Italy has asserted that the Decree did not concern activities conducted on the high seas, such as bunkering, but to alleged tax evasion and smuggling offences committed in the territory of Italy.

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Panama

- “[T]he Tribunal observed that since article 87 provides that the high seas are open to all States and that 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.” (Reply, para. 61 (referring to the Judgment on Preliminary Objections, para. 122); see para. 82; see also ITLOS/PV.18/C25/9, p. 5, l. 36-42)

“[T]he 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.” (Reply, para. 63; see also para. 184)

Italy

- “Panama has misconceived the meaning of paragraph 122 of the Decision of the Tribunal of 4 November 2016, in which the ITLOS decided that Article 87 and Article 300 of the Convention are relevant to the present dispute. Clearly, 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.” (Rejoinder, para. 3; ITLOS/PV.18/C25/5, p. 6, l. 35 - p. 7, l. 19 and p. 27, l. 1-27)

“[N]othing would prevent this Tribunal from adjudging and declaring, even at this merits stage, that article 87 is simply irrelevant to this case.” (ITLOS/PV.18/C25/5, p. 7, l. 18-19)

Do the Decree of Seizure and its execution relate to activities undertaken by the *M/V “Norstar”* on the high seas or to crimes committed in Italian territory and, in the latter case, is article 87 of the Convention applicable?

Panama

- “[T]he order of arrest clearly stated that the M/V ‘Norstar’ was carrying out bunkering activities outside the territory of Italy, specifically on the high seas.” (Reply, para. 15; see para. 132; *with regard to documents concerning the Italian*

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judicial system, see Reply, paras 133-183; ITLOS/PV.18/C25/9, p. 18, l. 29-40, and p. 25, l. 45 - p. 26, l. 22) “The activities for which the M/V Norstar was arrested were carried out on the high seas.” (Memorial, para. 85; see also Reply, paras 5, 37 and 51)

“[T]he bunkering operations had been considered as part of the criminal acts that led to the arrest.” (ITLOS/PV.18/C25/9, p. 4, l. 21-22)

“[T]he bunkering of gas oil 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”. (Memorial, para. 76; see also para. 72 and Reply, para. 40)

“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.” (Reply, para. 54; see para. 36)

“[T]he Decree of Seizure explicitly refers to the constructive presence doctrine as the basis for its jurisdiction.” (ITLOS/PV.18/C25/9, p. 26, l. 31-32)

“The 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 transhipping, otherwise referred to as mother vessel and contact vessel.” (ITLOS/PV.18/C25/9, p. 27, l. 12-16)

With regard to the constructive presence doctrine, see ITLOS/PV.18/C25/9, p. 26, l. 31 - p. 27, l. 21.

- “The regulation by Italy of conduct from other States that occurs on the high seas outside its jurisdiction is incompatible with the Convention …”. (Memorial, para. 67)

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"[T]he Decree of Seizure was based on the internal laws and regulations of Italy." (Reply, para. 99; see also para. 98)

"[E]ven if Italy considered the reintroduction of fuel purchased in international waters to its own territory to be a criminal offense, it would not have jurisdiction to arrest the M/V 'Norstar' for such activities on the high seas." (Reply, para. 120; see also para. 191)

- "None 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." (Reply, para. 105)

"[T]he Italian judicial authorities in both Savona and Genoa concluded that this was not a crime, thus acquitting the M/V 'Norstar' and the persons therein connected of the charges brought against it." (Reply, para. 118; see also paras 42, 43, 45, 182 and 183; ITLOS/PV.18/C25/2, p. 22, l. 31-43)

With regard to article 3 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, see Reply, para. 97, also referring to the PCIJ Case of the *S.S. "Wimbledon"*.

Italy

- "[T]he 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 sea. Rather, it was adopted in the context of proceedings concerning alleged offences that occurred within the Italian territory." (Counter-Memorial, para. 44; see also para. 8 and paras 15, 44, 103, 117, 133 and137)

"[T]he Decree of Seizure targeted alleged fiscal and customs offences carried out in areas that were subject to Italy's full jurisdiction." (Counter-Memorial, para. 126)

"[N]either the original investigation of the Italian Fiscal Police nor the Decree of Seizure of the Prosecutor challenged the bunkering activity of the *M/V Norstar*. The *M/V Norstar* was arrested and detained not because of its bunkering activity, but

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because it was *corpus delicti* of an alleged series of crimes consisting essentially in smuggling and tax evasion." (Counter-Memorial, para. 117; see para. 3)

With regard to constructive presence, see ITLOS/PV.18/C25/10, p. 13, l. 1-5.

- "Italy did not apply extraterritorially its laws and regulations in respect of the *M/V Norstar* and did not sanction activity carried out on the high seas." (Counter-Memorial, Introduction to chapter 3, section II C; see paras 120-137)

"The scope of the Italian legislation on which the Decree of Seizure was based is strictly territorial." (Counter-Memorial, para. 105; *with regard to the "principle of territoriality" in the Italian Penal Code*, see Counter-Memorial, paras 106-110)

"[T]he crimes considered by the Prosecutor were crimes committed on the territory of Italy." (Counter-Memorial, para. 128; see also para. 127 and paras 37 and 47; *with regard to documents concerning the Italian judicial system,* see Counter-Memorial, paras 129-131)

"[T]he Italian courts acquitted those involved with the 'Norstar' on the basis of the fact that a crime was not found to have been committed. That is, an acquittal on the merits." (Counter-Memorial, paras 58 and 132, and Rejoinder, paras 21 and 29)

"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." (ITLOS/PV.18/C25/5, p. 18, l. 34-36)

- "[T]hose 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." (Counter-Memorial, para. 132; see also para. 58 and Rejoinder, paras 21-29)

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- **Article 87, paragraph 1, of the Convention**

Panama

- “[T]he freedom of navigation governed by article 87 does apply to this case, because the activities for which the M/V ‘Norstar’ was detained took place in international, not Spanish, waters. Thus, there is a clear distinction here; Italy has based the applicability of article 87 on the locus where the arrest was made, while Panama insists that its relevance must be based on the locus of the alleged crime.” (Reply, para. 83; see para. 103)

“This wording [of article 87] refers not only to immediate but also indirect interference with the freedom of the high seas. This strongly suggests that even if these interferences do not occur directly on the high seas but take effect from a different location, they still impact navigational freedom.” (ITLOS/PV.18/C25/9, p. 2, l. 45-48; see also ITLOS/PV.18/C25/9, p. 3, l. 1-5, and p. 2, l. 37-40)

“[T]he fact that a vessel is in port does not affect its right to enjoy freedom of navigation, including the freedom to sail towards the high seas.” (Reply, para. 72; see also Memorial, para. 74; ITLOS/PV.18/C25/2, p. 32, l. 4-24, ITLOS/PV.18/C25/9, p. 19, l. 3-6 and p. 22, l. 34-38 and, with regard to the *M/V “Louisa” Case*, ITLOS/PV.18/C25/9, p. 28, l. 33-41)

“Freedom of navigation means not only the right to traverse the high seas but also the right to gain access to it. This freedom would mean little to the international community if the vessels in port could not enjoy the same protections as those already on the high seas. Similarly, this freedom would be meaningless if States could indiscriminately arrest vessels in port without justification.” (Reply, para. 74)

“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

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to arrest them in port. The coastal State could rely on the concept that article 87 can only be breached if the interference takes place on the high seas. That is the other extreme." (ITLOS/PV.18/C25/9, p. 29, l. 9-18)

"In a similar vein, Rayfuse recalls that '[w]hile historically the port state has enjoyed enforcement powers in respect of violations occurring within its waters, *no right of sanction has applied in respect of activities that took place on the high seas* or within the maritime zones of other states before a vessel entered a port state's waters.'" (Reply, para. 71)

- "The M/V Norstar conducted bunkering activities supplying gas oil to megayachts on the high seas, outside the jurisdiction of any coastal State. As a lawful activity and as a legitimate use of the high seas, the only State that had jurisdiction over the bunkering activities of the M/V Norstar was the flag State, Panama." (Memorial, para. 16)

With regard to the usual location of the M/V "Norstar" *during bunkering operations*, see the testimony of Mr Rossi, ITLOS/PV.18/C25/1, p. 14, l. 21-22 and p. 24, l. 43-47; see also the testimony of Mr Morch, ITLOS/PV.18/C25/1, p. 28, l. 16-18.

With regard to the location of the M/V "Norstar" *when the Decree of Seizure was issued*, see ITLOS/PV.18/C25/9, p. 22, l. 44 - p. 23, l. 13; see also the testimony of Mr Morch, ITLOS/PV.18/C25/2, p. 3, l.15 - p. 6, l. 46; *with regard to the "Diario de Palma" newspaper article from August 2015*, see the testimony of Mr Morch, ITLOS/PV.18/C25/2, p. 6, l. 21 - p. 11, l. 30.

With regard to the arrest of the M/V "Norstar" *and the locus of the arrest*: "Italy violated article 87 because it arrested the M/V 'Norstar' for lawful activities that were conducted on the high seas." (Reply, para. 89; see also paras 78, 84 and 85; ITLOS/PV.18/C25/1, p. 8, l. 37 - p. 9, l. 4 and ITLOS/PV.18/C25/2, p. 26, l. 33 - p. 28, l. 10).

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“[T]he arrest of the M/V Norstar and its crew members was unlawful because the ship did not violate any laws or regulations of Italy that were applicable to it.” (Memorial, para. 63)

“Panama concedes that the M/V ‘Norstar’ was in Spain when it was arrested. However, Panama maintains that the arrest of the M/V ‘Norstar’ was illegitimately based on conduct on the high seas so as that the location where that arrest took place is ultimately irrelevant. What is relevant are the motives that led to such a forceful action by Italy.” (Reply, para. 57; see also Reply, paras 75, 104)

- “[T]he application of its internal laws by Italy to the activities and conduct performed by the M/V ‘Norstar’ and all the persons involved in its operation constitutes a clear breach of article 87 of the Convention.” (Reply, para. 106; see also paras 12 and 13 and Memorial, para. 20)

“Italy has hindered Panama’s right of navigating the oceans, by subjecting the M/V Norstar to Italian laws that apply to its own vessels within its own territorial waters.” (Memorial, para. 75)

“Italy made a complete confiscation of the ‘Norstar’ and its effects, thus completely removing its freedom to navigate and conduct legitimate business on the high seas.” (ITLOS/PV.18/C25/1, p. 5, l. 40-42; *concerning the “confiscation”*, see also ITLOS/PV.18/C25/2, p. 20, l. 47 - p. 21, l. 14)

“However, in spite of being aware that, by lacking a contiguous zone, it did not have any right to exercise its enforcement power to challenge any infringement of its customs or fiscal laws and regulations outside its territorial sea, Italy still proceeded to apply its internal legal regime to the M/V ‘Norstar’ and all the persons involved in its operation.” (Reply, para. 11; see para. 129, Memorial, paras 79, 83 and 87, and ITLOS/PV.18/C25/2, p. 23, l. 46-48)

With regard to extraterritoriality: “The fact that the arrest was executed while the vessel was in a port in Spain does not absolve Italy from having unlawfully extended

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the application of its criminal and customs law to proscribe conduct that occurred outside its jurisdiction." (Memorial, para. 66)

"By arresting the Norstar, Italy applied its laws extraterritorially, thereby violating principles of jurisdiction under international law." (Memorial, para. 65; see also ITLOS/PV.18/C25/1, p. 6, l. 39-43, ITLOS/PV.18/C25/9, p. 3, l. 29-33, and ITLOS/PV.18/C25/2, p. 33, l. 29-33)

- "Despite its own authorities concluding that the arrest of the M/V 'Norstar' was unlawful, Italy still does not accept this fact." (Reply, para. 63; see para. 103)

"[It]s unlawfulness is a natural consequence of the reversal of the arrest order by the Italian authorities themselves." (ITLOS/PV.18/C25/1, p. 7, l. 45-46)

"[T]he Tribunal of Savona ruled that the arrest of the *'Norstar'* was wrongful precisely due to the location of the vessel when it was bunkering. For this reason, the Public Prosecutor's order of arrest was revoked and the vessel was ordered to be returned to its owner." (ITLOS/PV.18/C25/9, p. 15, l. 44-47)

"A coastal State may decide to arrest a foreign vessel; but, if the arrest proves to be wrongful, the arresting party must bear the consequences of its decision. The legal procedures applied by Italy to arrest the M/V 'Norstar' had to conform with international law, despite their origin in its laws and practice of its own courts." (Reply, para. 101)

- "Panama's position is that before arresting a vessel, the arresting State must establish the existence of a probable cause to believe that an offence has truly been committed and that the defendant is likely to have committed it." (ITLOS/PV.18/C25/3, p. 8, l. 43-45; see also p. 7, l. 46 - p. 8, l. 8, p. 8, l. 36-41, p. 8, l. 47 - p. 9, l. 21 and ITLOS/PV.18/C25/2, p. 30, l. 14-19)

"Italy may have suspected the commission of a crime. … After the investigation, it should have been clear that there was no reason to arrest, much less to keep the order of arrest in force. How long was it necessary to keep the 'Norstar' under arrest

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as *corpus delicti?"* (ITLOS/PV.18/C25/2, p. 32, l. 36-40; *concerning the presence of evidence on board the* M/V "Norstar": see the testimony of Mr Rossi, ITLOS/PV.18/C25/1, p. 18, l. 44-46 and p. 19, l. 7-8)

"[I]n international law, reasonableness encompasses the principles of necessity and proportionality." (ITLOS/PV.18/C25/9, p. 30, l. 20-21), *on the reasonableness of the Decree of Seizure:* ITLOS/PV.18/C25/9, p. 30, l. 32-26, ITLOS/PV.18/C25/6, p. 21, l. 27-42)

Italy

- "[T]he Decree of Seizure and the Request for its execution do not constitute a breach of Article 87 because conduct ordinarily able to breach Article 87 is conduct that results in a physical and material interference with the navigation of a ship (namely, the execution of the Decree)." (Rejoinder, para. 44)

With regard to the freedom of navigation: "Freedom of navigation is first and foremost to be interpreted as freedom from enforcement actions." (Counter-Memorial, para. 87; see Rejoinder, para. 53; see also ITLOS/PV.18/C25/5, p. 31, l. 18-20)

"The essential content of freedom of navigation consists in a prohibition for States other than the flag State to interfere with the navigation of a vessel on the high seas." (ITLOS/PV.18/C25/5, p. 29, l. 23-25; see also Counter-Memorial, para. 78); "while the degree of interference may vary, at least some degree of interference with freedom of navigation is necessary in order for a breach of article 87 to be conceivable." (ITLOS/PV.18/C25/5, p. 29, l. 39-42; see also p. 30, l. 1 - p. 32, l. 10)

"Italy does not deny that in certain exceptional circumstances an act that falls short of enforcement action may still become relevant from the perspective of article 87, for instance when it produces some 'chilling effect'." (ITLOS/PV.18/C25/5, p. 32, l. 26-29) "Did the Decree of Seizure and the request for execution as such determine any chilling effect with regard to the vessel's ability to navigate? Again, no, they did not, because they were unknown." (ITLOS/PV.18/C25/6, p. 9, l. 38-40)

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"[U]ntil the decree was executed against the *M/V Norstar*, in Spanish waters, the Decree was a mere internal act of the Italian investigative and judicial authorities, which did not produce any effect on the *Norstar*'s freedom of navigation." (Rejoinder, para. 50(e); see also ITLOS/PV.18/C25/5, p. 32, l. 15-17; *with regard to the "chilling effect"*, see ITLOS/PV.18/C25/5, p. 32, l. 26 - p. 33, l. 18 and ITLOS/PV.18/C25/6, p. 8, l. 39 - p. 9, l. 43)

- "Two things can be evinced from this passage [*M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, para. 109]: a) that, contrary to Panama's contention, Article 87 does not apply everywhere, but only *applies to the high seas and, under article 58 of the Convention, to the exclusive economic zone*; b) that, again, contrary to Panama's contention, *Article 87 cannot be interpreted in such a way as to grant a vessel a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it*. The *M/V Norstar*'s case falls squarely within this statement." (Rejoinder, para. 55; see also ITLOS/PV.18/C25/6, p. 1, l. 15-45)

"The *M/V Norstar* was not prevented from gaining access to the high seas arbitrarily, but in the context of proceedings governed by law that required its arrest and detention. Therefore, no breach of Article 87 has occurred due to the *M/V Norstar*'s inability to take to the high seas." (Rejoinder, para. 63)

- *With regard to the seizure of the* M/V "Norstar" *and its place of enforcement:* "the question is therefore whether, at the time when the Decree of Seizure was enforced by the Spanish authorities, the *M/V Norstar* was in an area of the sea where it enjoyed freedom of navigation under Article 87(1), also read in conjunction with Article 58(1)." (Counter-Memorial, para. 88)

"Freedom of navigation is not a right enjoyed by States in all maritime zones, but rather on the high seas". (Counter-Memorial, para. 89, referring to article 86 of the Convention) "… [A]s is confirmed by article 8, paragraph 1, of the Convention, the internal waters' regime is characterized by the unlimited sovereignty of the coastal

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State, thus excluding any right of navigation for foreign ships, except the cases of distress or special agreement." (ITLOS/PV.18/C25/5, p. 35, l. 13-16)

"[A]t the time when the Decree of Seizure was enforced, the vessel was in Spanish internal waters and, therefore, it did not enjoy the right to freedom of navigation under Article 87(1). As a consequence, no breach of Article 87(1) can have occurred vis-à-vis Panama." (Counter-Memorial, para. 75; see para. 91; see also para. 102 and Rejoinder, para. 44; see also ITLOS/PV.18/C25/9, p. 27, l. 33-38)

With regard to the interpretation of article 87 advocated by Panama: "[T]his amounts to a fully-fledged attempt at re-writing article 87 of the Convention, as if it applied anywhere and everywhere that a ship may be – even in internal waters – so long as the ship sometimes traverses the high seas. That is clearly wrong, and Panama has failed to set down any way in which this extraordinary enlargement of article 87 may be reasonably confined, nor has Panama paid any attention to the dramatic consequences its new interpretation of the law would have for a State's sovereignty, including its enforcement powers to investigate and adjudicate crime in its internal or territorial waters." (ITLOS/PV.18/C25/10, p. 4, l. 9-16)

- "[A]n extraterritorial exercise of jurisdiction that does not determine any physical interference with the movement of a ship on the high seas does not constitute a conduct ordinarily able to breach Article 87. Since the *M/V Norstar* was within Spanish internal waters at the time when the Decree of Seizure was issued and executed, Article 87 of the Convention would not even be engaged, let alone breached, by Italy's conduct." (Counter-Memorial, para. 7; see also paras 75, 92 and 93; Rejoinder, para. 29; ITLOS/PV.18/C25/6, p. 3, l. 1-4; see also ITLOS/PV.18/C25/10, p. 5, l. 5-10)

"[A]rticle 87 is not concerned with territoriality or extraterritoriality, and these are not the elements to consider when assessing a possible breach. It is concerned with interference with navigation, as simple as that". (ITLOS/PV.18/C25/6, p. 3, l. 29-31)

"[T]here are provisions of the Convention that protect ships and their activities on the high seas from extraterritorial intrusions by the jurisdiction of a coastal State even

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when these intrusions do not result in interference with freedom of navigation." (ITLOS/PV.18/C25/6, p. 10, l. 16-19)

"What conduct would article 87 prohibit, for example, that articles 92 or 89 would not already prohibit, if article 87 were a provision simply protecting from extraterritorial exercise of jurisdiction?" (ITLOS/PV.18/C25/6, p. 10, l. 34-36)

- "[T]he Decree in question was never found unlawful by the Italian courts." (ITLOS/PV.18/C25/5, p. 18, l. 11-12; see also Rejoinder, para. 8)

"[T]he Tribunal of Savona's decision … was entirely separate from any assessment of lawfulness or otherwise of the Decree of Seizure in question. Indeed, the Tribunal of Savona did not say anything about the lawfulness of the Decree of Seizure. … The fact that an accused is ultimately acquitted does not mean that the investigation of that individual that led to its acquittal was unlawful." (ITLOS/PV.18/C25/10, p. 5, l. 47 - p. 6, l. 4)

"The legality of the arrest of a vessel under Article 87 must be assessed on the basis of the requirements of Article 87, that is to say, if the arrest interfered with the ship's freedom of navigation. It must not be assessed under the prism of whether the alleged crimes were later found to have been actually committed, or else." (Rejoinder, para. 29; see also ITLOS/PV.18/C25/6, p. 6, l. 20-35)

"[I]f the Italian courts had declared the Decree unlawful as a matter of Italian law, which they did not, this would not mean that there is a breach of international law." (ITLOS/PV.18/C25/5, p. 8, l. 11-12, with reference to the *ELSI Case* and the *Case concerning certain German interests in Polish Upper Silesia*)

"[A] State cannot possibly be held internationally responsible for conducting investigations that ultimately led to the acquittal of the defendants. That would represent an intolerable interference with each State's sovereign right to investigate and prosecute crime." (ITLOS/PV.18/C25/5, p. 8, l. 16-19) "[A] State cannot possibly be held internationally responsible every time it does not award compensation to an

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individual who has been acquitted of a crime, particularly if it has not been asked for." (ITLOS/PV.18/C25/5, p. 8, l. 23-25)

- "[T]he Decree of Seizure … was adopted on the ground of a regular investigatory framework and it was based on sufficient *fumus* for the purposes of further investigation into alleged criminal activity carried out primarily by an Italian national in relation to alleged crimes committed exclusively on Italian territory." (ITLOS/PV.18/C25/5, p. 14, l. 4-7; ITLOS/PV.18/C25/5, p. 13, l. 26 - p. 14, l. 7 and p. 24, l. 50 - p. 25, l. 2; *with regard to the nature and purpose of the Decree in Italian law*, see the testimony of Mr Esposito, ITLOS/PV.18/C25/7, p. 23, l. 26-31; *with regard to "fumus"*, see the testimony of Mr Esposito, ITLOS/PV.18/C25/7, p. 26, l. 32-49; ITLOS/PV.18/C25/10, p. 14, l. 11–25)

