INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

THE M/V "NORSTAR" CASE

THE REPUBLIC OF PANAMA *v.* THE ITALIAN REPUBLIC

COUNTER-MEMORIAL OF ITALY

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COUNTER-MEMORIAL OF ITALY

CHAPTER 1
INTRODUCTION

1. This Counter-Memorial addresses the misstatements of facts and the erroneous legal arguments that Panama has advanced in relation to the present case in its Memorial of 11 April 2017.

I.The incorrect factual characterisation by Panama of the dispute before the Tribunal

2. While some of the issues that constitute the factual matrix of this case are not disputed between the Parties, such as the fact that the *M/V Norstar* was moored at the port of Palma de Mallorca when it was arrested, others remain the subject of marked disagreement. Italy's position is that Panama's narration of the facts is based on serious mischaracterisations, on which Panama has to rely to try and argue its case before the Tribunal.

3. By way of example, in order to attempt to claim a breach of Article 87, Panama portrays the bunkering activity of the *M/V Norstar* on the high seas as the reason for the commencement of the Italian criminal proceedings that led to the seizure of the *M/V Norstar*. However, the plain text of the relevant judgments demonstrates that the legality of bunkering was never disputed by the Italian authorities, and that the *M/V Norstar* was instead arrested in connection with the suspected crimes of smuggling and tax evasion.

4. Similarly, for purposes of trying to ground and maximise the compensation of the damages that it alleges to have suffered, Panama claims that the *M/V Norstar* was a seaworthy vessel, in almost perfect conditions at the time of its seizure. However, evidentiary material on which Panama itself relies shows that the *M/V Norstar* was in a state of dismay when it was arrested.

5. In the same vein, in order to suggest to this Tribunal that Italy has breached the human rights of those involved in the operation of the *M/V Norstar*, Panama complains about a restriction of their freedom of movement. However, documentary evidence shows that not only were these individuals never detained; they were also never subject to any measure, including the most tenuous ones, that would have determined some sort of deprivation of their personal freedom.

II.Panama's claim on Article 87

6. Panama's argument on Italy's alleged breach of Article 87 is based exclusively on the proposition that Italy applied its jurisdiction extraterritorially.

7. In order to counter this argument, Italy will demonstrate that an 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.

8. Secondly, and subordinately, Italy will also demonstrate that the Decree of Seizure did not entail an extraterritorial application of Italy's territorial jurisdiction, since it 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.

9. In summary, the plain facts of this case are as follows: the *M/V Norstar* was arrested in the internal waters of Spain for a crime that it was suspected of having committed in Italy; Italy is the place where the criminal conduct under investigation began, with the *M/V Norstar* being loaded with gasoil bought in exemption of excise duties; Italy is the place where the crimes of smuggling and tax evasion were allegedly perfected at the moment of the re-introduction of such gasoil, in violation of Italian custom and criminal laws.

III.Panama's claim on Article 300

10. Panama argues in its Memorial that Italy has breached Article 300 of the Convention, having acted in bad faith. Panama's claim in this regard is haphazard and confused.

11. By way of example, Panama seems to ignore that the assessment of whether Article 300 of the Convention has been breached has to be carried out only, and exclusively, from the perspective of Article 87. 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.

12. In addition, and again only by way of example, Panama's allegations that Italy acted in bad faith are entirely unsubstantiated on their merits, based on apodictic statements and certainly incompatible with the presumption of good faith that Italy, just like any other State, enjoys in international law.

IV.Panama's new claims, including those based on breach of human rights

13. Panama also advances entirely new assertions and claims in its Memorial:

(a) The alleged breach by Italy of Articles 92 and 97 of the Convention;

(b) The alleged breach of Article 300, for the part that concerns abuse of rights;

(c) A number of alleged human rights violations, including the alleged infringement of the principle of due process of law and fair trial.[1]