"The fact that this investigation did not lead to the ultimate prosecution of the individuals concerned – and condemnation – of course, does not necessarily mean that the seizure of that *corpus delicti* must therefore have been wrongful. As I will revert to shortly, the Italian courts acquitted the defendants, but did not find the Decree to be unlawful." (ITLOS/PV.18/C25/5, p. 17, l. 21-25; *with regard to the "corpus delicti" under article 253, paragraph 1, of the Code of Criminal Procedure,* see ITLOS/PV.18/C25/5, p. 17, l. 12-19)

"I should also emphasize at this point that Mr Carreyó's assertions on Monday that the seizure was a *sine die* confiscation is simply wrong. This seizure, by its very nature, as a means of investigation, as we have just seen from article 253 of the Italian Procedural Criminal Code, was only a temporary measure. That is also why, of course, the vessel was conditionally released in February 1999 and unconditionally released in March 2003. Clearly, there was nothing confiscatory about this seizure, nor anything *sine die* about it, and it was only the owner's failure to retrieve the vessel that extended the period of the seizure." (ITLOS/PV.18/C25/5, p. 17, l. 27-35)

With regard to the proportionality of the Decree: ITLOS/PV.18/C25/7, p. 4, l. 28-34

With regard to the non-arbitrariness of the Decree: ITLOS/PV.18/C25/7, p. 4, l. 36-44

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- **Article 87, paragraph 2, of the Convention**

Panama

- “In article 87, paragraph 2, the requirement of ‘due regard’ is a qualification of the rights of States in exercising the freedom of the high seas. The standard of ‘due regard’ 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.” (Memorial, para. 96; see also ITLOS/PV.18/C25/2, p. 37, l. 13-44; ITLOS/PV.18/C25/9, p. 8, l. 42-46)

“This provision does not distinguish between flag and coastal States; the freedoms are to be implemented and upheld by all States with respect to the interests of other States.” (Reply, para. 336; see also Reply, para. 110)

- “By its wrongful conduct, Italy has interfered unreasonably with the interests of Panama as the flag State with exclusive jurisdiction over M/V Norstar on the high seas.” (Memorial, para. 98)

Italy

- “[T]he obligation to have due regard to the rights of other States under Article 87(2) binds States that exercise their freedom of navigation under Article 87(1). It is … Panama that invokes Article 87(1), in the present dispute, and therefore any obligation of due regard under Article 87(2) binds Panama, and not Italy.” (Counter-Memorial, para. 202; see also ITLOS/PV.18/C25/6, p. 6, l. 43 - p. 7, l. 23)

“In 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.” (Counter-Memorial, para. 140)

- “Therefore, Italy has not violated paragraph 2 of Article 87 of the Convention, either.” (Counter-Memorial, para. 141)

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Did Italy breach article 300 of the Convention by maintaining the arrest of the *M/V "Norstar"* and by exercising its jurisdiction over the activities carried out by the vessel?[1]

- **The link between article 300 and article 87 of the Convention**

Panama

- "All 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." (Reply, para. 203; see paras 239 and 240)

"Panama is most aware of the interrelationship between these two provisions, recalling that the Tribunal cited the *M/V 'Louisa'* case in its judgement of 4 November 2016." (Reply, para. 202; see also ITLOS/PV.18/C25/3, p. 2, l. 36-41 and p. 3, l. 33-50)

- "[T]he freedom of navigation established under Article 87 guarantees a right to freedom of navigation on the high seas to all States as well as an obligation to respect other States' freedom to navigate without undue interference. It is in this context that Article 300 finds application to this case." (Memorial, para. 102; see also ITLOS/PV.18/C25/3, p. 2, l. 46 - p. 3, l. 3)

With regard to good faith: "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, including examples cited by Italy in its Counter-memorial, have demonstrated a lack of good faith, thereby contravening article 300 of the Convention." (Reply, para. 217)

[1] *Panama:* "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" (Final submissions of Panama; see also Reply, Submissions, para. 593; see Memorial, Submissions, para. 260).

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With regard to the definition of good faith: “A state does not act in good faith when it is found to have violated or acts in violation of a provision of the Convention.” (Memorial, para. 108) “In international exchanges and negotiations, good faith is presumed. However, Panama maintains that this presumption has been distorted by the unlawful conduct of Italy in several instances”. (Reply, para. 220)

With regard to abuse of rights: “Article 300 of the Convention specifically protects States from any abuse of rights and is being invoked by Panama with respect to the manner of the exercise of the right of jurisdiction recognized by the Convention. This provision also empowers the Tribunal to find justice and provide remedies when there are abuses of rights, including the seizure of property as an incidental procedure to the criminal prosecution of the persons having an interest on the operations of the M/V Norstar.” (Memorial, para. 125)

With regard to the interpretation of article 87 and “effet utile”, see Reply, paras 213-215: *“*[I]t is crucial to use the concept of good faith to interpret article 87 and link it with article 300 of the Convention” (Reply, para. 215; see also ITLOS/PV.18/C25/3, p. 1, l. 23 - p. 2, l. 41)

Italy

- “Panama invokes Article 300 as a stand-alone provision, contrary to the constant case law of this Tribunal on the interpretation of Article 300.” (Counter-Memorial, para. 168; see also para. 165, referring to the decision on Preliminary Objections, para. 131)

“Panama has failed to identify any provision of the Convention with respect to which Article 300 would have been breached”. (Rejoinder, para. 65(c); see also Counter-Memorial, para. 168)

- “Panama’s argument is that Italy has breached Article 300 with regard to Article 87, because it has breached Article 87. … If Panama were correct that violating a provision of UNCLOS equals to not fulfilling in good faith the obligations assumed under that provision, the illogical consequence would be that a violation of Article 300 would occur any time a State acts in contravention to the Convention.

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This conclusion is not tenable …" (Counter-Memorial, para. 146; see also Rejoinder, paras 69-70)

"[A] breach of Article 300 cannot be argued autonomously … Establishing 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." (Rejoinder, para. 75)

With regard to good faith: *"*All of the conduct that Panama claims are indicative of lack of good faith on Italy's part are not, on their merits, contrary to good faith." (Rejoinder, para. 65(d); see also Counter-Memorial, para. 169, and ITLOS/PV.18/C25/6, p. 20, l. 7-26)

With regard to the definition of "good faith": "Panama's allegations that Italy did not act in good faith are unsubstantiated and apodictic, and based on mere presumptions." (Counter-Memorial, para. 153) "[T]he ease with which Panama presumes bad faith on Italy's part is against fundamental principles of international law." (Rejoinder, para. 103, see also Counter-Memorial, para. 154) "Not only can bad faith not be presumed, … but such a serious allegation against Italy and against a State must also be proved to a rigorous standard of proof. Panama falls far short of that in this case." (Memorial, para. 108; Reply, para. 220)

With regard to abuse of rights: "Also with regard to the abuse of rights component of Article 300, the principle applies that it is necessary to establish a link with specific provisions of the Convention." (Counter-Memorial, para. 197, referring to the *Chagos Marine Protected Area Arbitration*, para. 303) "Panama has …failed to provide a link with any provision of the Convention that it alleges Italy has violated in exercising rights or jurisdictions under the Convention." (Counter-Memorial, para. 196)

With regard to "effet utile", see Rejoinder, paras 73 to 80, and ITLOS/PV.18/C25/6, p. 19, l. 7 - p. 20, l. 5 and p. 20, l. 28-42.

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Did Italy breach the obligation of good faith under article 300 of the Convention in light of the circumstances of the arrest of the *M/V "Norstar"* and Italy's subsequent conduct?

The circumstances of the arrest of the *M/V "Norstar"*

Panama[2]

- "Italy has not acted in good faith. Italy breached its obligation first by violating its obligation to allow free navigation under Article 87 by arresting and detaining M/V Norstar and its crew when it had no jurisdiction to do so." (Memorial, para. 114; see also Reply, para. 216)

"More importantly, as Captain Husefest of the M/V 'Norstar' has stated, Italian gunships threatened the M/V 'Norstar' in international waters. Such an action clearly exhibited bad faith." (ITLOS/PV.18/C25/3, p. 6, l. 21-23)

"Since Italy has admitted that arresting the M/V 'Norstar' on the high seas would have constituted a violation of its freedom of navigation, Panama would then like to ask: is it good faith on the part of a coastal State to avoid arresting a vessel when traversing its own territorial waters or international waters, for acts carried out there, but rather wait until it sailed into the port of another State to do so? Clearly, the answer is no, since such behaviour is deceptive in nature." (ITLOS/PV.18/C25/3, p. 6, l. 25-30; see also Reply, para. 225)

- "Italy knew that the M/V Norstar carried out such bunkering 'from 1994 to 1998', and did not take any steps to criminally prosecute this activity during those four years. Therefore, its decision to suddenly treat the Norstar's actions as a crime could hardly be considered as good faith." (Memorial, para. 118; see also Reply, paras 250 to 253 and 354 and ITLOS/PV.18/C25/3, p. 5, l. 3-47)

[2] For the list of Italy's actions which, according to Panama, "failed to meet good faith standards", see ITLOS/PV.18/C25/3/11, p. 3, l. 11-31.

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"Italy has stated that the reason for which it ordered and requested the arrest of the M/V Norstar was its 'bunkering activity off the coasts of France, Italy and Spain'. This attitude of Italy does not reflect good faith either but rather is an intentional act of evading the actual and relevant facts of this case …". (Memorial, para. 117; see also para. 120, and Reply, para. 224, 293-300)

- "[W]hen 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." (Reply, para. 247)

"[T]he arrest of the M/V 'Norstar' was seemingly rushed and enforced without the final and definitive approval of the Italian jurisdictional authorities." (Reply, para. 255; see also paras 226, 254, 260-273 and 362, and Memorial, para. 120)

Italy

- "The circumstances invoked by Panama are hardly indicative of any bad faith on Italy's part. On the contrary, they advance Italy's argument that its conduct was in compliance with the Convention". (Counter-Memorial, para. 150)

"In order to make up for its inability to prove any interference, the Panamanian narrative went on so far as to submit, for the first time in this proceeding …, that the 'Norstar' was harassed. On this point, the witness statement of Mr Husefest is vague and unreliable about time and circumstances. For the record, the question is not whether the 'Norstar' experienced any interference on the high seas at any point in its life, but whether the Decree of Seizure and the request for its execution determined any interference." (ITLOS/PV.18/C25/10, p. 5, l. 14-19)

- "[T]he *M/V Norstar* … was arrested and detained because it was allegedly part of a unitary criminal plan concerning the commission of the crimes of tax evasion and smuggling in the Italian territory. Therefore, the fact that the *M/V Norstar* was only arrested in 1998 finds a simple explanation in the fact that it was only by then that investigative activities by the Italian tax police came to suggest its

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involvement in the crimes specified above." (Counter-Memorial, para. 151; see also Reply, para. 82, and ITLOS/PV.18/C25/6, p. 22, l. 11 - p. 23, l. 10)

- "Panama's second contention is equally not indicative of any bad faith. … The *Norstar* was arrested in the internal waters of Spain precisely to avoid breaching the provision of the Convention on freedom of navigation on the high seas." (Counter-Memorial, para. 152; see Reply, paras 83 to 85; see also ITLOS/PV.18/C25/6, p. 23, l. 32 - p. 24, l. 20)

- "[T]he adoption of the Decree was neither premature nor unjustified." (Rejoinder, para. 88) "[T]he purpose of the Decree was to secure evidence assessing the commission of a crime by certain individuals also through the *M/V Norstar*." (Rejoinder, para. 89; see also ITLOS/PV.18/C25/6, p. 22, l. 28 - p. 23, l. 10)

"It is true that the Decree was adopted without the approval of the jurisdictional authorities, but only because such approval is not even contemplated, let alone required, by the Code of Criminal Procedure." (Rejoinder, para. 95; see paras 92 and 96)

Italy's conduct subsequent to the arrest of the *M/V "Norstar"*

(i) Conduct in relation to communications sent by Panama

Panama

- "One of the most salient illustrations of the lack of good faith on the part of Italy is that it did not answer any of the communications sent by Panama as a means to exchange views." (Reply, para. 276; see paras 277 to 292; see also Memorial, para. 114, ITLOS/PV.18/C25/3, p. 9, l. 30 - p. 10, l. 17, and ITLOS/PV.18/C25/9, p. 12, l. 40 - p. 13, l. 32)

"The failure to respond to a request for negotiation constitutes by itself a breach of an international obligation and reflects a lack of good faith." (Memorial, para. 121; see para. 123)

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Italy

- “What Italy is saying is that it did not respond to Panama’s communications because it *believed* – and, Italy accepts that this belief was legally wrong since 31 August 2004 – that the requests from Panama were coming from individuals not authorized to represent Panama.” (Rejoinder, para. 99; see paras 100, 101,105 and 108; see also Counter-Memorial, para. 177; ITLOS/PV.18/C25/6, p. 15, l. 42 - p. 18, l. 22)

“Panama presumes, without indicating any element to substantiate its position, that the reason for Italy’s silence was bad faith. In essence, Panama presumes Italy’s bad faith. Not only is this not true in light of Italy’s explanation of its own silence; Panama’s assertion is also contrary to the principle that good faith must be presumed.” (Counter-Memorial, para. 181)

(*ii*) *Conduct in relation to the Italian domestic proceedings*

Panama

- “Italy has not acted in good faith … neglecting to release the vessel when its own courts had decided that no crime had been committed.” (Memorial, para. 114; see also para. 119 and Reply, paras 302 and 311)

- “[T]he M/V ‘Norstar’ was detained for an inordinate period of time. Panama’s position is that the detention was prolonged, 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.” (Reply, para. 228; see also para. 229)

“Italy has completely abandoned its duty to provide for the maintenance of the vessel in order to prevent its decay … Thus, Panama feels entirely justified in describing Italy’s actions …as being conducted in bad faith.” (Reply, para. 331; see paras 303 to 312; see also ITLOS/PV.18/C25/3, p. 12, l. 17-43)

- “Italy has acted in bad faith not only by bringing the persons involved in the operation of the M/V Norstar to trial, but also by letting criminal proceedings endure

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for 5 years, from 1998 until 2003. Although the Italian courts dismissed the claims of the Prosecutor, none of the accused has received any offer of compensation." (Memorial, para. 115)

Italy

- "The return of the vessel was promptly offered upon payment of a security; at the end of the proceedings, it was released unconditionally, yet it was never collected by the owner. Even if Panama's statements were factually correct, Panama does not explain, let alone prove, how they are indicative of any lack of good faith." (Counter-Memorial, para. 183; see also para. 182)

- "Italy … has not detained the *M/V Norstar* for an unreasonable period of time; … at the latest on 11 March 1999, that is, less than 6 months after the execution of the Decree of Seizure on 25 September 1998, the *M/V Norstar* was released and could have been collected by its owner, who however failed to do so." (Rejoinder, para. 115; see paras 13-40 and 116; see also Counter-Memorial, paras 53-55, and ITLOS/PV.18/C25/6, p. 23, l. 33 - p. 23, l. 25)

- "The Italian judicial system provides for mechanisms of compensation for those who feel they have suffered a damage due to legal proceedings; however, none was activated by those who were put to trial. Also, Panama does not explain how bringing to trial people who are accused of a crime, or the duration of criminal proceedings, [is] suggestive of a lack of good faith." (Counter-Memorial, para. 184; see also the testimony of Mr Esposito, ITLOS/PV.18/C25/7, p. 26, l. 4-27)

(iii) Conduct in relation to the proceedings before the Tribunal

Panama

- "Italy has not acted in good faith by delaying these proceedings". (Memorial, para. 114)

"There were seven attempts made by Panama to communicate with Italy concerning this case, yet all of them were unsuccessful." (Reply, para. 282)

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"The 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." (Reply, para. 284)

- "[T]he Counter-memorial adds a … dimension to Italy's bad faith conduct. Italy has now tried to alter the facts of the case, saying that it was investigating actions by the M/V 'Norstar' performed in Italian territory." (Reply, para. 230; see paras 231-233 and paras 338-348)

Italy

- "That Italy has delayed these proceedings is a patently false statement. … It is regretful that Panama should make such gratuitous accusations, without pointing to one single event in support of its argument." (Counter-Memorial, para. 170)

"[A]ny delay in *commencing* these proceedings is imputable to Panama, and to Panama only. It is useful to recall that Panama invoked the commencement of international proceedings for the first time in 2001; it reiterated its position in 2002, and then went completely silent for 5 years and 7 months before actually commencing them." (Counter-Memorial, para. 171)

"Italy has explained in the incidental phase of the proceedings before the Tribunal that it did not consider Mr Careyò as a legitimate representative of Panama." (Counter-Memorial, para. 177)

"Italy's partial lack of response to Panama's communications cannot be invoked to blame Italy for Panama's delays in commencing this case. A Claimant can decide at any time that it wants to commence proceedings against a respondent, when there is no prospect of success in negotiations." (Counter-Memorial, para. 172)

- "It is impossible for Italy to understand how Panama can consider in breach of Article 300 and good faith statements that Italy has made in its Counter-Memorial, that constitute the mere narration of facts and legal principles in the context of a pleading. Italy hopes to be able to address this matter during the oral phase of the

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proceedings, in the event that Panama would like to clarify its position." (Rejoinder, para. 111)

Did Italy exercise its jurisdiction in a manner constituting an abuse of rights in breach of article 300 of the Convention?

<u>**Panama**</u>

- "Panama contends that Italy breached this provision 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." (Memorial, para. 126)

"Italy breached Article 300 of the Convention by exercising its authority and jurisdiction in contravention of the Convention, and in such a manner that acted to the detriment of Panama and persons involved in the operation of the M/V Norstar, thereby constituting an abuse of its authority and jurisdictional rights." (Memorial, para. 128)

"Italy violated the principle of legality because it knew that there was no international law of the sea provision in force allowing the application of its customs laws for arresting a vessel for acts performed in the high seas." (Memorial, para. 125)

- "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." (Reply, para. 356; see also paras 358-359, 362 and 363)

<u>**Italy**</u>

- "If, contrary to Italy's arguments, the Tribunal were to find that the abuse of rights component of Article 300 falls within its jurisdiction in the present case, its breach with respect to Article 87 still would not have occurred." (Counter-Memorial, para. 199; see also ITLOS/PV.18/C25/6, p. 12, l. 41 - p. 13, l. 44)

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"The necessary prerequisite to establish that a State has abused a right under international law is that such State had a right to exercise in the first place." (Counter-Memorial, para. 200)

"Article 87 … does not confer any right or jurisdiction to Italy in the present dispute, but only places obligations on Italy vis-à-vis Panama." (Counter-Memorial, para. 201)

"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." (Rejoinder, para. 124; see para. 125)

- "Panama tries to enlarge the scope of the dispute … Italy does not intend to engage the merits of this argument, but wishes to note that Article 21 of the Convention is not part of the present dispute as determined by the Tribunal, and therefore does not fall within its jurisdiction in the present case." (Rejoinder, para. 121)

If the Tribunal has jurisdiction to consider these provisions, does the Decree of Seizure for the *M/V "Norstar"* breach articles 92 and 97, paragraphs 1 and 3, of the Convention?

<u>Panama</u>

- "By ordering the arrest of the M/V Norstar in the exercise of its criminal and tax jurisdiction for bunkering activities performed by Panama on the high seas, Italy also breached Articles 92, 97(1) and 97(3) of the Convention." (Memorial, para. 92; see also ITLOS/PV.18/C25/2, p. 36, l. 12-15)

"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." (Memorial, para. 90; see also para. 93)

"[B]y instituting proceedings against the master and the other persons in the service of the M/V 'Norstar', Italy also contravened article 97(1)." (Reply, para. 373)

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"Panama contends that the character of the dispute is not transformed in any way by the consideration of these provisions, and does not expect that Italy will be judged on the basis of these additional provisions, but rather that they will complement the application and interpretation of articles 87 and 300 of the Convention, hence contributing to the sound administration of justice." (ITLOS/PV.18/C25/2, p. 37, l. 7-11)

Italy

- "While Panama invokes Articles 92, 97(1) and 97(3), it is apparent from the Submissions in Chapter 5 of its Memorial that Panama does not seek a declaration from the Tribunal that Italy has breached those provisions of the Convention." (Counter-Memorial, para. 207)

"Considering that Articles 92(1), 97(1) or 97(3) and their content were not even mentioned in Panama's Application and therefore do not arise directly from it, the issue that Italy would like to address is whether these claims can be considered as implicit in Panama's Application. The answer should be most definitely in the negative." (Rejoinder, para. 139)

- **Rules of evidence**

What is the standard of proof applicable in this case?

Panama

- "Panama has already argued … 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." (ITLOS/PV.18/C25/9, p. 24, l. 16-19)

"The *probatio diabolica* rule states that the *ratio* inherent in the rules of burden of proof for negative facts applies to cases where an actor faces problems establishing the evidence, provided such problems are beyond its reach and no fault is imputable to it. This principle is applicable to Panama in the present case because it has

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requested evidence from both Italy and Spain without success."
(ITLOS/PV.18/C25/3, p. 29, l. 10-14; see also ITLOS/PV.18/C25/3, p. 28, l. 39-46, with reference to the *Corfu Channel Case*; ITLOS/PV.18/C25/9, p. 13, l. 34-43; *with regard to evidence on criminal procedure in Italy*, see also ITLOS/PV.18/C25/9, p. 24, l. 29-38; *with regard to the logbook and other documents relating to the vessel*, see ITLOS/PV.18/C25/9, p. 14, l. 36-46; *with regard to the testimony of Mr Esposito*, see ITLOS/PV.18/C25/9, p. 13, l. 45-47; *with regard to the letters sent by the Service of Diplomatic Litigation and Treaties of the Italian Ministry of Foreign Affairs* (Reply, Annex 12, and Memorial, Annex 7), see ITLOS/PV.18/C25/9, p. 14, l. 1-16 and l. 23-32)

- "[I]t is not only possible to prove facts through written documents only. The 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. This evidence has an equal value." (ITLOS/PV.18/C25/9, p. 31, l. 9-12)

- "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." (ITLOS/PV.18/C25/9, p. 31, l. 14-17)

Italy

- "It concerns the generally recognized principle that 'evidence produced by the parties [must be] "sufficient" to satisfy the burden of proof'" (ITLOS/PV.18/C25/5, p. 8, l. 30-32)

"Panama advances a significant number of factual and legal contentions which are unsupported by a sufficient standard of proof." (ITLOS/PV.18/C25/5, p. 9, l. 16-17; see also ITLOS/PV.18/C25/7, p. 8, l. 9-16) "[F]requently where Panama cannot prove its assertions, it instead tries to shift the burden of proof onto the defendant." (ITLOS/PV.18/C25/5, p.10, l. 10-12; *with regard to the use of the maxim "res ipsa loquitur" by Panama*: ITLOS/PV.18/C25/7, p. 9, l. 8-18).

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- “It is not for Italy to provide Panama with all the evidence it needs to build its case.” (ITLOS/PV.18/C25/10, p. 8, l. 18-19)

“Panama must now bear the consequences of that refusal. It is not for Italy to provide Panama with all the evidence it needs to build its case.” (ITLOS/PV.18/C25/10, p. 8, l. 18-19)

- “Nor can Panama make up indeed for its evidential failures through the oral testimony of self-interested witnesses.” (ITLOS/PV.18/C25/10, p. 8, l. 44-46)

“I [Counsel for Italy] also want to challenge the strength of that oral evidence as a general matter based on well-accepted principles in international dispute settlement affirming 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.” (ITLOS/PV.18/C25/10, p. 9, l. 11-15, with reference to the *Nicaragua Case*; see l. 16-22; see also, ITLOS/PV.18/C25/10, p. 9, l. 24-31)

- **Jurisdiction and applicability of article 87**

Panama and Italy are both States Parties to the Convention. The Parties disagree on whether the Tribunal has jurisdiction over the *M/V “Norstar” Case*.

The relevant provisions concerning jurisdiction are laid down in article 286, article 287, paragraph 4, and article 288, paragraph 1, of the Convention and in article 21 of the Statute. Article 286 of the Convention provides:

> Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Article 287, paragraph 4, of the Convention provides:

> If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

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Article 288, paragraph 1, of the Convention provides:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

Article 21 of the Statute provides:

> The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

Reference should be made in this regard to article 288, paragraph 4, of the Convention, which provides: "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal."

The Tribunal's substantive jurisdiction, that is to say, the authority to exercise the powers inherent in the judicial function, stems both from its Statute, as laid down by UNCLOS, which establishes it, and from the declarations made by Panama and Italy recognizing its jurisdiction in the present case.

In judicial settlement, the two legal bases are distinct. Jurisdiction stems from a combination of the Statute and the consent of each Party. The consent of each Party permits the Tribunal to entertain the specific dispute between them. However, the powers that constitute "jurisdiction" in general stem from the Statute.

The Tribunal may deal with the merits of a case only if the conditions laid down by the parties and in its Statute are satisfied in the case at issue. The conditions laid down by the parties relate to the jurisdiction of the Tribunal while the conditions laid down in its Statute relate to the admissibility of the action. It is therefore for the parties and for the Tribunal to raise objections to the exercise of judicial power if any of those conditions is not satisfied.

The present case was brought before the Tribunal unilaterally by Panama, the Applicant, availing itself of a compulsory jurisdiction mechanism. Italy, the

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Respondent, seeks to evade it by contesting the jurisdiction of the Tribunal and the admissibility of the Application.

The Tribunal has to examine with particular care the question of its jurisdiction, which is fundamental to the present case because the Parties disagree completely on this point.

The Tribunal has taken precautions in its case-law in respect of the examination of its jurisdiction according to the nature of the proceedings brought before it. These precautions should be qualified on account of the differences between provisional measures and preliminary objections.

The distinction between jurisdiction and admissibility is of particular practical importance. Judicial decisions that do not adhere scrupulously to the limits imposed on jurisdiction can have a significant effect on the parties' expectations, especially since international judicial bodies rule at first and last instance. Similarly, the misclassification of a question of admissibility as a question of jurisdiction may unduly extend the scope of the parties' judicial claims in fact and in law. Consequently, the court or tribunal must always avoid deciding a question of admissibility when it examines its jurisdiction, that is to say *the authority to exercise the powers inherent in the judicial function*, which stems both from its Statute and from the declarations made by the Parties recognizing its jurisdiction in the present case. It should be noted that, in judicial settlement, the two legal bases are distinct. The exercise of judicial power by the Tribunal is subject to these two types of conditions being satisfied.

Sometimes, the Tribunal has relied on arguments relating to the admissibility of the legal action in order to decline jurisdiction. That was what happened in the *M/V "Louisa" Case,* as I pointed out (in paragraph 38 of my Separate Opinion). The Tribunal states that

> to enable it to determine whether it has jurisdiction, Saint Vincent and the Grenadines must establish a link between the facts advanced and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by it (para. 99 of the Judgment,

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> which reproduces the reasoning adopted by the ICJ in *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803).

It should have been added that the dispute must be one which the Tribunal has jurisdiction to determine *ratione materiae* pursuant to the Convention. In other words, the dispute must exist and be justiciable.

As the ICJ stated in the Lockerbie case: "The dispute must in principle exist at the time the Application is submitted to the Court" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9, at pp. 25-26, paras 42-44).

Furthermore, the Court also held that "in terms of the subject-matter … the dispute must be 'with respect to the interpretation or application of [the] Convention'" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, para. 30).

In the *M/V "Norstar" Case*, the Tribunal conducted an examination of the applicability of article 87, relied on by Panama, and concluded that: "[c]onsequently, the Tribunal concludes that article 87 is relevant to the present case" and, in the operative provisions of the Judgment, it "[r]ejects the objections raised by Italy to the jurisdiction of the Tribunal and finds that it has jurisdiction to adjudicate upon the dispute".

It should be borne in mind that, in the law on evidence, relevancy expresses proof of facts which have a legal interest in the dispute and which are such as to influence the outcome of the dispute.

In addition, the Tribunal's ruling is binding on the Tribunal itself and on the two Parties, having the force of *res judicata*.

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In other words, the relevancy of the article and its applicability are essential elements of the applicable regime in the legal order that provides a basis for the settlement of the dispute in that order. Thus, the Tribunal does not need to concern itself with internal considerations – pure facts in the international order – in order to fulfil its function.

As the ICJ states,

> [a]lthough it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 116, at p. 132).

This recalls the system applicable to nationality. "It does not depend on the law or on the decision of [of a State] whether that State is entitled to exercise its protection, in the case under consideration" (*Nottebohm Case (second phase), Judgment of 6 April 1955, I.C.J. Reports 1955*, p. 23). On the other hand, the internal validity of nationality is the primary condition for its international validity. Just as international law acknowledges that States have exclusive competence in determining nationality, it makes its effectiveness in the international order subject to its own requirements. Accordingly, a challenge by a State to an act of nationality does not invalidate it but does render it not opposable.

As is noted by Brownlie,

> Nationality is a problem, inter alia, of attribution and regarded in this way resembles the law relating to territorial sovereignty. National law prescribes the extent of the territory of a State, but this prescription doesn't preclude a forum which is applying international law from deciding questions of title in its own way, using criteria of international law.
> (I. Brownlie, "The Relations of Nationality in Public International Law", *BYBIL*, 1963, pp. 290-291)

It should be recalled that the high seas are the maritime area where there is complete freedom of navigation for any vessel. That freedom – the first of the six freedoms provided for in article 87, paragraph 1 – forms the basis for the principle that the flag State has exclusive jurisdiction over its own vessels in accordance with international rules under article 92, paragraph 1. This is a guarantee of the

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effectiveness of freedom on the high seas so that no State is tempted to set itself up as a maritime police force.

The fundamental principle in this maritime area is freedom of navigation. In a world of free communication and in particular undergoing globalization of trade, the principle influences all the legal regimes applying to the different maritime zones. This key principle in the law of the sea prevails over claims to ownership asserted by the maritime powers.

It should be stressed that the flag State generally enjoys exclusive jurisdiction over vessels flying its flag on the high seas. The relevant exceptions are laid down in international treaties and the Convention (article 92, paragraph 1) or may be based on international custom, such as the right of self-defence. Since the high seas are governed by international law, the freedom of navigation is subject to certain limitations recognized within that legal order. Thus, ships on the high seas may be checked by foreign warships if they are engaged in activities subject to the right of visit of States other than the flag State (article 110 of the Convention). This is because the freedom of navigation may lead to conduct or activities of which States collectively disapprove; hence the developments relating to the freedom of navigation.

It must be hoped that in the foreseeable future these developments will include cases of trafficking of migrants, drugs and weapons of mass destruction and even IUU fishing, which are detrimental to peace on the seas and oceans. Through treaties, States will be able to regulate effectively the policing powers of the coastal State, the flag State and other States in those activities alongside piracy, ships without nationality, unauthorized broadcasting from the high seas, the right of visit and cooperation to combat crimes on the high seas in general.

Under article 87 of the Convention, the high seas are open to all States. Accordingly, no part of that zone can come under the sovereignty of any one State. In short, the principle of freedom of the high seas forms the legal regime for this area and the freedom of navigation is the first of the six freedoms recognized by paragraph 1 of article 87 of the Convention. This means that any vessel may sail on the high seas

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without intervention from States other than the flag State. Freedom of navigation is based on the individual jurisdiction of the State over vessels flying its flag in that zone. There are exceptions to the exclusive jurisdiction of the flag State in relation to the right of hot pursuit, the right of visit, piracy or any other incident of maritime navigation.

In the present case, the main issue to be resolved is whether or not bunkering on the high seas is covered by the freedom of navigation. As we know, such activity on the high seas falls outside the regulation or control of any State except the vessel's flag State. As such, bunkering in that area is covered by the freedom of navigation. Consequently, control or exercise of jurisdiction over the vessel on the high seas by any State other than the flag State constitutes a blatant breach of the freedom of navigation enshrined in article 87 of the Convention; such control or exercise of jurisdiction may take a wide variety of very different forms.

The Tribunal rightly holds that, by extending the application of its criminal law to the high seas, issuing the Decree of Seizure and requesting the Spanish authorities to execute it, which they did, Italy breached the freedom of navigation enjoyed by Panama as the flag State of the *M/V "Norstar"* under article 87, paragraph 1, of the Convention.

The interpretation of the legal regime of internal waters must be more cautious, on the other hand. The State does exercise its full sovereignty in its maritime waters, with any associated consequences for foreign vessels.

However, the inalienable rights inherent in the status of a vessel exclusively carrying out offshore bunkering activities should not be overlooked. Access to a State's port does require the prior authorization of the State's port authorities but the abovementioned status of the vessel gives it the right of access to the high seas.

Otherwise, it would be destined to wander off the coast, not fully enjoying the freedom of navigation which must provide a right of access to and from the sea or the freedom to access or transit through a port. The conditions and arrangements

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under which that freedom is exercised must comply with the port State measures and may not in any way undermine its legitimate interests.

It should be borne in mind that ships sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in the Convention, are subject to its exclusive jurisdiction on the high seas. If those ships did not benefit from the freedom of navigation and the related rights, they would have to resolve to return to the ports of the flag State even if they were thousands of nautical miles away.

In this case, however, the matter at hand is not "[t]o interpret the freedom of navigation as encompassing a right to leave port and gain access to the high seas". Rather, it is a question of the arrest and detention of the *M/V "Norstar"*, wrongful acts the consequences of which are to prevent

- the *M/V "Norstar"* gaining access to the high seas and therefore
- enjoying the freedom of navigation, and
- developing the bunkering activities in which the *M/V "Norstar"* was engaged on the high seas.

The acts subjecting the activities of the *M/V "Norstar"* on the high seas to the jurisdiction of Italy breach the freedom of navigation because the principle of the exclusive jurisdiction of the flag State is a fundamental element of the freedom of navigation enshrined in article 87 of the Convention.

The arrest and detention of the *M/V "Norstar"* are unlawful because the vessel did not violate any Italian laws. Italy's application of its laws, resulting in the confiscation of the vessel, breaches article 87 by depriving it of the freedom of navigation. The lack of a contiguous zone prevents it from exercising its enforcement powers to challenge any possible infringement of its customs or fiscal laws. In addition, the Italian judicial authorities confirmed in respect of Italy's extraterritorial application of its laws – in arresting the *M/V "Norstar"* – that the arrest was unlawful. The Decree of Seizure and its execution related to activities carried out on the high seas by the *M/V "Norstar"*. These constitute obstacles to navigation and only the authorities of

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the flag State may order the arrest or the detention of the vessel. In other words, it is for those authorities to avoid obstacles to navigation: freedom of movement, the right to leave port, physical interferences on the high seas with indirect measures etc. That is to say, in light of the facts of the case, the legal regime of the freedom of navigation has been substantially affected.

As far as article 300 of the Convention is concerned, the Tribunal has recognized its relevance in this case. It will have to be determined whether or not it is applicable in the light of the pleas raised by Panama.

Article 300 states:

> 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 right.

Article 300 encompasses two aspects underlying the concepts of good faith and abuse of rights. Good faith is always presumed and it is for the party alleging bad faith to prove it. Good faith represents a legal standard by which the court or tribunal is able to assess the conduct of the parties. It can be viewed as

> conduct which the parties are legally obliged to observe, in the performance and the interpretation of their rights and obligations, whatever their source, in accordance with a general legal principle whose binding force is reaffirmed in consistent practice and jurisprudence (*Dictionnaire de droit international public*, Jean Salmon (ed.), p. 134).

"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 253*,* at p. 268, para. 46).

The principle is recalled in the 1969 Vienna Convention on the Law of Treaties with regard to both the performance and the interpretation of treaties (article 31, paragraph 1, of the VCLT). In respect of the exercise of a power, good faith presupposes the possibility that an act can be justified by reference to the pursuit of a legitimate purpose. "The power of making the valuation rests with the Customs

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authorities, but it is a power which must be exercised reasonably and in good faith" (*Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 176, at p. 212). In any event, good faith is always linked to an existing rule.

> The principle of good faith is … one of the basic principles governing the creation and performance of legal obligations … ; it is not in itself a source of obligation where none would otherwise exist (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 69, at p. 105, para. 94).

As regards abuse of rights, it makes it possible to sanction any exercise of a right that goes beyond the limits of reasonable use of that right. The existence of the right can hardly be contested, but it is the manner in which it is exercised, where this causes prejudice to others, that entails an abuse of rights. Abuse of rights can also stem from the application of an unlawful act which is incompatible with the primary rule establishing the right in question. There is also an abuse of rights where the State acts with the sole intention of harming another, even if it complies with its international obligations. Ultimately, abuse of rights can be viewed as where a

> State exercises a right, power or competence in a manner or for a purpose for which that right, power or competence was not intended, for example to evade an international obligation or to obtain an undue advantage (*Dictionnaire de droit international public*, *op. cit.*, p. 364).

In this case at issue, it would seem that it is this second element of article 300, abuse of rights, that allows the Tribunal to fulfil its task. The somewhat elliptical approach taken by the Tribunal may seem surprising, in particular the emphasis placed on the first element, good faith.

The question arising is whether the rights, powers and freedoms conferred on the Respondent by the Convention are exercised by it in a manner which scarcely constitutes an abuse of rights.

(a) It is apparent from the *ratio legis* for the Decree of Seizure and its execution that it was a matter of offshore bunkering which was considered to relate to *corpus delicti*. These acts were obstacles to free navigation, exacerbated by the continued detention of the *M/V "Norstar"*. By illegally

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applying its internal legislation outside its territory to lawful offshore bunkering activities and by exacerbating these acts by extending the detention of the *M/V "Norstar"* for a very long period, despite the decisions made by the Italian courts themselves holding that the prosecution was unlawful in criminal law.

(b) The *M/V "Norstar"* was detained for a very long period under the control and authority of Italy, which was not required to take any steps to return the ship to its owner or to the flag State. On the contrary, the *M/V "Norstar"* had decayed so much that it had to be sold in public auction as scrap. Nevertheless, as the court having jurisdiction, the Tribunal of Savona should have taken the appropriate steps to maintain and thus to preserve the ship and other property on board during the time of the detention.

(c) The other important element is that Italy waited until the *M/V "Norstar"* was in the port of Palma to arrest the vessel. The decision to arrest the vessel in the internal waters of a third State, when it was clear that such an arrest on the high seas would constitute a breach of the freedom of navigation, is telling. Furthermore, it is possible under the Decree of Seizure itself for the vessel to be arrested on the high seas. As the case stood so far back in time and involved intertemporal law, the Tribunal should have paid closer attention to the documentary evidence and carried out a more detailed examination of the oral proceedings in order to arrive at a more precise characterization of the facts of the case.

Note should also be taken of other points that bear out the idea of an abuse of rights.

(d) The premature enforcement of the Decree of Seizure. The arrest of the *M/V "Norstar"* was premature and enforced without final and definitive approval from the Italian judicial authorities. It should be noted that the Decree of Seizure and the Request for its execution were issued on 11 August 1998, while the Italian fiscal police transmitted its findings on the investigation regarding the *M/V "Norstar"* to the Public Prosecutor only on 24 September 1998. As we know, provisional measures may be ordered only if it is established that they

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are justified *prima facie* in fact and in law and that they are urgent, none of which has really been proved by the Respondent. Furthermore, the decisions delivered by the Italian courts indicated that the prosecution was illegal from the point of view of criminal law.

(e) The other important point is the withholding of information. Since the incidental phase, the Applicant has stated that Italy has always been opposed to disclosing all the documents concerning the criminal proceedings against the *M/V "Norstar"*. Its argues that Italy has withheld vital information relevant to the present case. In this regard, Panama has referred to letters from the Service of Diplomatic Litigation dated 4 September 1998 and 18 February 2002, informing the Italian Prosecutor of the non-existence of a contiguous zone and expressly referring to the claim for damages by the Agent of Panama. The existence of these documents was disclosed by Italy only in 2016. The obligation to cooperate in the settlement of disputes is thus seriously impaired.

(f) Note can also be taken of the silence kept when confronted with the persistent claims made by Panama, not to mention the international obligation to have due regard for the interests of other States. 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.

(g) In addition, Panama asserts that the reasons Italy used to justify the Decree of Seizure were contradictory. In its view, 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 have amounted to a breach of article 87 of the Convention, Italy based its Decree of Seizure on the constructive presence doctrine, which is applicable only to seizures on the high seas. Furthermore, once the Tribunal of Savona had held that the *M/V "Norstar"* conducted its business outside territorial waters, it is inconsistent to allege that the vessel was arrested for a crime that it was suspected of having committed in Italy. Accordingly, the Applicant requests the application of the principle of

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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 prohibits Italy from now arguing in direct opposition to the conduct it itself had stated was responsible for this case being brought before the Tribunal.

All these points which have been emphasized constitute at least an abuse of rights on the part of Italy in the absence of evidence on the basis of which they could be characterized as bad faith.

II. STANDARD OF PROOF

What is the standard of proof applicable in this case?

In characterizing proof as the demonstration of the existence of a fact (in his *Dictionnaire de la terminologie du droit international*, p. 471), Basdevant recalls the *Queen Case* of 26 March 1872:

> One must follow, as a general rule of solution, the principle of jurisprudence, accepted by the law of all countries, that it is for the claimant to make the proof of his claim.

It is said today that "the applicant has the burden of proof" and, according to J.C. Wittenberg, "La théorie des preuves devant les juridictions internationales", *R.C.A.D.I. 1936*, p. 59, "written proof is that which comes from papers or documents such as to establish the alleged fact".

Consideration will now be given the methodology of proof before turning to the matter at hand. Written proof comes from papers or documents such as to establish the alleged fact, including treaties, correspondence, laws, regulations, orders, decrees, judicial and administrative acts, etc.

The ICJ states that:

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> In accordance with its practice, the Court will first make its own determination of the facts and then apply the relevant rules of international law to the facts which it has found to have existed …
> (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda, Judgment, I.C.J. Reports 2005*, p. 168, para. 57).

The Court continues:

> These findings of fact necessarily entail an assessment of the evidence. The Court has in this case been presented with a vast amount of materials proffered by the Parties in support of their versions of the facts. The Court has not only the task of deciding which of those materials must be considered relevant, but also the duty to determine which of them have probative value with regard to the alleged facts. The greater part of these evidentiary materials appear in the annexes of the Parties to their written pleadings. The Parties were also authorized by the Court to produce new documents at a later stage. In the event, these contained important items. There has also been reference, in both the written and the oral pleadings, to material not annexed to the written pleadings but which the Court has treated as "part of a publication readily available" under Article 56, paragraph 4, of its Rules of Court. Those, too, have been examined by the Court for purposes of its determination of the relevant facts. (para. 58)

The Court concludes its methodological considerations in paragraph 59:

> As it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value. In accordance with its prior practice, the Court will explain what items it should eliminate from further consideration (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 50, para. 85; see equally the practice followed in the case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3).

The particular characteristics of jurisdiction in international law explain the relative margin of discretion of the organ exercising it and the vital role played by parties in establishing a purely voluntary jurisdictional connection. They can be seen inter alia in the rules on evidence.

The evidentiary mechanisms show that the parties and the judicial body combine in establishing the legal truth.

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On the one hand, it is for each party to prove its claims, both in relation to the facts on which they rely (including domestic law, which has the status of simple fact vis-à-vis the International Tribunal) and in relation to the law, whatever might often be said and in particular where the applicable rules are customary and the State invoking them has to establish both their substance and their applicability in its relations with the opposing party. On the other hand, however, the Tribunal has considerable latitude in most cases in assessing the probative value of evidence presented to it and plays an important role in establishing the truth; written or testimonial evidence is submitted to it, but it does not remain passive in relation to that evidence and has the power to examine witnesses, to request additional information from the parties, to have recourse to new measures of inquiry (expert opinions, inquiries) etc.; it may apply an adverse presumption to the failure by one party to produce evidence under its control; lastly, within the considerable latitude it is allowed by the rules on evidence, which do not follow any particular national system but rather the common set of their "general principles", it enjoys a wide margin of autonomy in respect of admissibility and the assessment of the probative value of evidence submitted to it.

The facts of the present case, viewed in light of the applicable rules of law, show extremely clearly the successive failures by Italy to fulfil its obligations to Panama under the Convention.