14. Italy will demonstrate that all such new arguments either fall outside the jurisdiction of the Tribunal, or are inadmissible. However, as regards in particular human rights, in order not to leave any doubt as to the full compliance by the Italian authorities with the principle of due process, Italy will also show briefly how the Italian authorities conducted themselves reasonably, proportionately and humanely. For example, Italy will show: that only months after the execution of the Decree of Seizure, the Italian Judiciary acceded to the request by the ship-owner that the vessel be returned, but that the owner of the vessel failed to retrieve it; that none of the defendants were ever imprisoned pending trial, nor other restrictive measures were enforced against them; that within a reasonable timeframe, the Italian judicial authorities acquitted all the defendants involved in the operation of the *M/V Norstar* and ordered the definitive release of the vessel; and, finally, that effective domestic remedies were available for those who allegedly suffered damages in connection with the arrest and detention of the *M/V Norstar*, but that such domestic remedies were never activated by those concerned. All this is hardly suggestive of procedural misconduct by the Italian authorities.

V.Panama's claim on reparation of damages

15. Lastly, Panama claims in its Memorial several heads of damages that it alleges to have suffered as a consequence of Italy's arrest and detention of the *M/V Norstar*.

16. Italy will demonstrate, first and foremost, that the vast majority of the losses claimed by Panama on behalf of the persons involved in the operations of the *Norstar* are not tied by a direct link of causality to Italy's conduct, and that therefore Italy cannot be held accountable for them. Italy will also show that any link of causality that may have existed between certain conducts and the damages suffered by Panama has been interrupted in 1999, when the owner of the *M/V Norstar* failed to retrieve his vessel, despite the decision by the Italian judicial authorities to release the vessel upon the posting of a reasonable bond.

17. In the alternative, Italy will also demonstrate that the negligent and omissive conduct of the ship-owner has contributed in a most decisive manner to the causation of any loss that Panama may have suffered and that, therefore, a contributory standard of fault should be applied with respect to the assessment of any damage that Italy may be found to have caused to Panama. Lastly, Italy will also show that the heads of damages invoked by Panama are based on inaccurate and exaggerate estimations, and that they fall far below the evidentiary threshold required in international litigation

VI.The structure of this pleading

18. The present Chapter serves as introduction.

[1] Panama's Memorial, paras. 133-136.

19. In **Chapter 2**, Italy addresses the factual background of the dispute in detail. Italy's portrayal of the facts has been as accurate as possible, bearing in mind that the seizure of the *M/V Norstar* happened almost 20 years ago.

20. **Chapter 3** deals with the alleged breach of Article 87 of UNCLOS.

21. **Chapter 4** counters Panama's arguments on the alleged breach of Article 300 of UNCLOS.

22. In **Chapter 5**, Italy addresses Panama's new assertions based on Articles 92, 97(1) and 97(3), and the claim regarding human rights.

23. Lastly, **Chapter 6** addresses the issue of compensation of damages.

VII.Submissions

24. 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 below.

CHAPTER 2
STATEMENT OF FACTS

Introduction

25. In this Chapter, Italy describes the facts concerning the arrest and detention of the *M/V Norstar*. It will emerge from Italy's narration that the facts described by Panama in its Application of 16 November 2015 (the "Application") and Memorial of 11 April 2017 (the "Memorial") are mischaracterised, erroneous and affected by several omissions.

26. In the sections that follow, Italy will go chronologically through the facts that led to the arrest and detention of the *M/V Norstar*, and the developments of the legal proceedings connected thereto. To this end, this Chapter is arranged into five sections. **Section I** explains the facts that were under investigation in the pre-trial proceedings which led to the order of arrest and seizure of the *M/V Norstar* (the "Decree of Seizure"). **Section II** addresses the legal grounds on which the Decree of Seizure was based; **Section III** illustrates the time and space circumstances related to the issuance and subsequent enforcement of the Decree of Seizure; **Section IV** illustrates the conditional lifting of the Decree of Seizure; **Section V** describes the Judgment of the Tribunal of Savona of 13 March 2003 and the order of release of the *M/V Norstar* (the "Order of Release") in which it resulted; **Section VI** illustrates the appeal brought by the Public Prosecutor of the Tribunal of Savona against the acquittal of those involved in the activities related to the operation of the *M/V Norstar* in the criminal proceedings and the confirmation of the acquittal by the Court of Appeal of Genoa of 25 October 2005.