Italy has sought to evade its fundamental responsibility by placing it on Spain, which carried out the arrest of the *M/V "Norstar"*. However, the clauses establishing prerogatives in the Strasbourg Convention of 20 April 1959 are clear. They present a requesting State and a requested State, the latter acting in the name and on behalf of the former, in conformity with the Convention. Article 1 thereof provides:

> 1 The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

In truth, Spain itself had no interest in the seizure of the *M/V "Norstar"*. Its action simply follows the "International Letters Rogatory of the Tribunal of Savona to the

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Spanish Authorities, 11 August 1998" and Italy's order constituting a request for international judicial assistance sent to Spain.

It is thus Italy that initiated the letters rogatory and, consequently, it is Italy that is responsible for the actions of the Spanish authorities carried out in its name since, with Spain being the requested State, they were hardly responsible for conducting an investigation into the validity or invalidity of the arrest of the vessel in the context of a request for assistance.

Spain was accountable only for the manner in which the arrest was carried out, that is, for the protection of the integrity of the vessel and crew when arrested. This definition of mutual responsibility is inherent in the system of judicial assistance. This distinction between the responsibility of the requesting State and the responsibility of the requested State in the area of judicial assistance also means that, if a criminal charge is unfounded, it is the requesting State that is liable for compensation, not the requested State; any other conclusion would result in States' refusing to accept a request for judicial assistance.

What is more, in annex to its letter of 18 March 2003, Italy sent Spain the judgment of the Tribunal of Savona, requesting it to execute the release order. That is to say, Italy considered its request necessary in order for the vessel to be released. Similarly, Spain considered that the vessel was still Italy's responsibility when it requested its authorization to demolish the vessel in its letter of 6 September 2006.

The necessary conclusions must be drawn from these findings with regard to Italy's international responsibility, and in particular the issue – the crux of the present case – of the production of documents, to which Italy has systematically refused to grant access to Panama.

As we know from the statements made by the Italian expert Mr Esposito, Panama was legally entitled under Italian law to request the entire files from the administrative and criminal proceedings for the purposes of the present case.

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In *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I. C. J. Reports 1980,* p. 3, at p. 10, para. 11, the ICJ states:

> In the present case, the United States has explained that, owing to the events in Iran of which it complains, it has been unable since then to have access to its diplomatic and consular representatives, premises and archives in Iran; and that in consequence it has been unable to furnish detailed factual evidence on some matters occurring after 4 November 1979. It mentioned in particular the lack of any factual evidence concerning the treatment and conditions of the persons held hostage in Tehran.

In other words, no one is expected to do the impossible. In those circumstances, as in the case of the *M/V "Norstar"*, the burden of proof becomes volatile because what must be proved is significantly limited by what can be proved.

An international court or tribunal must adjudicate on the facts in dispute, which it may do only if the parties have both the right and the opportunity to furnish evidence to it with a view to the resolution of the dispute.

The criterion of relevance, which stems from the logical need to have available papers and documents such as to establish the facts alleged by the Applicant, would seem to apply.

The concept of *probatio diabolica* is a legal requirement for achieving an impossible proof. This can be viewed as a remedy whose purpose is to reverse the burden of proof or to grant additional rights to the Applicant.

There is hardly consensus between the Parties in this case on the rules on evidence, with regard to the burden of proof, the applicable standard of proof or the probative value of witnesses.

In respect of the request for further information made by the Tribunal concerning the cargo on board the *M/V "Norstar"* at the time of seizure and the monitoring and maintenance works carried out after the seizure, Italy declined its responsibilities when the detained vessel fell within its jurisdiction *ratione materiae*. It asserts that the ship owner and Panama were in possession of documentation stating that they did not have access to those documents, which remained on board the ship after the

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seizure. The documents were therefore placed under the authority and control of the Italian authorities, through the Spanish authorities, from the arrest until the destruction of the *M/V "Norstar"* in 2015.

Italy was thus in a position to provide the documents to the Tribunal, as the Italian expert Mr Esposito enlightened the Tribunal. He stated, in response to the question whether Italian law permitted files in criminal cases to be produced as evidence, that "[t]he law provides for this … it must be acknowledged that the law makes it possible to transfer files from one case to another, having due regard to the rules".

Accordingly, Panama was legally entitled to request the whole files. Italy's refusal to grant access to those files was therefore contrary to Italian law.

Italy states in its letter to the Tribunal of 27 September 2018 that it is not in possession of any relevant documents. In its view, Panama's alleged justifications for not providing information on the issue at stake are untenable. It maintains that not only is Panama's answer speculative in nature, but the exercise of speculation is particularly extreme and riddled with contradictions.

The present case seems to centre on the question of the production of documents.

The relevance of the facts give rise to the relevance of the rules governing those facts. Such relevancy translates the application of the law, as the legally relevant facts permit the characterization and determination of the applicable law, allowing the judicature to give a ruling in order to settle the dispute. Note should also be taken of the comment made by Italy which seems to refer to extinctive prescription.

According to Italy, Panama cannot shift the blame to it for its own failure to provide adequate evidence in this case. In this regard, it claims that Panama must bear the evidential consequences of its significant delay in commencing this case.

That late commencement of the proceedings is in fact imputable to Italy. This question was examined in the Preliminary Objections phase. Paragraph 214 of the Judgment of 4 November 2016 states:

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> The Tribunal observes that, in spite of several attempts by Panama to initiate discussion on the detention of the *M/V "Norstar"* and seek compensation for related damages, Italy maintained silence by not responding to the communications from Panama.

And paragraph 217 states:

> The Tribunal is of the opinion that by disregarding correspondence from Panama concerning the detention of the *M/V "Norstar"*, Italy in effect precluded possibilities for an exchange of views between the Parties.

The Tribunal should be cautious on this point. This is an approach which infers acquisitive prescription from extinctive prescription. A concept from the domestic order is simply transposed into the international order, the "time" element and the need to settle the claim having been highlighted. Since the subject-matter to which the concept is applicable is completely different in the two orders, prudence must be exercised in the way it is used. Furthermore, the centralized element (the State in the domestic order) is lacking in the international order.

As is stated by Judge Anzilotti,

> International law does not have the institution of either acquisitive or extinctive prescription, even in the form known as "immemorial" prescription; as a general rule, the passage of time is not sufficient to determine the acquisition or the loss of a right.
> (Cours de droit international, pp. 336-337, cited by Krystina Marek, *Identity and Continuity of States in International Law*, Geneva, 1954, p. 576; see also T.M. Ndiaye, "Les Falklouines et le droit international", *Annales Africaines, Revue de droit de Dakar;* 1983, pp. 25-59, in e-book, T.M. Ndiaye; Ecrits de Droit 2019, p. 44, footnote 49)

It is impossible for the judicature to make inquiries itself to establish all the facts of a case. To that end, it must benefit from the support of the parties to the proceedings in accordance with the relevant rules. It is for the parties to provide the court or tribunal with the facts. The burden of proof, that is to say, "[the obligation] on the litigant who relies on a fact to demonstrate its existence, upon pain of it being discounted in the decision on the case" (J. Salmon, *Dictionnaire de droit international public*, Jean Salmon, *op. cit.*, p. 168), may take time.

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The burden of proof requires the parties to bring to the attention of the Tribunal, in the forms prescribed by the Statute and the Rules, all the legally relevant facts whose characterization allows the dispute to be settled. This means that the applicant must prove the facts on which its action is based and the respondent must prove those on which its objection is based. Proof is to be furnished by the party alleging a fact rather than by the party denying it. Proof lies with the parties, not with the judicature.

The judicature has the capacity freely to assess evidence submitted to it. Although there are no general, predetermined rules on the probative force of a certain category of evidence, the circumstances in which it was determined must be taken into account. In the case at issue, what must be proven was limited by what could be proven, such that it is justified to adjust the applicable standard of proof. The Tribunal should have adjusted the standard of proof to be satisfied by the Applicant on the ground that the Respondent refused the request for evidence submitted to it.

III. REPARATION

As regards reparation, it should be borne in mind that the law on responsibility is now regulated by the International Law Commission's Draft Articles on Responsibility, article 1 of which provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State."

There must therefore be an internationally wrongful act, that is to say, a breach of an international norm, and the wrongful act in question must be carried out by a State, which entails its responsibility.

The breach of the international obligation can be seen as a failure by a State to comply with the conduct required by an international norm which prescribes, prohibits or permits a certain attitude. The wrongful act is thus manifested in a discrepancy between what should be done and what is done, either by going beyond what is permitted by the norm or by doing less than what should be done, thereby giving rise to non-compliance. In addition, the norm laying down the obligation must be in force for the State concerned at the time of the act whose wrongfulness is at

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issue, in accordance with article 13 of the ILC Draft Articles. In the present case, Panama and Italy are both States Parties to the United Nations Convention on the Law of the Sea.

The rules on reparation are well established in international law. As the Tribunal and the PCIJ state:

> 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".
> (*M/V "SAIGA" (No. 2), (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 65, para. 170; *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014,* p. 4, para. 428; *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17,* p. 47)

Under article 31, paragraph 1, of the ILC Draft Articles on State Responsibility, "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

Reparation can take various forms. It may be in the form of restitution in kind, compensation, satisfaction, assurances or guarantees of non-repetition. It may also take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case, including 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), op. cit*., para. 171)

In the present case, by the Decree of Seizure of the *M/V "Norstar"* issued by the Public Prosecutor at the Tribunal of Savona, by the request for execution and by the arrest and detention of the vessel, Italy breached article 87, paragraph 1, of the Convention and, pursuant to the abovementioned rules on reparation, Italy is under an obligation to make reparation for the damage caused which engages its responsibility.

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It is not easy to deal with responsibility without the essential facts, given the associated risk of speculation. In the absence of the most relevant evidence, the circumstances of the case at issue should be examined.

There are three important elements: the extension of the application of Italy's criminal legislation to the high seas; the Decree of Seizure; and the arrest and detention of the *M/V "Norstar"*. The probative seizure should give rise to the inspection, the report from which determines: the condition of the vessel, the security system, maintenance and related costs depending on the duration of the detention. With the inspection report and the logbook, it is possible to determine the damage and thus the reparation, whether in the form of a *restitutio in integrum*; *lucrum cessans* or *damnum emergens*, depending on the circumstances.

By ordering the arrest of the *M/V "Norstar"* and requesting its execution, within the framework of its criminal jurisdiction, in respect of offshore bunkering activities, and by applying its customs laws to those activities, Italy breached article 87, paragraph 1, of the Convention by hindering the vessel's ability to navigate and conduct lawful activities. Thus, the right of Panama and of vessels flying its flag to enjoy freedom of navigation was breached. Consequently, as the State responsible for an internationally wrongful act, Italy is under an obligation to make reparation for the damage caused by its breach of article 87, paragraph 1, of the Convention. Reparation covers in particular the damage caused by the arrest and detention of the *M/V "Norstar"*. Italy claimed that the causal link was broken because Panama failed to retrieve the *M/V "Norstar"* in 1999 and again in 2003, after the Italian courts ordered the release of the vessel against payment of a bond.

However, since the arrest of the *M/V "Norstar"* was wrongful, the Respondent had the duty to order the release of the vessel without any consideration or bond. The demand for a bond for the release of a vessel which should not have been arrested was unlawful. Furthermore, as the Applicant states, the ship owner 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. In addition, it is apparent from the case file (Reply, para. 30) that, although the Italian courts ordered

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the release, that decision was never executed, nor has Italy taken any further steps to comply with it.

It should be observed that, by reason of the letters rogatory, it was Italy, and not the ship owner or the flag State, that had the responsibility for maintaining the vessel after its arrest. It was therefore its responsibility for showing acknowledgment of the surveys required for the *M/V "Norstar"* to maintain its class, because it is for the party responsible for the arrest to provide for the maintenance of the vessel. It must update the ship's class certificate and designation of the *M/V "Norstar"*.

It should be noted, lastly, that Panama was refused access to the vessel, that is to say, the internationally wrongful act continued and the causal link was never broken. This conclusion should have been reflected in the obligation of mitigation and compensation. This consists in the payment of a sum of money as reparation for damage suffered by the victim of a wrongful act. As the International Law Commission states:

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.
>
> (ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001 version), article 37)

In the present case, the damage has not been made good by restitution, as the *M/V "Norstar"* was detained for a very long period under Italy's control and authority. It decayed so much that it had to be sold in public auction as scrap.

In what condition was the *M/V "Norstar"* at the time of its arrest? The parties have presented conflicting assertions concerning the seaworthiness of the vessel. They rely on documentary and testimonial evidence of doubtful probative value. It can be noted that there is no record of the bad physical condition of the *M/V "Norstar"* at the time of its arrest in the "Report of Seizure" 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". This reflects the fact that the Respondent's view that the *M/V "Norstar"* was in a state of abandonment at the

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time of its arrest cannot be accepted. In addition, insufficient evidence was produced before the Tribunal to conclude that the vessel was not seaworthy at the time of its arrest.

As regards the value of the *M/V "Norstar"* at the time of arrest, it should be noted that the "Statement of Estimation of Value" produced by the Applicant is based on an estimation made without a physical inspection of the vessel and its class records. The Applicant acknowledges that the estimation was given on the assumption that the equipment of the *M/V "Norstar"* was stated to be in good working order; that the vessel had been described as being maintained in a condition normal for its age and type; and that the class had been maintained without recommendation. It transpires that this assumption is not supported by evidence produced before the Tribunal.

Accordingly, the Tribunal will have to exercise its discretionary power in establishing the amount of compensation to be paid to Panama in respect of the loss of the *M/V "Norstar"*.

In short, the causal link is determined *ab initio* once and for all. In this instance, reparation covers damage directly caused by the arrest and detention of the *M/V "Norstar"*, which had not received the necessary maintenance work and had not been the subject of the corresponding mandatory surveys. Furthermore, Italy had a duty to take the necessary steps to enforce the order and place the vessel at the disposition of the ship owner so that he could appraise its condition through the intermediation of a competent authority.

As regards the value of the *M/V "Norstar"* at the time of the arrest, it must be noted that the Tribunal is unable to adjudicate on this point for lack of information and documentary and testimonial evidence produced by the Parties on the facts of the case at issue. It had to resolve to accept the estimate of the value of the *M/V "Norstar"* made by the expert called by Italy, which has not been disputed by Panama.

It should be borne in mind that Panama claims that damages should include the market value of the vessel, the loss of profits and the financial damage to the ship

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owner and charterer, along with other heads of damage arising from the arrest and detention of the *M/V "Norstar"*.

(signed) Tafsir Malick Ndiaye

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SEPARATE OPINION OF JUDGE LUCKY

Introduction

1. I did not vote in favour of all the operative paragraphs of the Judgment of the Tribunal for reasons that may differ substantially from those in the said Judgment. I find it difficult to concur with some of the findings, specifically with respect to abuse of rights. This Separate Opinion sets out the reasons for my disagreement. My findings will deal with the evidence - documentary and oral – and the admissibility of such evidence.

2. The chronology of the procedure of the case is set out in the introduction to the Judgment and I shall not repeat it.

3. This is a case in which the versions of each Party differ. Therefore, opposing views and conflicting evidence have to be assessed and evaluated. In this regard, the oral and documentary evidence is important and consideration must be given to the admissibility of the documentary evidence presented, including photographs. It is an important case that will establish the extent to which article 87 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") can be applied. The interpretation, construction and application of article 87, paragraph 1, of the Convention to the facts found are crucial elements. Therefore, the evidence and the submissions of Counsel must be carefully considered.

4. That this case would result in one or more dissenting or separate opinions should come as no surprise or be the cause of any discomfort. In my view, the ventilation of interpretation of the relevant law, specifically articles 87 and 300, and the findings of fact will be the subject of the highest international scrutiny, and will auger well for the development of the jurisprudence of this specialized court.

5. My concern is primarily with the evidence in determining the important issues, for example, the condition of the *M/V "Norstar"* at the time of its arrest and detention in 1998, in 2003, and when the vessel was sold as scrap in 2015. It will be noticeable that I have spent some time elucidating the evidence. The reason is that the

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evidence is crucial, because, after 20 years, evidence that would have been very helpful and beneficial to both sides is unavailable. Consequently, in this Separate Opinion I have had to rely on the evidence presented, including the oral evidence, which is very important. I will deal with the oral evidence of the witnesses in some detail in order to support my conclusions and findings.

6. Among the paragraphs set out above, I have to include the last sentence of paragraph 221, which reads as follows: "The Tribunal, therefore, cannot accept Panama's claim that freedom of navigation under article 87 of the Convention includes the right to 'sail towards the high seas' and that a vessel enjoys such freedom even in port of the coastal State." It must be noted that the evidence discloses that the *M/V "Norstar"* was prevented from having access to the high seas because of its unlawful arrest and detention. Paragraph 258 reads:

> The Tribunal is of the view that Panama has failed to prove any bad faith on the part of Italy in this regard. The arrest of the *M/V "Norstar"* in a Spanish port cannot be a breach of good faith under article 300 of the Convention. The Tribunal cannot accept the claim.

While it may not be bad faith per se, it will be demonstrated later in this Opinion that there was certainly a lack of good faith. Paragraph 275 reads:

> 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, does not relate to article 87 of the Convention. Therefore, the Tribunal accordingly finds that Panama's claim in this regard falls outside the scope of the Tribunal's jurisdiction.

My view is that the claim is within the jurisdiction of the Tribunal and relates to article 87 of the Convention. It will be clarified in this Opinion. Suffice to mention at this juncture that the proceedings are based on article 87 and the infringement of same. The Tribunal found that article 300 is not applicable. I find that it is not only relevant but also that it was infringed by Italy.

Historical and factual background

7. The background is adequately set out in paragraphs 69 to 86 of the Judgment.

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Significant dates

8. It will be helpful if the following events and dates are set out so that this Opinion can be followed in a logical sequence.

(i) August 1998: Decree of Seizure against the *M/V "Norstar"* issued. (This was in accordance with the prior investigation and section 3 of the European Convention on Mutual Assistance in Criminal Matters (Strasburg) 1969, and letters Rogatory to the relevant authorities in Spain);

(ii) 24th September 1998: *M/V "Norstar"* arrested in the Bay of Palma de Mallorca, Spain. The *M/V "Norstar"* was detained as a *corpus delicti* regarding criminal cases in Italy against the owner and some of its crewmembers*;*

(iii) 25th September 1998: Decree of Seizure executed while the *M/V "Norstar"* was in the internal waters of Spain, moored off the port of Palma de Mallorca;

(iv) 13th March 2003: the Tribunal at Savona, Italy, delivered its judgment in the criminal proceedings, acquitted all the defendants, and ordered the unconditional release of the *M/V "Norstar"* to Intermarine. The prosecutor appealed the decision to acquit the defendants but not the order to release the said vessel;

(v) 21 July 2003: the Spanish Authorities instructed the provincial marine service, an institution coming under the Spanish Ministry of the Interior to lift the detention of the *M/V "Norstar"* pursuant to the decision of the Italian judicial authorities. On the said day the detention order was lifted;

(vi) 2nd July 2003: all the relevant documents were delivered to Mr Morch, who was informed that the vessel could be collected within 30 days from the receipt of the notification, after which the judge might order the sale of the vessel by public auction; Mr Morch did not recover the vessel then or, in fact, ever. His reason was that vessel had deteriorated and was never maintained by the Spanish authorities or the duly appointed custodian.

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9. It is not disputed that the *M/V "Norstar"* had been carrying out bunkering activities on the high seas and that bunkering on the high seas is lawful. However, the following facts and law are disputed:

(i) The condition of the *M/V "Norstar"* prior to and at the time of arrest;

(ii) The seaworthiness of the *M/V "Norstar"*;

(iii) Whether, according to Italy, the *M/V "Norstar"* was moored and abandoned in the Bay from March 1998 until it was demolished and sold for scrap in September 2015. [Panama denied this and provided evidence that the vessel was seaworthy and had sailed to Algeria and back to the Bay after bunkering vessels on the high seas, and had also been bunkering vessels before that];

(iv) Whether article 87, paragraph 1, of the Convention is applicable in the circumstances of this case;

(v) If article 87, paragraph 1, is applicable;

(vi) Whether article 300 of the Convention applies; and,

(vii) Whether Panama is entitled to damages and costs.

Italy submitted the following matters, on which the Parties disagree:

(a) The whereabouts of the *M/V "Norstar"* between 11 August and 25 September 1998;

(b) The physical condition of the *M/V "Norstar"* at the time of its arrest;

(c) The correct characterization of the relevant Italian law and proceedings;

(d) The basis for the adoption of the Decree and the place where the alleged crimes were committed;

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(e) The reasons why the *M/V "Norstar"* was released and the individuals acquitted; and

(f) The communication concerning the release of the vessel and the owner's failure to retrieve the *M/V "Norstar"*.

The evidence

10. The evidence comprises the oral testimony of witnesses and documents tendered in evidence. The evidence of witnesses, who testified in support of the case for each Party, is important because it is helpful in arriving at the findings of fact. It is not disputed that the arrest and seizure occurred 20 years ago and that some crucial evidence is not available. In the circumstances, the Parties presented the evidence in their possession to substantiate their case.

11. Documentary evidence is set out in the list of annexes of the Parties. It comprises, inter alia, certified/official copies of the Decree of Seizure, the international letters rogatory from the Tribunal of Savona to the Spanish authorities, the report of the Seizure by the Spanish authorities, the judgments of the Italian courts, financial statements and photographs. I have considered all of these documents in order to arrive at my findings.

12. As I alluded to earlier, one of my concerns is the condition of the *M/V "Norstar"*, whether it was in the port of Palma de Mallorca, Spain, from March 1998 until it was dismantled in September 2015, or whether it had sailed to Algeria for gas oil and bunkered vessels on the high seas before sailing into the port of Palma de Mallorca, where it was seized and arrested. In this regard, the oral and documentary evidence is paramount, and due consideration must be given to the credibility of the witnesses and the admissibility of the documentary evidence, including the photographs tendered in evidence.

13. It will be useful to set out the salient parts of the oral evidence of the witnesses for both sides with comments, where I find it is necessary.

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On behalf of Panama

14. Mr Silvio Rossi testified that he used to advise the fiscal police of the arrival and departure of the *M/V "Norstar"*. He did not provide specific times and dates.

15. He said that, before the arrest in Spain, the *M/V "Norstar"* was "in a very good condition, and of course after staying five years or how many years, the situation was not the same because a boat without maintenance becomes a wreck." The foregoing, in my view, is based on conjecture, because he did not inspect the vessel after the arrest.

16. He said: "The boat was operating before it was arrested. "I have never been in prison in my life." Without being asked he spoke of his knowledge of fiscal laws. He said the foregoing without being asked. He continued: "In 1998 the Norstar supplied two or three vessels, not many". In my opinion, he seemed preoccupied with his business ventures and was of little or no assistance with respect to the condition and commercial business of the *M/V "Norstar"*. His evidence on this issue was not specific. He did not answer the questions posed by Counsel for Panama and his answers to Counsel for Italy did not address the questions put to him.

17. Mr Morch testified that the *M/V "Norstar"* was always clean and well maintained. In 1998 the *M/V "Norstar"* loaded gas oil in Algeria.

18. Prior to the arrest, the ship had all the required certificates and had passed the annual survey in 1997 (former captain Tore Husefest corroborated the foregoing in his testimony). Mr Morch was shown photographs allegedly taken prior to the arrest of the *M/V "Norstar"*. The photos show the vessel in a good condition. The evidential weight of the photographs will be considered later in this Opinion.

19. Mr Morch testified that the legal process - that is the proceedings before the Courts - "dragged on for a long time and all the defendants could not be sure that they would be acquitted. This meant mental stress for everyone. Affected was Silvio Rossi, Renzo Biggio, Emil Petter Vadis Tore Husefest and myself".

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20. Silvio Rossi did not testify that he was mentally stressed. Apart from Mr Morch, the other defendants in the criminal cases did not testify. Mental stress must be proven by medical evidence. No such evidence was produced. In these circumstances a claim for mental stress must fail for lack of evidence.

21. Mr Morch testified that the captains, Odd Falck and Tore Husefest, lost their jobs after the arrest of the *M/V "Norstar"* "I think they both stayed at home without employment until 1999, one year after". Neither testified. There is no evidence of loss of earnings and Mr Morch said that he thought they stayed at home. Therefore his testimony is insufficient in a claim for loss of earnings.

The physical condition of the *M/V "Norstar"* at the time of arrest

22. The condition of the vessel is important because, if the evidence of Italy is accepted, it would not have been necessary to proceed with the case. If, on the other hand, the evidence is that the *M/V "Norstar"* was seaworthy at the time of its arrest, then it would be necessary to consider the effect of the Decree of Seizure and whether **a**rticle 87 of the Convention is applicable.

23. Panama contends that the ship was seaworthy at the time of arrest. Italy argues that the vessel was not seaworthy and had been in the port of Palma de Mallorca from March 1998 and did not leave until it was dismantled in September 2015. In order to support its claim, Panama provided evidence from Mr Silvio Rossi, Mr Arve Morch, the owner, and Mr Husefest, the captain of the vessel in 1997, and tendered an excerpt of sworn testimony of the former captain, now deceased, at a hearing in 1999.

24. The following excerpts from Mr Rossi's testimony are relevant.

> I used to advise the fiscal police of the arrival and departure of the Norstar. Before the arrest the Norstar was in a very good condition, and of course staying in port for 5 years or how many years, the situation was not the same because a boat without maintenance becomes a wreck.

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25. Apart from the abovementioned excerpts, Mr Rossi was not helpful. He demonstrated a wide knowledge of the customs laws and policing requirements with which he complied but did not answer the questions posed.

26. Italy led evidence of Mr Esposito, former prosecutor of the Supreme Court, former Attorney General, a judge at San Marino, and *ad hoc* judge of the European Court of Human Rights, in my view highly qualified in his field; and, Mr Matteini, a sea captain since 1982, and named on the national register for experts in naval evaluation. Neither Mr Esposito nor Mr Matteini physically examined the *M/V "Norstar"*.

On behalf of Panama, Mr Morch testified that the vessel was always clean and well maintained. It is not correct to say that it was abandoned in the port and was in a state of "dismay". The vessel was engaged in bunkering and on one occasion had left the port and sailed to Algeria, where it was loaded with gas oil (this statement is supported by the testimony of the deceased captain that was tendered in evidence).

27. Mr Morch said that, at the time of the arrest, the vessel had all the valid certificates, the Panama national certificate and trading certificate, and had passed the annual survey in 1997 when Captain Tore Husefest was in command of the vessel. Mr Morch identified photographs of the vessel which were tendered. However, in my view, these photographs have to be considered in the context of the accepted test relating to admissibility: relevance (is the photo relevant?); authenticity (Is the photograph authentic? Where is it from? Who was the photographer? What is the relevance of the photograph in the context in which it is presented); and reliability (What is the evidential weight to be given to the photograph?). I do not think the photographs pass the reliability test. In the circumstances, I cannot accept them as cogent and convincing evidence of the state of the vessel at the time of arrest.

28. Mr Morch stated, inter alia, that "after several attempts to have the vessel released, we received from the Court a letter dated 18th January 1999 in which Italy offered to release the M/V Norstar against a bond of 250,000.00 lira. The owners had no option. They could not pay the bond." This statement is supported by the document from the bank which was tendered in evidence. Mr Morch was refused a

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guarantee in a fax from the bank, dated 16 September 1998 (this document was tendered in evidence without any objection), because the bank felt that the risk was too high. He went on to say:

> Therefore the owner had neither the opportunity to pay the bond or to provide a bank guarantee, nor the In this situation all involved had to wait until the Public prosecutor had lost his case that he had to start in the Tribunal di Savona. This is exactly what happened.
>
> The judicial process dragged on for a long time. All the defendants could not be sure that they would be acquitted. This has meant mental stress for everyone. Those affected were Silvio Rossi. Renzo Biggio, Emil Petter Vadis Tore Husefest and myself.
>
> The captains, Odd Falck and Tor Tollefsen, who were employed at the time of the arrest of the Norstar, lost their jobs after the arrest of the Norstar. I think they both stayed home without employment.

29. Apart from the former captain, no other members of the crew testified. Evidence of mental stress was not presented at the hearing. In these circumstances a judge cannot assume that a person suffered mental stress. Mental stress must be proven through medical evidence.

30. Counsel for Panama submitted that Mr Morch was cross-examined. His testimony should certainly be given more weight than a newspaper report of 2015 in which the *M/V "Norstar"* was described as abandoned, hosting vagrants and having rats on board. The author of the article was not named and he/she was not examined or cross-examined before this Tribunal. This evidence is obviously hearsay and is unacceptable

Among other answers, I find the following relevant and important. Mr Morch said the captain of the *M/V "Norstar"* died three years before the hearing. He insisted that the vessel was not in the port from March 1998 until the arrest in September 1998. He added that it had sailed to Algeria for gas oil in July 1998.

> While it was under arrest he did not have access to the ship. During the period of arrest and detention no one took care of it. It is not correct to say that the ship was abandoned. The crew was still on board when it was arrested. The logbooks were still on board in 2015 while the vessel was under Italian detention. Access to the vessel was denied. It was impossible to get on board. Everything was closed. The keys were taken.

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31. The witnesses were cross-examined. Having observed their demeanour and conduct and the manner in which they testified, the fact that their testimony was corroborated by other witnesses for Panama, as well as documentary evidence, convinces me that the core of their testimony is credible.

32. Mr Morch confirmed that there was no information about a custodian being appointed to oversee the ship. The transcript reads:

> ***JUDGE LUCKY:*** *Thank you, Mr President. Good afternoon, Mr Morch. For the purpose of my question, I would like to read what you said from the transcript this morning. In answer to learned counsel, you said: "The owners were working hard to retrieve the vessel after the detention in September 1998. I believe that it was for Italy to deliver the vessel and to allow us to confirm its condition as well as the existence of the effects and ship's papers that were there at the moment of arrest." Mr Morch, are you aware that the "Norstar" was a corpus delicti in criminal proceedings?*
> ***MORCH:*** *Yes, I was.*
> ***JUDGE LUCKY:*** *Did you or the other owners make any effort to visit the vessel and inspect it during that period while it was a corpus delicti?*
> ***MR MORCH:*** *No. The area was completely closed after the detention in Palma de Mallorca. We had no access to anything; it was denied. We could not pass the gate because it was closed, so when the ship was brought alongside by the port authority to the mega-yacht yard it was impossible to go on board the ship. Everything was closed. The keys were taken and everything was closed. I know that it was closed.*
> ***JUDGE LUCKY:*** *Finally, do you know that a custodian was appointed to oversee the ship during that period? Do you know that there was a custodian and who appointed the custodian?*
> ***MR MORCH:*** *No, it was never told. We had no communication later. Nobody informed us about a**nything***
> He provided valuable information with respect to the ship's documents which are crucial in assessing the evidence and arriving at the truth.
> ***JUDGE LIJNZAAD:*** *Do you know what happens with the ship's documents such as the papers relating to its IMO certificate or class certificate or logbook when the ship was arrested in Italy? Do they stay on board or go elsewhere?*
> ***MR ESPOSITO*** *(Interpretation from Italian)**:** The main problem lies in the custodian nomination, which means that we need actually to impose a binding link. That means the asset is not available any more after it is arrested. Together with this, we need to choose a custodian. All of these proceedings are then in the hands of the custodian, and if there is a problem, the custodian can talk to the Public Prosecutor in order to ask what is the line of action that the custodian should follow, and the same thing goes for the upkeep. If, for example, the custodian cannot go ahead with the upkeep of the boat, then the Public Prosecutor is still the decision-maker of the situation. The problem that we had here was that we had two different jurisdictions in charge. We had Italy requesting the arrest and Spain executing the order, so that is why we had these problems.*

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> ***JUDGE PAWLAK:*** *The question is simple. If Italy arrests a ship, who is responsible for taking care of the ship – the owner, the Italian authorities, other authorities?*
> ***MR ESPOSITO*** *(Interpretation from Italian)**:** The general rule is whoever has issued the seizure order. It can be a Public Prosecutor but it can also be a judge. In this case the Public Prosecutor is the chief of the situation. He is the master of the situation, so the Public Prosecutor is in charge. He is in charge of the whole situation, naturally, and I can also give you more precise information. According to the Code, there is a rule for each phase of the procedure, so it is important to nominate a guardian to write all the reports, to seal the reports, and then naturally the custodian becomes the person in charge. The responsibility actually moves from the Public Prosecutor to the custodian, and if the custodian has problems that he cannot solve by himself, in this case the custodian can ask the Public Prosecutor what he needs to do, because the Public Prosecutor is still the person in charge until the trial is in the investigation phase. However, after that, the judge actually becomes the person in charge, and then if the custodian has problems, instead of referring to the Public Prosecutor, he needs to refer to the judge.*

33. *(*Italy submitted that Judge Pawlak's question is premised on the arrest of a ship in Italy. However, Mr Esposito's answer is based on a general rule that does not apply specifically to Italy and in my view is also applicable in circumstances such as in the instant case.) *[See Submissions of Italy infra)* I set out the above to support my view that the *M/V "Norstar"* was seaworthy and in a good condition when it was arrested and seized. Italy argued that the *M/V "Norstar"* was in a bad state at the time of arrest.

34. Italy provided no evidence to support such an argument or claim. The evidence of the witnesses Mr Morch, Silvio Rossi and Captain Husefest testified that the *M/V "Norstar"* was fully operational, seaworthy and well maintained. Prior to the arrest and seizure, it had been bunkering on the high seas and had sailed to Algeria to refuel in July 1998. They continued that a custodian had been appointed and that the ship had not been maintained while it was detained in the port of Palma de Mallorca.

35. 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. Counsel contends that it is possible to prove facts through written documents. The Rules of the Tribunal expressly provide,

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inter alia, in articles 44 and 72, that Parties may provide evidence through witnesses or experts. Such evidence will have equal value.

36. The testimony of the witnesses called by Panama in this case - Mr Morch, Mr Rossi and Mr Husefest - was particularly strong because the witnesses were directly involved in the events surrounding the *M/V "Norstar"* and had extensive knowledge of the facts concerning the vessel and its activities. **I find that the *M/V "Norstar"* was in a good condition and seaworthy at the time of arrest.**

37. Italy disagrees with Panama's contention that article 87 of the Convention was infringed, because the vessel was prevented from carrying out its commercial activities on the high seas, thereby being prevented from exercising its freedom of navigation on the high seas. Panama argued that the Decree was unlawful and so too the arrest and detention of the *M/V "Norstar"*. This argument, Counsel for Italy submits, amounts to "a fully-fledged attempt at rewriting article 87 of the Convention, as if it applied anywhere and everywhere that a ship may be so long as the ship traverses the high seas".

38. Counsel submitted that Mr Morch asserted without any substantiation that the *M/V "Norstar"* had made a voyage to Algeria in July 1998, but neither Mr Morch nor anyone else on the Panama side has substantiated that the *M/V "Norstar"* was anywhere but in Palma de Mallorca from the time of the Decree of Seizure, namely 11 August 1998, to the time of the *M/V "Norstar"*'s arrest, 25 September 1998. That is the only time period that can be relevant in light of the jurisdictional boundaries of this dispute.

39. Apparently, Counsel is alleging that Mr Morch is not speaking the truth. However, Panama, albeit after the proceedings closed, and without objections from Italy, submitted an excerpt of testimony from the investigating tribunal in Savona, given by the former captain of the *M/V "Norstar"*, who testified that the *M/V "Norstar"* had sailed to Algeria in July 1998. The captain has since died. It must be noted that, although the declaration is an excerpt from sworn testimony before a tribunal, the findings of that tribunal have not been produced before this Tribunal. I will be considering this testimony in the light of all the evidence.

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40. Learned Counsel criticised Panama for the allegation in its application that, after imprisoning members of the crew of the *M/V "Norstar"*, the Italian Republic has (up until this date) failed to give account of this event. Panama conceded that no-one involved with the *M/V "Norstar"* was imprisoned in connection with the arrest or thereafter.

41. In its final submission 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 the arguments articulated during this proceeding. Panama is also liable to pay the legal costs derived from this case.

42. The submissions of learned Counsel are very helpful in the determination of the issues in this case. I must mention my appreciation, because the submissions reflect study and research.

I have read, studied and considered the submissions of advocates for both Parties. Their views and guidance are appreciated and are of considerable assistance in resolving the issues, interpreting the relevant law and arriving at findings in law and fact.

43. It seems to me that, based on the above, Italy is apparently distancing itself from the acts of arrest and seizure. I cannot agree. The Decree was issued by the Public Prosecutor in Italy and letters rogatory were sent to Spain in accordance with the Strasbourg Convention (set out above) to carry out the arrest and seizure. Italy in these circumstances could be regarded as the Principal and Spain its Agent, therefore Italy is responsible for the actions of Spain.

44. In this case the vessel was arrested and seized and detained in 1998 as a *corpus delicti* with regard to criminal proceedings in Italy against the following: Rossi Silvio (not in custody, present), Biggio Renzo (not in custody, present), Melegari Bruno, not in custody, present), Morch Arve Einair (failed to appear), Vadis Emil Petter (failed to appear),Tor Tollefsen, captain of the vessel (failed to appear), Bocchiola Massimo (not in custody, present and Falzon Joseph (failed to appear).

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The accused were charged for smuggling and evasion of custom duties and taxes. The Courts, both at first instance and appeal, found that the offences were not proven, acquitted the accused and, in 2003, ordered the release of the vessel.

45. It is convenient at this juncture to mention that this case must be distinguished from the *M/V "Louisa"* Case that was cited by Italy. While this contention will be dealt with later, it is necessary to consider the following: The *M/V "Louisa"* was in Spanish internal waters when it was arrested along with the captain for criminal offences involving the stealing of artefacts which were kept on board the vessel. It was argued that, by being detained, the *M/V "Louisa"* did not have access to the high seas. However, the evidence disclosed that criminal proceedings were ongoing and the *M/V "Louisa"* was intrinsically involved in the criminal activity that led to the charges being laid against those charged.

46. In the period September 1998 to 2003 the vessel was under preventative detention and as a result did not have access to the high seas to continue with its commercial activities of bunkering.

47. It is my view that in these circumstances article 87 should be given a wide and generous interpretation. Freedom of navigation is a right and the *M/V "Norstar"* was denied this right.

Case for Italy

48. An investigation into the *M/V "Norstar"* began in 1997 when the Italian Fiscal Police, while inquiring into the operations of Rossmare International, an Italian company registered in Savona, was involved in purchasing and loading gasoil, and intended for the ship's fuel store. The said purchased fuel was exempt from excise duties. The fuel was then sold to mega yachts and vessels on the high seas. These vessels would then sail into Italian ports with the fuel sold to them on board, thus evading customs and excise duties. Evidence collected during the investigation confirmed the suspicion that the aforementioned plan was masterminded by Silvo Rossi, the managing partner of Rossmare International and executed through the *M/V "Norstar"*. The *M/V "Norstar"* sailed into the Spanish port of Palma de Mallorca

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in March 1998 and did not leave the port until it was demolished in September 2015. Therefore, contrary to the Panama's contention, it could not have sailed to Algeria in August and have bunkered vessels prior to its arrest and seizure in September 1998. Italy, without admitting that the vessel was seaworthy and had left the port, argued that article 87, paragraph 1, was not infringed because the vessel was not on the high seas at the time of arrest and seizure but was in the internal waters of Spain.

49. It is not disputed that the Public Prosecutor filed criminal charges against Silvio Rossi, the owner of the vessel, Arve Morch and others.

50. Italy called the following witnesses: Mr Esposito, former prosecutor for the Supreme Court, Attorney General, and currently a judge in San Marino *ad hoc* judge at the European Court of Human Rights; and Mr Matteini, sea captain since 1982 and named on the national register for experts for naval evaluation.

51. Mr Esposito provided evidence on the procedural aspect of the seizure and arrest of vessels for the investigation, the issuance of the Decree of Seizure and the execution of same. I will deal with his evidence later in this Opinion (see para. 96). Mr Matteini provided evidence of the value of the *M/V "Norstar"*. He never inspected the vessel but arrived at his conclusions from photographs he downloaded from the Internet, and from his experience as a ships' valuator.

Submissions of Counsel

Panama

52. Panama submits that the arrest of the *M/V "Norstar"* and the subsequent events amount to a breach of articles 87 and 300 of the Convention. Article 87 protects ships against any form of interference with the freedom of ships to navigate on the high seas; this includes freedom to carry out legal activities, such as the bunkering of vessels. Panama refutes Italy's claim that mega yachts and other vessels that had been bunkered on the high seas sailed into Italian ports without declaring that the fuel on board had been supplied by the *M/V "Norstar"* and was subject to custom duties and taxes. Panama contends that Italy provided no

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evidence to support their argument; further, the Court at Savona and the Court of Appeal in Genoa had decided that there was insufficient evidence to prove the charges.

53. Italy by its own actions violated articles 87 and 300 of the Convention, incurring international responsibility for which it must provide reparations to Panama in the form of compensation. The Decree of Seizure related to activities performed on the high seas, that is bunkering activities of the *M/V "Norstar"* in international waters. Bunkering on the high seas is a lawful activity. The record reflects that the *M/V "Norstar"* was a fully operational and well-functioning ship. Panama's witnesses, Mr Morch, Captain Husefest and Mr Rossi, testified that the *M/V "Norstar"* was seaworthy and well-maintained at the time of its arrest.

54. Italy was responsible for the appointment of a custodian even though the arrest was carried out by Spain*. (In my view the evidence discloses that Italy was the Principal and Spain the Agent, consequently, Italy is responsible for the actions of Spain.)* In her address, Counsel for Panama posed the rhetorical question: if the vessel was in a derelict condition, why was a bond of 250,000,000 lira (approximately €125,000) fixed? The vessel deteriorated after its arrest, due to Italy's and, *de jure*, Spain's fault for having failed to "take care " of the ship when it had a legal obligation to do so after it had (albeit unlawfully) arrested the vessel and kept it under its control for an unreasonably long period of time.

55. Italy referred to a newspaper article, which Panama submitted in the proceedings, to say that, "from March 1998 to the date of the article, August 2015 the M/V Norstar was abandoned and in a state of disrepair and 'dismay'". Apart from this letter, Italy presented no evidence to support its contention, and further, as I shall point out later, the letter was not signed and the author was not identified. In my view, Panama included this letter to demonstrate that the article was not accurate. Mr Morch was cross-examined about the article. In response he stated that the vessel had left during this period to "call at the port of Algeria to load cargo and supply vessels." He said the article was definitely wrong. Panama submits that Mr Morch is a credible witness whose testimony should be given more weight than a

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newspaper article, the author of which was not examined or cross-examined to ascertain the accuracy of the information and the dates mentioned in the article.

56. The Decree of Seizure specifies that the *M/V "Norstar"* was bunkering vessels offshore and that those vessels would then return to Italian territory without issuing a statement for customs purposes and thereby evading taxes. This could only mean that the *M/V "Norstar"* was arrested and the persons connected to it charged, because it was carrying out offshore bunkering. The Decree also refers to the doctrine of constructive presence, meaning that the *M/V "Norstar"* was the "mother ship" operating on the high seas for the bunkered fuel and returned to the territorial waters of Italy without making the required declarations for customs duties and taxes.

57. Constructive presence, in the light of the evidence, is not applicable in this case.

58. In this case the *M/V "Norstar"* was allowed to enter the internal waters of Spain. However, the detention was not arbitrary. The vessel was detained as a *corpus delicti* for criminal proceedings against the crew, and one Silvio Rossi for offences against the Italian Criminal Code and for trial in Italy by the Italian Courts. Who, therefore, is responsible for the maintenance of the vessel: Italy, Spain or both?

Panama cites Cohen, who explains that a coastal State cannot impede the freedom of foreign vessels by arbitrarily preventing them from leaving its marine areas. In this case the *M/V "Norstar"* was allowed to enter the internal waters of Spain. The detention was not arbitrary; it was detained as a *corpus delicti* in criminal proceedings against the crew and Silvio Rossi for offences against the Italian Criminal Code and for trial by the Italian Courts. In the light of the accepted procedure where a ship is arrested and detained in accordance with a decree, the State responsible for issuing the decree and order for arrest is responsible for the appointment of a custodian and the maintenance of the vessel. In this case it must be Italy.

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Cohen continues: the arbitrary detention of a foreign vessel by a coastal State, after having allowed it to enter its internal waters and/or call at port, cannot but be a blatant breach of the freedom of navigation.

59. Counsel asked the Tribunal to adhere to the decision of the Court in Savona whereby:

> the purchase by recreational vessels of fuel intended to be used as even in full 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.

60. In its final submission, Panama requested 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 those 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.

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61. It must be noted that the arrest and detention took place 20 years ago. If the shipowner had obtained access to the logbooks of the *M/V "Norstar"*, all the information persistently requested by Counsel for Panama would have been readily available. Italy contends that article 87 of the Convention is not applicable because the arrest of the *M/V "Norstar"* was due to its activities in territorial waters, not for activities carried out on the high seas. Italy also contends that article 87 of the Convention only applies if there is physical interference on the high seas and not if the vessel is arrested in a port. Italy argues that while in port, vessels do not enjoy freedom as if on the high seas.

Italy

62. Italy submits that there are five flaws that characterize Panama's case. Italy is the Principal and Spain is the Agent, within the scope of the dispute, as defined by this Tribunal in its Judgment of 4 November 2016; Panama characterizes article 87 as a provision without geographical limits; Panama attempts to plead a breach of article 87 without demonstrating any interference which could impinge on the freedom of navigation; Panama misunderstands the relevance of the acquittals of the accused; and Panama baselessly accuses the Italian Public Prosecutor of arbitrariness.

63. Panama made false allegations of imprisonment; Panama's delay in commencing this case militates against its claim for damages and compensation; and it has repeatedly grossly inflated its damages claim. Italy rebuts Panama's allegations concerning the Prosecutor's conduct, in particular: (a) the reasonableness of the Prosecutor's actions; and (b) the limitations on the Prosecutor's responsibility for the execution of the Decree of Seizure of the *M/V "Norstar"*.

64. I refer to some intrinsic parts of the submission of Counsel for Italy: Panama's continued attempts to make this case about the arrest of the *M/V "Norstar"* must fail; it is the Decree of seizure, together with the Request for its execution, which is relevant to the present dispute. 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,

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the key event upon which Panama brought this claim in the first place is no longer relevant to this dispute.

65. Attempts to plead breaches of human rights obligations must fail. The Tribunal has no jurisdiction to determine breaches of such obligations, which are contained in separate treaties that have their own enforcement regimes.

66. Panama contends that article 87 has an obligation with no geographical limits. In doing so, Panama is attempting to enlarge the obligation under this article to an extent that is not tenable.

Italy cited the following cases in support*:*

(i) *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, pp. 36-37, para. 109;

(ii) *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Declaration of Judge Paik, ITLOS Reports 2013*, p. 49, p. 56, paras. 28-29; and

(iii) *Rejoinder of Italy*, 13 June 2018, paragraph 56.

67. In the *M/V "Louisa" Case*, Judge Paik declared that:

> [w]hile the content of the freedom of the high seas is subject to change, and indeed has evolved over time, it has been long established that this freedom is one which all States enjoy "in the high seas". ... To extend the freedom of the high seas to include a right of the State to have access to the high seas to enjoy that freedom is warranted neither by the text of the relevant provisions or the context of the Convention, nor by established State practice on this matter.

Counsel for Italy cited the above to support Italy's argument that article 87 of the Convention does not provide that denial of access to the high seas infringes the right of freedom of navigation on the high seas. For reasons set out in this Separate Opinion, I do not agree.

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68. In the same vein, Counsel referred to the Dissenting Opinions of Judge Cot and Judge Wolfrum in the *M/V "Louisa" Case*. Judge Cot observed that: "It is hard to imagine how the arrest of a vessel in port in the course of national criminal proceedings can be construed as violating the freedom of navigation on the high seas." Judge Wolfrum commented that

> Article 87 covers freedom of the high seas and, in particular, freedom of navigation. But the existence of a basic freedom does not prohibit the coastal State from exercising the powers of its police and judiciary in its own territory. It is hard to imagine how the arrest of a vessel in port in the course of national criminal proceedings can be construed as violating the freedom of navigation on the high seas. To take this argument to the extreme would, in fact, mean that the principle of the freedom of navigation would render vessels immune from criminal prosecution since any arrest of a vessel, under which ground whatsoever, would violate the flag State's right to enjoy the freedom of navigation.

69. Italy disagrees with Panama's contention that article 87 of the Convention was infringed, because the vessel was prevented from carrying out its commercial activities on the high seas, it was thereby prevented from exercising its freedom of navigation on the high seas. Panama argued that the Decree was unlawful and so too the arrest and detention of the *M/V "Norstar"*. This argument, Counsel submits, amounts to "a fully-fledged attempt at rewriting article 87 of the Convention, as if it applied anywhere and everywhere that a ship may be so long as the ship traverses the high seas."

70. During the period September 1998 to 2003 the vessel was under preventative detention and as a result did not have access to the high seas to continue with its commercial activities of bunkering. Panama complains that the *M/V "Norstar"* was denied its right to freedom of navigation. It sailed into the port with consent, was detained therein and was not allowed to exercise its right of navigation in the high seas. Counsel for Panama advanced a novel argument. He contends that, by preventing the *M/V "Norstar"* from leaving port to sail onto the high seas, Italy has infringed the right to freedom of navigation. This may be so in a case where a vessel is detained without just cause. However, in the instant case, the vessel, as a *corpus delicti* in an investigation relating to criminal offences and until released by the Italian court, could not leave the port. In fact, Italy contends that this article is not applicable, because the vessel was an exhibit in criminal proceedings as a result of

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an investigation, an investigation that resulted in charges being preferred against the owner, Silvio Rossi, the captain and the crew. Further, Italy argues that article 87 applies to the high seas. Therefore, even if it is given the widest and most generous interpretation, article 87 cannot be deemed to include the territorial sea or internal waters. If that were the case, the article would provide for such circumstances. The sovereignty of a State must be respected and so too the laws of the State.

71. In its final submission, 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 the arguments that are articulated during this proceeding. Panama is also liable to pay the legal costs derived from this case.

I have read, studied and considered the submissions of advocates for both Parties. Their views and guidance are appreciated and are of considerable assistance in resolving the issues, interpreting the relevant law and arriving at findings in law and fact.

72. It is my view that in these circumstances article 87 should be given a wide and generous interpretation. Freedom of navigation is a right and the *M/V "Norstar"* was denied this right.

73. Once more I must emphasise that this case must be distinguished from the *M/V "Louisa"* case. The *M/V "Louisa"* was in Spanish internal waters when it was arrested along with the captain for criminal offences involving the stealing of artefacts which were kept on board the vessel. It was argued that by being detained, the *M/V "Louisa"* did not have access to the high seas. However, the evidence disclosed that criminal proceedings were ongoing and the *M/V "Louisa"* was intrinsically involved in the criminal activity that led to the charges being laid against those charged.

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Assessment of evidence

74. In a trial in open court, issues are determined by reviewing documentary and oral evidence. The trial incorporates both written and oral evidence of witnesses and submissions of learned counsel. Consequently, the principle of "equal arms" (*égalité des armes*) is open to both sides. For the avoidance of doubt with regard to the foregoing, I have to add that if a tribunal strictly adheres to written proceedings and does not take cognisance of all the evidence, including testimony of witnesses, their answers on cross-examination and their demeanour and conduct in court, then cases will be determined on documentary evidence. I do not think this can be acceptable, especially in cases such as the instant case where the oral evidence is also crucial to arriving at the truth.

75. The issue to be determined is how a judge, sitting in an international court, assesses evidence and determines the facts. There is no general rule in international law. In fact, the Rules of the Tribunal are silent. Rules cannot set out how a judge should consider and find facts from the evidence. It is solely the function of the judge who is the fact-finder. This is a case abounding with evidence, both oral and documentary. It includes the testimony of a witness who has since died. Therefore, how can it be assessed? Italy did not object to the admission in evidence. It must be assessed in the light of all the oral and documentary evidence on the issue.

76. In common law, there are two main standards: one that is applicable in civil law cases and the other in criminal cases. The standard adopted in common law jurisdictions in criminal cases is proof beyond a reasonable doubt; in civil cases, the standard is based on the "preponderance of evidence" or "the balance of probabilities". In the civil law system, the concept of the standard is different. It is not "on the balance of probabilities" but is a matter for the personal appreciation of the judge, or "*l'intime conviction du juge*". In other words, if the judge considers himself to be persuaded by the evidence and submissions based on the evidence, then the standard of proof has been met. I have applied the foregoing when examining the documentary and oral evidence. The rules of procedure of tribunals do not deal with the authenticity of documents. A tribunal has the power to exclude documents.

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77. In the *M/V "SAIGA" (No. 2) Case*, the entries were not contested. The Tribunal referred to this fact and did not enquire into the authenticity of the entries in the documents. In the instant case, the authenticity of the statement was not challenged. Counsel did not object to or challenge the authenticity of the statement, neither was there any objection to its admissibility. However, by implication, Counsel suggested that the contents were not true and led evidence to contradict what is set out therein.

78. I mentioned above that in this case the oral evidence is crucial to arriving at a finding. Consequently, it is necessary to consider the evidence of each witness, individually and collectively.

79. Mr Silvio Rossi testified that he used to advise the fiscal police of the arrival and departure of the *M/V "Norstar"*. However, this was a generic statement. He was unable to provide dates and times and had no documentary evidence to substantiate his statement. He said "the vessel was in a very good condition however he did not see or inspect the vessel before it was arrested. He added that "the boat was operating before it was arrested". He added later on in his testimony that "the Norstar supplied two or three vessels, not many". Mr Rossi was described as the "mastermind in the operation of the Norstar", yet his answers in examination in chief and on cross-examination were not on the issue. He seemed preoccupied with telling the Court about his vast knowledge of the Italian Customs laws and his "good" relationship with the police and customs officials. He was not very helpful.

80. Mr Morch's evidence was based on personal knowledge of the *M/V "Norstar"*. He said it was clean and well maintained. In July 1998 it sailed to Algeria where it was loaded with gasoil. Prior to arrest, the vessel had all the valid certificates, the Panama national certificate, the trading certificate and had passed the annual survey in 1997. The former captain in 1997, Tore Husefest, corroborated this evidence. However, he was not able to produce any documents to support his statement because, he said, upon arrest all the documents in the captain's cabin were seized by the Spanish authorities. Access to the vessel was denied. It was impossible to get on board. Everything was closed. Documents may have been used in the investigation required under the Decree of Seizure. However, none was produced in

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court. Mr Morch claims he did not have access to the ship. No-one took care of it although, in accordance with the relevant law, a custodian was appointed. The vessel was not in a state of "dismay" when it was arrested, neither had it been abandoned as Italy contends.

81. During cross-examination he was shown a newspaper article written in August 2015 in which it is reported that the *M/V "Norstar"* entered the port of Palma de Mallorca in March 1998 and did not leave until 17 years later, when the ship was in a bad state. Apparently, Counsel used this article to demonstrate that the vessel never left the port as Panama claims and that it was in a bad condition. The article was written in August 2015. It is an article that was written by an unnamed reporter. It has no evidential value. It may, therefore, correctly describe the true of the state of the vessel at that time.

82. Mr Morch was shown photographs of the vessel. He testified that they had been taken prior to the arrest of the vessel. These photos show the vessel in good condition. He says that the photos were taken between 2010 and 2012. Before accepting the photos in evidence, I applied the accepted test for the acceptance of photographs in evidence. Firstly, is the photograph relevant? Secondly, is the photograph authentic? Where is it from? Who is the photographer? And what is the date of the photograph in the context in which it is presented? There were no definite answers to the foregoing questions. In my opinion, the photographs do not have the evidential weight required.

83. Mr Tore Husefest was the captain of the *M/V "Norstar"* in 1997. He testified that, at that time, the vessel was in a very good physical condition. He was at that time in possession of all the required certificates. If the vessel had not had all the necessary certificates, it would not have been able to enter the port. As captain, he kept the logbook, charts and record of customers, as well as records of salary payments. On occasions he noticed that the *M/V "Norstar"* was under surveillance by Italian gunships. Mr Husefest's evidence of threats by Italian gunboats was not challenged. He said that he did not report the threats because he did not want to interfere with the Italian authorities. The Italian authorities were aware of the *M/V "Norstar"*'s commercial activities of bunkering on the high seas. Towards the

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end of 1997 the seaworthiness of the *M/V "Norstar"* was as good as or better than that of other ships of similar age and type. All the documents with regard to maintenance records were stored in the vessel's files. The vessel was *de jure* under the control of Italy through Spain. It is accepted that when a vessel is under arrest, as a *corpus delicti*, it is under the custody and control of the court, which appoints a custodian. The custodian is responsible for the safety, care and maintenance of the vessel. No evidence has been provided to demonstrate that the custodian carried out his duties. In fact a custodian did not testify.

84. The documentary evidence of Mr Petter Vadis shows that it has also been proven that, in 2001, Mr Emil Petter Vadis, then managing director of the shipowner company, provided a list of clients from 1998, from which it can be seen that the *M/V "Norstar"* was not in a bad condition, but rather in very good working order and performing its usual operations until its arrest. The document does not stand alone: it corroborates the evidence of Mr Morch and Tore Husefest. Further, the document provides evidence of the amount and value of the cargo, including the gasoil, on the date of arrest of the *M/V "Norstar"*. The value was US$ 108,670.79; with interest it amounts to US$ 176,771.06. The question must be: Is this sufficient evidence to establish that at the time of arrest the said amount of fuel was on board the vessel? Mr Morch did not inspect or see the vessel when it entered the port, Mr Rossi said it may have bunkered two or three vessels while there, which could mean that the vessel left the port on more than one occasion. A judge cannot presume anything on the basis of conjecture. One person alleges something and another must prove it. In these circumstances the proof that the said amount of fuel was on board is insufficient. I do not agree with the reasoning of the Tribunal and consequently voted that Panama is entitled to damages for the loss of the gasoil onboard the vessel at the time of arrest. The only evidence on this issue is that of Panama and the fact that the evidence discloses that *M/V "Norstar"* had arrived from Algeria where it was fuelled with gasoil.

85. The following must be noted from the evidence of Mr Morch. He was unable to provide security in 1999 because the bank would not provide a guarantee owing to the risk – the *M/V "Norstar"* was a *corpus delicti* (see bank documents of 6 March 2000; and 6 and 8 May 2003). There is also no evidence that the owner, Mr Morch,

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refused to take possession of the *M/V "Norstar"*. He was informed of the Decision of the Court at Savona; there is no evidence of arrangements to collect the vessel.

86. It must be noted that if, as Italy says, the *M/V "Norstar"* was in such a bad condition, why a bond was fixed at 250 million lira.

87. In order to fully appreciate the process employed when an order for a vessel to be arrested and seized is made, I refer to the evidence of Mr Esposito, whom I regard as a fair, knowledgeable and truthful witness.

88. Mr Esposito said that there are three forms of seizure: probative seizure is a method implemented to search for proof. The problem, he says, is that probative seizure is characterized by the fact that the investigation is to be kept secret. It is a means to search for proof. The purpose of probative seizure is to ensure that the *corpus delicti* can be acquired and that all the elements relating to the offence can be gathered. The *fumus* is not requested for this measure; however it is required for the two other forms of seizure: preventative seizure and conservative seizure. It is necessary to have proof of the wrongdoing when the acts were committed. So, probative seizure is different from conservative and preventative seizure. Preventative seizure is the one adopted by the judge for the preliminary ruling on 24 February 1999. It is a means to search for proof. It is a temporary measure. When asked by Counsel for Italy whether it is possible to ask the judge for permission to carry out maintenance work, Mr Esposito said that "it is clear that with the decree of seizure there is no possibility to have access to the goods. (This evidence corroborates Mr Morch's evidence.) The goods are immobilized. (Mr Morch was unable to obtain the relevant books, e.g. the logbook.) At the same time, pursuant to Italian law, a custodian has to be appointed, a custodian for the seized ship, so the seized goods have to be entrusted to an individual who may be captain of the ship, so for maintenance purposes, a request might have been filed with the Spanish Authorities or with the Public Prosecutor in Savona." A custodian may have been appointed. There is no evidence specifying who the person was or what their responsibilities were. "After seizure a report must be prepared by the judicial police officers." Apparently a report was not prepared or if it was it has not been produced for the Tribunal. Mr. Esposito said that "*we had two different jurisdictions in charge,*

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Italy requesting arrest and Spain executing the Order, so that is why we have these problems" (my emphasis). The evidence discloses that he is correct.

89. It will be convenient to consider the non-production of the report, inventory and captain's logbooks at this stage. If the logbook had been produced, it would have shown whether the vessel was seaworthy, whether it was bunkering vessels on the high seas and whether it had sailed to Algeria in August 1998, and was bunkering prior to arrest. Panama asked Italy for these documents. Italy has not produced them and Panama has been unable to obtain them, so the Tribunal has to rely upon the verbal evidence of the witnesses. In my opinion, the evidence of the witnesses of this fact produced by Panama outweighs that of Italy. Mr Matteini said it was not possible to inspect the vessel, so he used available data. He referred to several photographs found in the marine traffic and ship finder. This photo showed that the ship was "active". The photographer's name is not on the photograph and there are no specific dates. I am not satisfied that the photos qualified for acceptance in evidence, having asked whether they are relevant, authentic and reliable to be given evidential weight.

The Decree of Seizure

90. The method adopted by Italy in executing the Decree of Seizure is set out above. After an investigation, the Public Prosecutor applied for and obtained a Decree of Seizure. The Decree reads in part:

> As a result of complex investigations carried out it emerged that Rossmare International s.a.s. managed by Silvio Rossi 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 custom warehouses both in Italy (Livorno) and in other EU States (Barcelona) and intended to trade in Italy, thus evading payment of custom duties and taxes by factiously using oil tankers, which are in fact chartered, and by resorting to consequent tax fraud in respect of the product sold to EU vessels;
>
> It was 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 tax exemption was granted (with reference to products bought in Italy and Spain, which are then surreptitiously re introduced into Italian, French and

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> Spanish customs territory) while being fully aware that the product will be subsequently introduced into Italian territory and that no statement for customs purposes is issued by the purchasers.
>
> Savona 11 August 1998
>
> THE PROSECUTOR OF THE REPUBLIC AT THE COURT OF SAVONA
> (Dott. Alberto Landolfi –Deputy)

91. It seems clear to me that the basis for the Decree of Seizure is the legal bunkering activities of the *M/V "Norstar"* on the high seas. It is on the basis of this Decree that the *M/V "Norstar"* was arrested and seized. Consequently, the *M/V "Norstar"*, from the date of seizure, was denied access to the high seas and its right of freedom of navigation on the high seas was infringed.

92. Letters rogatory were then sent to the Spanish authorities to execute the Order of Seizure. **The International letter Rogatory of the Tribunal of Savona to the Spanish Authorities** (Annex K of the Counter-Memorial of Italy)

93. In summary, the letter sets out facts in which it is alleged that the *M/V "Norstar"* and another tanker, the *M/V "Spiro F"*, loaded marine gas oil in named European ports and sailed to the high seas, where they bunkered mega yachts and other vessels. These vessels then sailed into the ports with gas oil for which taxes and custom duties had not been paid. With respect to the *M/V "Norstar"*, the request specified that the vessel loaded gas oil on four different occasions in the ports of Gibraltar, Livorno, and Barcelona and again Livorno in 1997. The following paragraph of the Request specifies that:

> (b) Normaritime Bunker Co. Ltd of Valletta (Malta), by means of the motor vessel Norstar, which was positioned close to the territorial waters off the Western coast of Liguria, has thus traded in gas oil purchased exempt from domestic taxes and mainly destined to supply mega yachts flying European Union flags through the intermediation of ROSSMARE INTRNATIONAL SAS (Which acted as a collector of all supply requests;
> In the following paragraph
> (c) it is alleged that ROSSMARE INTERNTIONAL SAS did not issue invoices to the various yacht owners that had left the ports for the sole purpose of fuelling up(through bunkering on the high seas0 and returning to the ports without declaring that they possessed the bunkered fuel.
> In the light of the above the Italian authorities were of the view that offences of smuggling, evasion of taxes and customs duties had been committed and hence the request for the arrest of the offenders and seizure of the Norstar was made to the Spanish authorities.

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94. The testimony of Mr Esposito was not challenged. He was fair and forthright. To the question “Does the foreign authority (in this case Spain) have to make an inventory of the conditions of the object of seizure?” he replied “Yes of course ... the country to which the Rogatory has been sent must of course write a report and give all the information concerning the vessel. The vessel’s captain must give all the information and must help the country to execute the Order in the case”. He went on to say that according to Italian law “all the information is kept by the authorities”.

95. In this case the report of seizure by the Spanish Authorities is set out in Annex K of the Counter-Memorial of Italy.

96. Minutes No. 640/1998 specify that the owner is Arve Morch; the name of the vessel is *M/V “Norstar”*; the documents of the *M/V “Norstar”* are in the central Port Authority of Palma de Mallorca (boat office unit); the place of deposit, port of Bahia de Palma; Remarks: It is moored. The report continues:

> *The captain questioned as to where and how to locate him, replies that he resides in the m/v” Norstar” where she is moored. The captain of the boat in relation to the facts of the case declares as follows: THAT HE WISHES A PROMPT SOLUTION OF THE CASE, AS HE WOULD LIKE RETURN BACK TO HOME SOON.*

97. The report does not mention details of an inventory. It does not itemize the documents or state whether a logbook and ship records are among them. As I mentioned earlier, these documents would be helpful for more conclusive fact-finding in this case. The above-mentioned documents are important. Consequently, the testimony of the witnesses for Panama has to be carefully scrutinized and assessed. These witnesses were cross-examined and were not shaken. In the circumstances, with no evidence to the contrary from Italy, I accept their evidence as the truth.

98. In my view the report submitted to the Tribunal did not include the captain’s logbook and the ship’s documents, including the records of purchases and sales to bunkered vessels. These would have been helpful in determining conclusively the activities of the *M/V “Norstar”*, its condition before and at the time of arrest and whether it had sailed from the port to Algeria and to bunker vessels on the high seas

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in August 1998. Prior to the hearing in September 2018, Panama made several requests for these documents. None of the above-mentioned documents were produced by Italy. Panama cannot be blamed for the non-production of documents requested.

99. It seems to me that the *probation diabolica* rule is applicable. Article 3 of the European Convention on Mutual Assistance in Criminal Matters (the Strasbourg Convention) provides:

> Chapter II Letters Rogatory
> The requested party shall execute in the manner provided by its law any letters relating to a criminal matter and addressed to it by the Judicial Authorities of the Requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records and documents.

100. Italy has not presented any articles, records or documents that were procured by the Spanish authorities and transmitted to the Italian Prosecutor or judicial authorities. As I mentioned above, the *M/V "Norstar"* was arrested, seized and detained and kept under guard. The owner did not have access to the vessel, therefore the obligation was on Italy to procure and produce the relevant documents if called upon by a court or tribunal. Despite requests by Panama, Italy did not produce any articles or records or documents. It appears as though Italy is blaming the Spanish authorities for not complying with the requirements of Article 3 of the Strasbourg Convention, i.e., obtaining a detailed report with an inventory of all the documents, records, fuel and goods on board at the time of arrest and naming and *appointing* a custodian for the maintenance of the vessel.

101. For the purpose of clarification, I refer once more to the testimony of Mr Esposito. He explained that the purpose of protective seizure is to ensure that the *corpus delicti* can be acquired and all elements relating to the offence can be gathered. The investigation prior to the seizure is secret. It could involve telephone tapping, surveillance and examination of documents (Silvio Rossi testified that his lines were tapped, and Tore Husefest, the former captain, testified that the *M/V "Norstar"* had been under surveillance by the Italian coastguard). Probative seizure is the means used to search for proof.

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102. It seems evident that, when the *M/V "Norstar"* was arrested, seized and detained, the Public Prosecutor was still searching for evidence in the cases against Mr Rossi, Mr Morch and certain members of the crew. From the time of arrest and detention, the *M/V "Norstar"* did not have access to the high seas to continue its commercial business of bunkering. Mr Esposito also said that the Public Prosecutor can inspect the vessel if it is in Italian waters, so if he wanted to have access to the vessel, which was in Spanish waters, he would have had to obtain the permission of the Spanish authorities. After seizure and arrest, a report with every detail must be prepared by the judicial police officers. (The report is set out later in this Separate Opinion; in my view it is not sufficiently detailed.) This statement in his testimony seems to resonate with one of the problems in this case "*the problem is that we had two different jurisdictions in charge. We had Italy requesting the arrest and Spain executing the order, so that is why we had these problems*" (my emphasis). The foregoing words speak volumes in this case.

103. In this case a detailed report was not produced, nor were the captain's logbook, the relevant records from the vessel upon arrest or an inventory. These would have been essential in assisting the Tribunal in arriving at its findings. In their absence, the Tribunal had to rely upon such evidence produced: the oral and documentary evidence submitted.

The judgments of the Italian courts

104. Background

(a) 25 September 1998: the *M/V "Norstar"* was seized as a *corpus delicti;*

(b) 15 August 1999: Mr Carreyó, by letter, asked the Italian Government to lift the seizure of the *M/V "Norstar"* "within a reasonable time";

(c) On 7 and 6 June 2002, in letters bearing those dates, Mr Carreyó reiterated his requests for the seizure to be lifted;

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(d) 13 March 2003: the learned judge at first instance in the criminal court acquitted all the accused of the charges made against them and ordered the release of the *M/V "Norstar"*;

(e) 18 March 2003: the Public Prosecutor appealed against the acquittal of the accused only, not against the release of the *M/V "Norstar"*;

(f) 25 October 2005: the appeal was dismissed;

(g) 17 April 2010: Mr Carreyó wrote to the Italian Minister of Foreign Affairs, reiterating the facts and seeking compensation for the damages caused by the illegal arrest of the *M/V "Norstar".*

It must be noted that, from the time of seizure until the acquittal of the accused and later the dismissal of the appeal, the *M/V "Norstar"* was in the port of Mallorca, Spain, apparently under the control of the Spanish authorities

The judgments

105. In the Court of Savona, Division for Monocratic Proceedings, the charges against all the above-named defendants were dismissed. The reasons are set out in the judgment.

106. Evidence was taken from: Silvio Rossi; Renzo Biggio; Bruno Melegari; Arve Linier Morch; Petter Emil Vadis; Tore Husefest; Massimo Bocchiola; and Joseph Falzon for avoiding customs duties and taxes, fraud and smuggling.

107. The following is an extract from the judgment that is helpful in the assessment of evidence before this Tribunal.

> The defendants have been committed to trial to answer for the offences they have been respectfully charged with described above. Evidence was taken during the trial by the transcript of telephone interception, reading of witnesses' statements submitted by the parties to the proceedings, examining the defendant Rossi and reading the interviews of the defendants who failed to appear. Then the parties have submitted their

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conclusions and the court delivered its judgment by reading out the decision on 13th March 2003.

108. It is clear to me that the learned judge considered evidence that must have included all the relevant documents and oral evidence. Consequently, he acquitted all the defendants and ordered the release of the *M/V "Norstar"*. The learned judge is the sole judge of the facts and the application of the relevant law to the facts. In other words, he was the fact-finder. It must be noted that this Tribunal sits as a court of superior record and as a final arbiter. In doing so the Tribunal must accept the findings of the judge at first instance in Savona who was aware of all the evidence in the case. Further, his decision was confirmed by the Court of Appeal in Genoa on 25 October 2005. Panama argues that the judgments in effect declare that the Decree of Seizure was unlawful because the *M/V "Norstar"* was seized and arrested on a basis that was wrong in law, because bunkering on the high seas is lawful. Italy contends that the Decree was issued in accordance with due process and was per se lawful. It seems to me that the execution of the Decree that was predominantly based on bunkering on the high seas is *de jure* and *de facto* unlawful.

Assessment of evidence

109. The issue to be determined is how a judge, sitting in an international court, assesses evidence and determines the facts. There is no general rule in international law. In fact, the Rules of the Tribunal are silent. Rules cannot set out how a judge should consider and find facts from evidence. It is solely the function of the judge who is the fact-finder. This is a case abounding with evidence, both oral and documentary. It includes the testimony of a witness who has since died. Therefore, how can it be assessed? Italy did not object to the admission in evidence. It must be assessed in the light of all the oral and documentary evidence on the issue.

The burden of proof

110. For purposes of clarification I must emphasize that in common law jurisdictions, there are two main standards: one that is applicable in civil cases and the other in criminal cases. The standard adopted in common law jurisdictions in

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criminal cases is proof beyond a reasonable doubt; in civil cases, the standard is based on the "preponderance of evidence" or "the balance of probabilities". In the civil law system, the concept of the standard is different, it is not based "on the balance of probabilities" but is a matter for the personal appreciation of the judge, or "*l'intime conviction du juge*". In other words, if the judge considers himself to be persuaded by the evidence and submissions based on the evidence, then the standard of proof has been met. I have applied the foregoing when examining the documentary and oral evidence.

111. "The Rules of Procedure of Tribunals do not deal with the authenticity of documents. Clearly, though a tribunal has the power to exclude documents" (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 40, at p. 46, paras.15ff).

112. In the *M/V "SAIGA" Case*, the Tribunal did not have to take a decision on the issue.

113. An issue relating to the authenticity of documents was raised in the *M/V "SAIGA" (No. 2) Case* cited above, while in *Qatar* v. *Bahrain,* the documents were challenged by the Respondent State as not being authentic and were excluded. Documentary evidence seems to be the most common type of evidence before the Tribunal (see C.F. *International Litigation*, p. 183, Amerasinghe *Evidence in*).

114. In the *M/V"SAIGA" (No. 2)* Case, the entries were not contested. The Tribunal alluded to this fact and did not enquire into the authenticity of the entries in the documents.

115. In the instant case, the authenticity of the statement was not challenged. Counsel did not object or challenge the authenticity of the statement, neither was there any objection to its admissibility. However, by implication, Counsel suggested that the contents were not true and led evidence to contradict what is set out therein.

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The law

116. The articles that are relevant are: articles 87 and 300 and articles 92, 97, paragraphs 1 and 3, of the Convention. Although I set out article 87 earlier, it seems convenient to repeat it here. It reads:

> *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 XIII.
>
> 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.

117. Article 300 reads:

> *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 right.

118. The specific article to be interpreted is article 87, paragraph 1(a).

119. Courts do not make law. Courts interpret, construe and apply the law to the facts of a case. Panama contends that the article should be given a wide and generous interpretation. Italy argues that the interpretation must be strict and in conformity with principles of international law. “Freedom of navigation” refers specifically to the high seas and not any other area. Freedom of navigation is a right, therefore any denial or prevention of or interference with the exercise of that right is an infringement of article 87, paragraph 1, of the Convention.

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120. In referring to the relevant articles, I also make mention of article 31 of the Vienna Convention on the Law of Treaties, which reads:

Section 3: Interpretation of treaties

Article 31
[General rule of interpretation]

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.

121. With Section 3 of the Vienna Convention on the Law of Treaties in mind, specifically, article 31(1), the ordinary meaning of the words, and more importantly in this case, the object and purpose of the article 87 of the Convention will be interpreted. The “object” is ensuring the right to freedom of navigation and the “purpose” is to guarantee that right. The words “freedom of navigation” are not qualified. It is a generic term; it will apply in circumstances where the right is circumscribed, for example, preventing a vessel from exercising the right. In this case the *M/V “Norstar”* was unlawfully denied access to the high seas in that it was unlawfully and unjustly arrested and detained such that the vessel was prevented from carrying out lawful activities of bunkering vessels on the high seas, thereby earning a livelihood for its owners and crew.

122. I am further guided by the following principles of interpretation: the interpretation of legislation is not a simple task and traditional methods which relied heavily on a conservative approach have been replaced by a more liberal style, as adopted by the courts, which, in general, are charged with the responsibility to interpret legislation.

123. The courts may take one or both of two general approaches. The first approach is a confined one, where the courts try to avoid imposing their own interpretation of the statute and restrict their role to the meaning of the specific provisions or ineffective result and the “mischief rule” which takes account of the deficiency that parliament sought to cure. This method promotes the use of rules such as the “literal rule”, which is best captured by Sir Harry Gibbs’ words “begin with

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the assumption that words mean what they say";[1] the "golden rule" that parliament does not intend an absurdity. The second approach involves a more dynamic and creative style of interpreting legislation which has been described by many as the court stepping obscenely out of its crease. This technique includes the modern purposive approach, where the spirit and purpose of an act is considered in the overall meaning of the specific provision(s) under review.

124. Article 87 of the Convention is part of the corpus of the United Nations Convention on the Law of the Sea. The Convention is part of International legislation, the interpretation of which is governed by rules of international law, such as Article 31 of the Vienna Convention on the Law of Treaties, referred to above, and general rules of interpretation of legislation in national law systems.

125. Having considered the evidence, the relevant law, and the submissions of Counsel for both Parties, for the reasons set out above I find that:

1. The *M/V "Norstar"* was in a good and seaworthy condition prior to its arrest and detention;

2. Spain was carrying out the instructions of Italy. Therefore Italy is liable for any abuse of right that may have taken place. In the light of the Decree and the letters rogatory in conjunction with section 3 of the mutual assistance treaty between Italy and Spain, Italy was responsible and liable;

3. The Decree itself shows that the main reason for the arrest and seizure was for bunkering activities on the high seas;

4. In the light of the judgments of the Court at Savona and the Appeal Court in Genoa, the charges against the accused were unfounded;

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[1] Considered by J. Bryson,"Statutory Interpretation: An Australian Judicial Perspective" (1992) 13 *Statute Law Review* 187 at 188.

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5. The hypotheses raised by Italy with respect to evasion of taxes and customs duties by re-entry into Italian waters by mega yachts and vessels after being bunkered by the *M/V “Norstar”* on the high seas have not been proven in any of the Italian Courts (see the judgments);

6. By being unlawfully arrested, seized and detained, the *M/V “Norstar “was* denied access to the high seas, and the provisions of article 87 of the Convention were thereby infringed.

Damages and compensation

126. For the above reasons Panama is entitled to damages and compensation.

127. Panama claims monetary compensation as a substitution for the loss of the *M/V “Norstar”*. The evidence discloses that, as a direct consequence of the arrest and seizure, the lack of maintenance while the vessel was under the authority of the custodian duly appointed by Italy and the auctioning off of the said vessel in September 2015, the vessel is a total loss for the owner. Evidence was led that the value of the *M/V “Norstar”* at the time of arrest was US$ 625,000.00. Panama claims interest at the rate of 6 per cent per annum from 5 September 1998 to the present date

128. Apart from Mr Morch, Panama led evidence from Mr Horacio Estribi, an economic adviser to the Ministry of Finance of Panama [18/C25/4] who testified that: “the loss and damage suffered by the owner includes damage for loss of the vessel, damage resulting from loss of revenue, continuing payment of wages, legal fees, payment due for fees and taxes to panama maritime Authority and payment due for fees and taxes to Palma de Mallorca port Authority.” The total amount for the loss of the vessel was US$ 1,641,670.06. This amount includes the principal and interest i.e., US$ 625,000 plus interest, which is US$ 1, 06,670. He said that CM Olson is a company well acquainted with the *M/V “Norstar”*.

129. In response to Panama’s claim, Italy led evidence from Mr Matteini, a sea captain and “part of the national register for experts for naval evaluation “and “an

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expert for the Tribunal in Florence.“ He said he assessed the value of the *M/V “Norstar”* at the time of execution of the seizure. He did not inspect the vessel but based his valuation on available data, including photographs, and he assessed the value of the *M/V “Norstar”* at the time of seizure as €250,000. It was not disputed that the *M/V “Norstar”* was approximately 20 years old. On the basis of his research, the *M/V “Norstar”* did not undergo any renewal action. Mr Matteini was shown several photographs that had been published in the Marine Traffic and Ship Finder, specifically Baltic and Marine Traffic. He added that

> when you look at my calculations to make comparisons also to prepare for this hearing. *These photographs are no longer available, because we are talking about a ship that has been demolished, a lot of time has gone by, and only the ship owner can do this*. The data has been cancelled and even though in my report I do state the sources, it is possible that some of these photos are no longer available on line.

It seems to me that he was speaking the truth about his findings. In my view, the evidence based on references to photographs and research is not evidentially reliable on such an important issue as the value of the vessel at the time of seizure, because he was unable to say in answer to Counsel for Italy whether the photographs were taken when the *M/V “Norstar”* was arrested. (The question was “According to your opinion when were these photographs taken?”)

130. When asked during cross-examination whether he had said: “the photographs were not fitted with any dates “, he replied

> I recall that in the data sheets that accompanied the pictures there are date indications, hour indications, time indications. No matter when, then, the pictures were uploaded onto the portal – so I correctly remember, some pictures have been displayed on the screed and they had a clear indication of a date. Maybe we can display the pictures again so we can confirm the date.

Counsel for Panama did not find it necessary to do so. Nevertheless, the photographs are evidence with the data sheets. The data sheets show all the relevant data. When asked at the end of the cross-examination whether he took the photographs into consideration for his evaluation, he said he did but he did not know the author or authority of those photographs, however they were taken from official websites.

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131. In my opinion, the photographic evidence led by both sides is not cogent and convincing. The witnesses were not clear and specific with respect to the dates on which the photographs were taken. It appears to me that in this case a judge must primarily rely on the oral evidence. Such evidence is gleaned from that of Mr Morch. Further, there is the evidence of the experts on the net worth of the *M/V "Norstar"* at the time of seizure. I do not think a judge can surmise or speculate. In this case one must rely on the evidence presented. Panama claims US$ 625,000. Italy's expert testified that the amount, having regard to the age of the vessel and likelihood of repairs and renovating, was €250,000. It is said "fairness transcends the strict requirements of the law", whereas in such circumstances a judge should consider an equitable solution. It is important to carefully access and examine the Olsen report and the oral evidence of the witnesses for Panama and the evidence led by Italy. I do so now.

132. As set out above, the evidence led by Panama compared with that of Italy does not exceed that of Italy, which is totally dependent on the acceptance of the evidence of Mr Matteini, who did not inspect the vessel but used photographs and experience to arrive at a valuation. It appears to me that the witness based his evaluation on references to photographs which are no longer available because he said "we are talking about a ship that has been demolished, a lot of time has gone by, and only the ship owner can do this". The shipowner testified and in his opinion the value of the vessel was higher. Further, Italy had pleaded that at the time of arrest the vessel was not seaworthy, it was in a state of "dismay" and abandoned. However, evidence was led, as set out in the report, that upon arrest, the captain was living on board. The allegation set out in the pleading was not proven. In fact, the Tribunal found that the vessel was seaworthy at the time of arrest.

133. It is not disputed that the *M/V "Norstar"* was built in 1966. At the time of arrest it was over 20 years old. In order to arrive at a figure for valuation the Tribunal has to rely on such evidence led by the Parties. In a court or tribunal the judge cannot assume or speculate. Panama asked the Tribunal to place a value at US$ 625,000. Mr Matteini says €250,000. In the absence of clear and specific evidence, the only specific figure is that provided by Mr Matteini.

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134. Panama submits that damages started accruing from the very moment the *M/V "Norstar"* was not allowed to leave port and only ended when the *M/V "Norstar"* was dismantled in September 2015.

135. Italy argues that the causal link was broken in 1999, when the Court in Savona advised that the *M/V "Norstar"* could be released upon payment of a bond through a bank guarantee, set at 250 million lira, approximately US$ 250,000. As I alluded to above, the owner, Mr Morch, could not raise the amount or secure a bank guarantee. The question is: was the link broken in 2003 when the Court in Savona ordered the release of the *M/V "Norstar"* or in 2005 when the Court of Appeal dismissed the appeal of the Prosecutor against the decision of the Court in Savona where the charges against Mr Morch, the crew and Mr Rossi were dismissed?

Abuse of rights

136. Article 300 of the Convention provides:

> *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 recognised in this Convention in a manner which would not constitute an abuse of right.

137. Good faith in this article could only mean with absolute fairness in mind parties will deal with each other honestly and fairly so that each party would receive the benefits under articles 2 and 87, paragraph 1, of the Convention and not do anything that would destroy the rights of the other party The obligations in this case would be those set out in articles 2 and 87, paragraph 1, "freedom of navigation", which means the right to sail freely on the high seas or in this case to conduct the business of bunkering other vessels. The said freedom is recognized in the Convention, i.e., freedom of navigation. The question is: does the evidence disclose an abuse of right? There is no evidence of "bad faith" on the part of Italy. However, in respect of good faith the following is relevant.

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138. Article 300 applies, in a direct way, the doctrine of abuse of right to the law of the sea, as set out in the Convention, thus creating definite limits on the manner in which States may exercise their rights, jurisdiction and freedoms established in the Convention. The primary question is: Did Spain on behalf of Italy exercise its right in a manner that would amount to an abuse of rights? I agree that article 300 is not applicable unless it relates to another provision of the Convention concerning a right, jurisdiction or freedom set out in the Convention which is exercised in an abusive manner by the coastal State, in this instance Spain, which, as I said, was acting on behalf of Italy. In my view article 2, paragraph 3, of the Convention provides the link to article 300. Article 2, paragraph 3, provides that "The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law". It seems clear to me that, while the Convention recognizes the sovereignty of the coastal State over its territorial sea, it prescribes that there are limitations to its substantive rights. In other words, a coastal State cannot unlawfully arrest and detain persons and/or a vessel and deny its right to access to the high seas as in the instant case. Consequently, it would be illogical if article 300 of the Convention, which introduces directly into the law of the Sea the concept and doctrine of abuse of right that apply to the exercise of rights, jurisdiction and freedoms individually recognized in the Convention; but, not to the said rights and freedoms exercised by the coastal State based on its sovereignty over the territorial sea.

139. The evidence discloses that Panama questioned the legality of the arrest and detention of the *M/V "Norstar"* and the persons connected therewith. It also challenged the way the Spanish and Italian authorities were, throughout the detention of the vessel, exercising their jurisdiction, which, in my view, amounts to an abuse of process. The evidence discloses that Spain acting on behalf of Italy executed the Decree of Seizure and arrested and detained the *M/V "Norstar"*, thereby preventing the vessel from accessing the high seas and enjoying its freedom of navigation. Italy deprived the *M/V "Norstar"* of its right to freedom of navigation: by unlawfully ordering the seizure and arrest of the *M/V "Norstar"* and by its failure to maintain the vessel after arrest. The seizure of all the documents, including the logbooks, and the failure after several requests to produce them amount to an abuse. The owner was not permitted to board the *M/V "Norstar"*. The relevant

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documents were on board the vessel but the owner was not allowed access to them. Contrary to accepted procedure, a custodian was not appointed to take care and ensure maintenance of the vessel.

140. The evidence discloses that Spain acting in accordance with the Order of Seizure seized all documents. Although required by law and the letters rogatory, Spain did not make out a full report and did not prepare an inventory of the items on the vessel. Further, as already mentioned, despite several requests, neither Spain nor Italy provided the necessary documents that would have been valuable evidence in the case for both Italy and Panama. The foregoing amounts to a lack of good faith. The owner was not allowed access to the vessel. It must be noted that the actions in these circumstances are attributed to Italy. In other words, Italy failed to ensure that the necessary requirements under the letters rogatory were fulfilled.

Article 300

141. The applicant contends that article 300 is applicable. The Applicant claims that Italy has violated article 300 that reads:

> *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 right.

142. As I alluded to above, article 300 embodies general principles of international law that emphasize “good faith” and abuse of right. The article must not be construed narrowly but should be given a wide and generous interpretation. It specifies that States shall exercise their rights, jurisdiction and obligations under the Convention in good faith and in a manner which does not constitute an abuse of right under the Convention. Counsel for the Applicant contends that the article is applicable per se and that the abuse of right is relevant because of the treatment meted out to Mr Morch. The *M/V “Norstar”* was arrested and detained for five months initially then for five years; the owner, Mr Morch, was refused access to the vessel, although he requested the relevant documents, e.g. the captain’s logbook and ship’s documents

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were not provided. During the period September 1998 to 2003 the vessel was under preventative detention and as a result did not have access to the high seas to carry out its commercial obligations, thereby depriving the owner of an income. The Decree itself shows that the main reason for the arrest was because of its bunkering activities, which in fact are legal in the circumstances. The court found that the charges against the accused were unfounded; consequently the arrest was unlawful. The end result must include abuse of the rights of the vessel and, by extension, the owner. A State should not proffer criminal charges that in reality never existed. No authority can investigate, charge, arrest and detain a person or, as demonstrated in this case, a vessel unlawfully.

143. Two questions arise: What are the obligations that Italy assumed under the Convention in the relationship with the *M/V "Norstar"*? Did Italy exercise its rights, jurisdiction and freedoms in good faith? Further, does the evidence led prove the contention of Panama? The answer must be affirmative. The interpretation of the said article is important.

144. In order to construe article 300, the rules of statutory interpretation apply. It is necessary to examine the ordinary or plain meaning of the provisions of the article; secondly, to determine what the object and purpose of the said provisions are; and, thirdly, to construe the true purport of the article. In doing this, the judge will not be making new law or leading to judicial legislation, but will be making a positive contribution to the development of international law. The law is not static, it is dynamic.

Statutory interpretation

145. The law on statutory interpretation will be helpful in construing article 300 of the Convention. Once more, I find the following passages relevant:

> In construing an ongoing Act the interpreter is to presume that Parliament intended the act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, social conditions, technology, the meaning of the words and other matters. An enactment of former days is thus to be read today in

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> the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation year in and year out; it also comprises processing by executive officials.
> (Bennion on *Statutory Interpretation*, 5th edition, 2008, p.887)

146. In order to determine whether the Court should apply a rectification construction, guidance is also taken from Bennion on *Statutory Interpretation*, 5th edition, 2008, p. 877, section 287 which states:

> A flawed text has been promulgated as expressing the legislative intention, this needs judicial correction, yet those who have relied on it are entitled to protection. This raises a difficult conflict between literal and purposive *construction. The Courts tread a weary middle* way between the extremes; the Court must do the best it can to implement the legislative intention without being unfair to those who reasonably expect a predictable construction. The cases where rectifying construction may be required can be divided into five categories, which may overlap. These are: One, the garbled text, which is grammatically incomplete or otherwise corrupt; Two, the text containing an error of meaning; Three, the text containing a casus ommisus; Four, the text containing a casus male inclusus; and five, the case where there is a textual conflict.

147. I do not think the text of article is “flawed”. However, the text in article 300 provides a link to other relevant articles in the Convention. Therefore, I have linked article 300 to article 2, paragraph 3, of the Convention, which provides that “the sovereignty over the territorial sea be *exercised subject to this Convention and to other rules of international law*” (my emphasis).

148. Therefore, there can be reference not only to article 300 but also to rules of international law.

149. In my opinion, article 300 does not provide for a right per se. It specifies that parties must act in good faith in the manner in which they exercise their rights recognized in the Convention and these rights must be recognized in the Convention to prevent an abuse of right. Article 300 must be paired with a substantive right in the Convention to be invoked. The article has a horizontal effect in the Convention and must be linked to a right in the Convention, for example under article 87, where the

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vessel was arrested and seized and members of a crew are arrested and detained in the territorial waters of Spain, where rights should not be abused.

150. The article does not provide for the protection of human rights per se. If it did, the article would have so provided; however, by inference, it envisages an abuse of human rights. There is little or no guidance by the courts on the interpretation of article 300 in this context. Therefore, it seems to be incumbent on a judge to interpret the article without "making new law". Consequently, if the five categories mentioned above are applied to the articles, the reader will find that the judge is not making new law but rising to the challenge of contributing to the development of international law and providing an enhancement to the existing law set out in the Convention.

151. Article 31 of the Vienna Convention on the Law of Treaties provides for methods of construction and I have applied it. I think recent approaches will be helpful.

Article 300 is set out under the rubric "Good faith and abuse of rights".

152. The obligations are set out in the relevant articles of the Convention. Spain has exercised its right to enforce its laws in its sovereign waters but in doing so, the rights of a person arrested and detained must be observed.

153. The principle of the respect and protection of a person's right is applicable throughout the Convention and this seems to be the true purport of article 300. The said article is set out under "General Provisions" and not in relation to any specific provision. It is a "golden thread" running throughout the Convention and as a result can stand by itself in relation to an abuse of a right or in conjunction with a specific provision. This article is applicable throughout the Convention and guarantees that good faith will be recognized and that States parties will not abuse any right under the Convention. In other words, the article provides that States, in exercising their obligations under the Convention, must do so in a manner such that there is no abuse of right. It is noticeable that the word" Convention" appears twice in the article and this in the context can only mean that any obligation or right abused must be set

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in an article in the Convention. It seems to me that in exercising its rights, jurisdiction and freedoms, the State must do so without abusing the right of any person.

154. I recognize that there is a view that such a right must exist under the articles of the Convention and that article 300 cannot prescribe a right per se. Nevertheless, the right must be provided for in an article under the Convention.

155. In the Preamble to the Convention the relevant part for the purposes of this case reads “Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law”.

156. It seems to me that where the Convention is silent and does not specify where the rules of general international law are applicable, abuse of right is recognized in international law.

157. Article 300 must be linked to one or more of the articles of the Convention to be applicable. The article can be linked to article 87 of the Convention, as I will demonstrate later.

158. I think that in exercising its rights, a State party to the Convention must ensure that it respects and recognizes the rights of those whom it has arrested. This is in accordance with the rule of law, both nationally and internationally.

159. It seems clear to me that the sovereignty of a State is qualified because it is subject to the Convention. Consequently, it will include the provisions of article 300 of the Convention. This means that when a person is arrested for an alleged offence in the territorial sea, his rights must not be infringed.

160. How therefore does the article apply to the facts presented by the Applicant in the context of the submissions and the law?

161. In construing article 300 I am also guided by the principles set out in article 31 of the Vienna Convention; firstly to consider the ordinary meaning of the words used;

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secondly the object of the provisions in the article; and, thirdly the true purport of the article.

162. It seems to me that construed as a whole, in the context of the Convention, article 300 focuses on an abuse of right. In this context, article 300 provides that States Parties shall act in good faith in fulfilling *obligations assumed under the Convention and to exercise the rights, jurisdiction and freedoms recognized in the Convention.*

163. I find that the provisions of article 300 were infringed by Italy.

Costs

164. Article 34 of the Statute of the International Tribunal for the Law of the Sea provides that: "Unless otherwise decided by the Tribunal, each party shall bear its own costs." In this case no reasons or reasons have been submitted for the Tribunal to otherwise decide. Therefore I agree that each Party shall bear its own costs.

(signed) Anthony A. Lucky

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JOINT DISSENTING OPINION OF JUDGES COT, PAWLAK, YANAI, HOFFMANN, KOLODKIN AND LIJNZAAD AND JUDGE *AD HOC* TREVES

1. For the reasons explained below we have regretfully been unable to vote in favour of the two key operative provisions of paragraph 469 of the Judgment which are set out in its subparagraphs (1) and (4): namely, the finding that Italy violated article 87, paragraph 1, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and, consequently, the decision to award Panama compensation for the loss of the *M/V "Norstar"*.

2. The core issue is whether article 87 of the Convention – "Freedom of the high seas" – is applicable and has been violated in the present case.

* * *

3. The majority recognizes that the Decree of Seizure of *M/V "Norstar"* issued by the Public Prosecutor at the Court of Savona, Italy, concerns alleged crimes committed in the territory of Italy.[1] At the same time, it is of the opinion that the Decree, in particular when viewed in the light of the Request from the Public Prosecutor at the Court of Savona to the Spanish Authorities for its execution, also "concerns" and "targets" the vessel's bunkering activities on the high seas.[2] Moreover, the majority 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".[3] It then concludes that "article 87 of the Convention may be applicable in the present case".[4]

4. While the majority states that it "does not question Italy's right to investigate and prosecute persons involved in alleged crimes committed in its territory", it points

[1] Judgment, para. 169.
[2] Ibid., paras. 172-177, 186.
[3] Ibid., para. 186.
[4] Ibid., para. 187.

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out that "[i]t is Italy's action with respect to activities of the *M/V "Norstar"* on the high seas that is the concern of the Tribunal".[5]

5. The majority notes that a "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" and that "[t]his principle is clearly reflected in article 92 of the Convention".[6]

6. The majority is of the view that "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" and "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".[7]

7. The majority is of the view that "[a]s no State may exercise jurisdiction over foreign ships on the high seas, … 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".[8] It also considers that "even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation".[9]

8. In the view of the majority, "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".[10] The majority finds that "Italy's application of its criminal and customs laws to bunkering activities of the *M/V "Norstar"* on the high seas could in itself … constitute a breach of the freedom of navigation under article 87 of the Convention".[11]

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[5] Ibid., para. 212.
[6] Ibid., paras. 216, 217.
[7] Ibid., para. 219.
[8] Ibid., para. 222.
[9] Ibid., para. 223.
[10] Ibid., para. 224.
[11] Ibid.

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9. In the opinion of the majority, the principle of exclusive flag State jurisdiction, which is an inherent component of the freedom of navigation under article 87 of the Convention, "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".[12]

10. The majority considers that "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" and that "[t]his would be so, even if the State refrained from enforcing those laws on the high seas".[13] In their view, "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" and "[t]his is precisely what Italy did in the present case".[14]

11. The majority, 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".[15]

12. The Judgment 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".[16]

* * *

[12] Ibid., para. 225.
[13] Ibid.
[14] Ibid., para. 226.
[15] Ibid.
[16] Ibid., para. 230.

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13. We are convinced that in the circumstances of the present case, article 87, paragraph 1, of the Convention is not applicable and thus is not susceptible to violation. Moreover, we are of the view that even if article 87, paragraph 1, were applicable, *quod non*, it would not have been violated by Italy.

14. For article 87 of the Convention to be violated, it must, in the first place, be applicable to the conduct in question. The conduct in question in the present case is first of all the issuing by Italy of the Decree of Seizure and the Request to Spain for its execution. Already, in its Judgment on Preliminary Objections, the Tribunal stated that the Decree of Seizure 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".[17] The Tribunal then concluded that article 87 of the Convention was "relevant to the present case".[18] However, in our view, the relevance of this article does not necessarily imply its applicability. While relevance may be sufficient to establish the Tribunal's jurisdiction, it is not enough to establish that this article applies to the conduct in question when considered on the merits.

15. Article 87 of the Convention protects the free movement of vessels primarily from the exercise of enforcement jurisdiction by non-flag States on the high seas. As stated by Judges Wolfrum and Attard in their *Joint Separate Opinion* in the present case, "[c]onsidering the object and purpose of article 87 of the Convention, this provision first and foremost protects the free movement of vessels on the high seas against enforcement measures by States other than the flag State or States so authorized by the latter". [19]

16. In the present case, it is not disputed that the Decree was enforced in the internal waters of Spain, which the *M/V "Norstar"* entered voluntarily. Moreover, Italy,

[17] *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016,* p. 44, at p. 73, para.122.
[18] Ibid.
[19] *M/V "Norstar" Case (Panama* v. *Italy), Preliminary Objections, Joint Separate Opinion of Judges Wolfrum and Attard,* para. 34. "[A]rticle 87 protects against enforcement actions undertaken by a State different from the flag State which hinder the freedom of movement of the vessel concerned. In this case such an enforcement action on the high seas did not take place." Ibid., para.38.

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being a party to the 1959 European Convention on Mutual Assistance in Criminal Matters[20] to which Spain is also a party, did not need to arrest the *M/V "Norstar"* on the high seas, as that Convention's mechanism of letters rogatory provided it with an accepted legal tool to ensure the arrest of the vessel in the port of Palma de Mallorca in Spain.

17. Article 87 may also protect vessels on the high seas from the prescriptive jurisdiction of non-flag States. The majority holds that freedom of navigation 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.[21]

18. However, for a State to apply its prescriptive criminal jurisdiction to any activity and in particular an activity beyond its territory, that State must target the activity as a criminal one extending rules of criminal law to this activity and not just mentioning or describing it. The activity must be criminally prosecutable under the law of that State.

19. Moreover, nothing in the text of the Convention, in its *travaux préparatoires*, in other international treaties, in customary international law, or in the practice of States suggests that article 87 and its corollary article 92 altogether excludes the right of non-flag States to exercise their prescriptive criminal jurisdiction with respect to activities on the high seas. Guilfoyle, referring to Gidel's *Le droit international public de la mer: le temps de paix* and to the *Judgment in the Case of the S.S. Lotus*, states that "[e]xclusivity of jurisdiction … creates only a prohibition on exercising **enforcement jurisdiction** over foreign vessels on the high seas; multiple States may still attach legal consequences to acts committed on a vessel on the high seas as a matter of **prescriptive jurisdiction**".[22]

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[20] Strasbourg, 20/04/1959; ETS 30.
[21] See para. 9, supra.
[22] *United Nations Convention on the Law of the Sea. A Commentary*, ed. by A. Proelss, 2017, pp. 700-701. The author is referring to: G. Gidel*, Le droit international public de la mer: le temps de paix*, vol. I (1932), p. 261; *"Lotus"*, *Judgment № 91927, P.C.I.J. Series A, No 10*, p. 4.

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20. The majority in the present case limits the prohibitive effect of article 87 with regard to prescriptive jurisdiction of a State to the “lawful activities” of foreign vessels on the high seas. This would seem to suggest that a non-flag State is not excluded from extending, in conformity with international law, its prescriptive jurisdiction to the unlawful activities of foreign vessels or of persons on the high seas.

21. Italy has stated that its criminal law is based on the strict observance of territorial jurisdiction.[23] It did not exercise its criminal jurisdiction - neither enforcement nor prescriptive - with respect to the bunkering activities of the *M/V “Norstar”* on the high seas. Italian law does not criminalize bunkering activities of foreign vessels on the high seas, and Italy never claimed that bunkering of mega yachts by the *M/V “Norstar”* on the high seas was unlawful under its own or international law.[24] In the present case, the Italian authorities were exercising criminal jurisdiction in respect of the alleged crimes of tax evasion and smuggling[25] which were considered under Italian law to have been committed on Italian territory.[26]

22. The majority is of the view that the Decree of Seizure “concerns” and “targets” bunkering activities of the *M/V “Norstar”* on the high seas. While the first (“concerns”) may be deemed to be true, the second (“targets”) is not, as will be elaborated below.

23. It is true that bunkering activities of the *M/V “Norstar”* on the high seas were described in the Decree of Seizure and other related documents issued by the Italian

[23] Counter-Memorial, paras. 106-112.
[24] “It is not contested that the Norstar may carry out bunkering activities; what is contested is that the activity carried out was widely different from bunkering (on the matter in point, it is noteworthy that the “bunkers receipts” addressed to the yachtsmen were fraudulently addressed on the basis of an agreement between [Silvio] ROSSI and ARVE [Morch])”. Office of the Prosecutor of the Republic attached to the Court of Savona, Decree refusing the release of confiscated goods by the Public Prosecutor of the Tribunal of Savona, 18 January 1999, Rejoinder, Vol. 2, Annex C, p. 2 of the English translation. "[W]e are not contesting whether the vessels seized could carry out bunkering operations, but we are contesting that the activity carried out was quite different from actually being bunkering […]." Appeal submitted by the Public Prosecutor, 20 August 2003, Rejoinder, Annex D, p. 2 of the English translation.
[25] See, for ex., Counter-Memorial, paras. 37, 39, 46-47; Rejoinder, Vol. 1, paras. 13, 15, 18-19.
[26] Counter-Memorial, paras. 105-112; 117-118, 121, 127-137; “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.” Article 6 (2), Italian Criminal Code, *Published on the Italian Official Gazette, n. 251, of 26 October 1930*, Counter-Memorial, Annex V.

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judicial authorities within the framework of the criminal case against the Italian national Mr Silvio Rossi and several other persons. Ordinarily, prosecutorial documents describe the whole sequence of the relevant conduct of an alleged perpetrator, including the possession and use of the object (the *corpus delicti*) as an instrument of the alleged criminal act and the conduct that formed part of the alleged criminal scheme. Such description, however, does not necessarily mean that the possession and use of a possible *corpus delicti*, or such conduct itself, is unlawful or criminal. Neither does it mean that the prosecution and the prosecutorial documents describing them criminalize or target them. Not every element in the chain of events that leads to a crime is necessarily criminal.

25. The criminal scheme investigated by the Italian prosecution consisted of three main elements: (1) the fuel was bought in Italian territory for falsely stated purposes to avoid payment of taxes, (2) the fuel was intended to be sold at a reduced price to mega yachts outside the territorial waters of Italy using the *M/V "Norstar"*, knowing that, after its sale, (3) the fuel would be reintroduced undeclared into Italian territory.

26. Since the vessel was instrumental in the allegedly criminal conduct, the bunkering activities of the *M/V "Norstar*" were relevant for the criminal case investigated by the Italian authorities. In the Decree of Seizure the Public Prosecutor needed to describe how the *M/V "Norstar*" was used as *corpus delicti*, in particular to transport the tax-free fuel to a position outside Italian territorial waters, where it would be used for supplying the fuel to mega yachts. However, nothing suggests that these bunkering activities, relevant for the prosecution of the alleged crimes, were on their own unlawful or criminal under Italian law or that the Decree and the Request, issued in the exercise of Italian criminal jurisdiction, criminalized or targeted them as such. It was only the first and the third elements of the scheme described above that were targeted and prosecuted by Italy.

27. The fact that the bunkering activities of the *M/V "Norstar"* were included in the description of the allegedly criminal conduct in the Decree of Seizure and other related documents may be considered sufficient to determine that the Decree also concerned these activities, that consequently article 87 of the Convention may be relevant and accordingly to find, as the Tribunal did, that it has jurisdiction in the

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present case. However, this is not sufficient to find that Italy, by issuing the Decree, has targeted and criminalized the bunkering activities of the *M/V "Norstar"* on the high seas. Accordingly, this fact is not sufficient to conclude in the present case that article 87 is applicable, let alone that it has been violated by Italy.

28. Moreover, even if, for the sake of argument, one accepts that describing the bunkering activities in the Decree of Seizure serves to prove that Italy targeted and criminalized the bunkering activities of the *M/V "Norstar"* on the high seas, thereby extending to such activities its prescriptive criminal jurisdiction and thus making article 87 applicable, we believe that Italy still has not been in violation of article 87 of the Convention.

29. As a matter of principle, bunkering on the high seas may be considered a lawful activity. Thus, it is protected by article 87 (and by article 92) of the Convention from the prescriptive jurisdiction of States other than the flag State of the bunkering vessel.

30. However, in the present case, even if Italy, in the exercise of its prescriptive criminal jurisdiction, was targeting the activities of the *M/V "Norstar"* on the high seas, it was not targeting the bunkering as such. Rather, the focus of its investigation was the use of the vessel *as a means* to transport and supply fuel for the purchase of which allegedly appropriate taxes were not paid in its territory and which was subsequently allegedly smuggled into its territory. Italy was entitled to investigate this otherwise lawful activity as an integral part of the allegedly criminal scheme.

31. It is widely recognized that a State may extend its prescriptive criminal jurisdiction to conduct beyond its territory when a constituent element of an alleged crime has occurred in its territory or where there is a sufficient connection to it. It may do so, in particular, if the alleged crime, of which the conduct is a part, originated in its territory, or if it was completed in its territory and, at least in some cases, when the alleged crime produces harmful effects in the State's territory.[27] As it has been

[27] See, for ex.: Brownlie's *Principles of public international law,* 8th ed. by J. Crawford, Oxford Univ. Press, 2012, pp. 458-459; C. Ryngaert, *Jurisdiction in international law*, 2nd ed., Oxford Univ. Press,

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observed, most criminal codes in continental Europe ordinarily state that "offences are considered to be committed within the territory where one of its constituent elements was committed within that territory".[28] The Italian Penal Code Article 6 quoted in the Judgment is no exception.

32. Even if Italy exercised its prescriptive criminal jurisdiction in respect of this conduct on the high seas, this was exercised in respect of an integral part of the alleged crime (tax evasion), which commenced in its territory (purchase of fuel for falsely stated purposes in Italian ports), was completed in its territory (reintroduction of non-declared fuel into Italian internal waters) and had effects in the Italian territory (financial damage from non-payment of taxes). Since the alleged crime was initiated and completed in Italian territory, there is no doubt that its location was Italy and not the high seas.

33. In these circumstances, the conduct on the high seas was merely an element of the alleged crime which took place in Italian territory. Thus, there was more than enough connection to Italy to justify under international law the exercise of its prescriptive criminal jurisdiction.

34. In our view, it does not matter in this case whether the exercise of jurisdiction with respect to activities on the high seas is labelled "territorial" or "extraterritorial". Even in the latter instance, the exercise by Italy of its prescriptive criminal jurisdiction in respect of the conduct on the high seas would have been in conformity with international law.

35. The separation of Italy's right to investigate and prosecute persons involved in alleged tax crimes committed in its territory and closely linked to the *M/V "Norstar"* from its right to exercise prescriptive criminal jurisdiction with respect to the conduct of the vessel on the high seas,[29] is misconceived. The conduct on the high seas for which the vessel was used, whether or not it was "targeted" by Italy, was

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2015, pp. 78-79; Chr. Staker, "Jurisdiction", in *International law*, 5th ed. by M.D. Evans, Oxford Univ. Press, pp. 297-298.

[28] C. Ryngaert, op. cit., pp. 101-102.

[29] See para. 4, supra.

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instrumental to the alleged crimes committed in Italian territory. The vessel was an instrument used both in and beyond the territory of Italy to perpetrate these crimes. We do not see how under these circumstances article 87, paragraph 1, can prohibit Italy from ordering the seizure of the *M/V "Norstar"* as *corpus delicti* and from implementing this order when the vessel entered internal waters voluntarily.

36. Finally, we are convinced that a State may exercise its prescriptive criminal jurisdiction with respect to conduct on the high seas where such conduct is integral to an alleged crime committed in the State's territory, not when it is justified or allowed by international law to do so, but when it is not prohibited by international law to do so.[30] Article 87 of the Convention does not contain such a prohibition. Therefore, even if, *quod non*, Italy through the Decree of Seizure and the Request for its execution exercised its prescriptive criminal jurisdiction with respect to the supplying of mega yachts on the high seas with fuel for the purchase of which taxes were allegedly not paid in its territory and which was subsequently allegedly smuggled into its territory, it did so in conformity with international law.

(signed) Jean-Pierre Cot
(signed) Stanislaw Michal Pawlak
(signed) Shunji Yanai
(signed) Albert J. Hoffmann
(signed) Roman A. Kolodkin
(signed) Liesbeth Lijnzaad
(signed) Tullio Treves

[30] "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts 'outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 19.

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