I.The conduct investigated by the Italian authorities that led to the Decree of Seizure

27. The investigation on the *M/V Norstar* commenced in September 1997, when the Italian Fiscal Police (*Guardia di Finanza*) in Savona started an ordinary tax inspection on the activities of Rossmare International S.a.s ("Rossmare Int'l"), an Italian registered company based in Savona.[2] The investigation originally concerned the question of the compliance by Rossmare Int'l with certain Italian fiscal regulations.

28. Rossmare Int'l operated in the import-export and national trade of fuels, lubricants and mineral oil products. Its business consisted in supplying those products to a clientele of recreational vessels. The managing partner of Rossmare Int'l was Mr Silvio Rossi, an Italian

[2] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 1, translating page 1 of the Italian version. The translation of the relevant passage from Italian reads as follows: "On September 11th, 2009 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.

national, who was also the sole owner of the Company Rossmare di Rossi Silvio ("Rossmare"), a trader in mineral oil products operating only within Italy.[3]

29. The original tax investigation on Rossmare Int'l. revealed the existence of a connection in the summer of 1997 between Mr Silvio Rossi and his companies, on the one hand, and the *M/V Norstar*, a ship flying the flag of Panama, on the other.

30. The *M/V Norstar* was owned and equipped by Intermarine & Co. AS ("Intermarine"), a company incorporated under the laws of Norway, whose Board of Directors included Mr Arve Einar Morch in the capacity of President. Intermarine was in turn owned by another Norwegian company, Borgheim Shipping, run by the same Mr Arve Einar Morch.[4] Intermarine had concluded a charter party with a Maltese company, Nor Maritime Bunker Company Ltd ("Nor Maritime"). The object of such contract was the lease of the *M/V Norstar*.[5]

31. The *M/V Norstar* was therefore a Panamanian-registered vessel, owned by a Norwegian company and leased to a Maltese company.

32. From the tax investigation conducted by the Italian Fiscal Police, it emerged that in summer 1997, the *M/V Norstar* had entered four times the ports of foreign countries: once in Gibraltar, once in Barcelona and twice in the Italian port of Livorno. The purpose of the entry into port was, in all cases, that of loading fuel on board the vessel.

33. As regards in particular the Italian port of Livorno, the *M/V Norstar* loaded fuel on two occasions. On 28 June and 12 August 1997, by the intermediation of Mr Rossi, acting as agent of Nor Maritime and Borgheim Shipping, Nor Maritime purchased and loaded on board the *M/V Norstar* a total of 844.000 litres of marine gasoil.[6] The *M/V Norstar* declared that fuel to be its fuel ship's store ("carico di provvista or provvista di bordo").[7]

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[3] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 1, translating page 1 of the Italian version. The translation of the relevant passage from Italian reads as follows: "Managing partner of the aforementioned company is Mr. Rossi Silvio, born in Savona on June 8th, 1948 and therein residing in Via Montegrappa 1/4. Mr. Rossi is also owner of the individual company "Rossmare by Rossi Silvio" that exclusively operates in Italy in the oil products trade field".

[4] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 1, translating page 2 of the Italian version. The translation of the relevant passage from Italian reads as follows: "The abovementioned tanker was found to be owned by Inter Marine & Co. AS, P.O. Box 1-3140 Borgheim, whose chairman of the Management Board was Arve Einar Morch n.m.g. while Fridtjof Valestrand and Petter Emil Vadis were members of the management board. The shipping company and the Norstar tanker turned out to be managed by the Borgheim shipping company P.O. Box 76 N3140 Borgheim, Norway whose manager turned out to be Arve Einar Morch himself".

[5] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 2, translating page 2 of the Italian version. The translation of the relevant passage from Italian reads as follows: "The Inter Marine Company through the Borgheim Shipping company has rented the Norstar tanker to the NOR MARITIME BUNKER COMPANY Ltd, 25 Pinto Wharf Valletta (Malta) whose manager was the abovementioned Fridtjof Valestrand and that was actually managed by the Borgheim Shipping itself".

[6] The sale to the Nor Maritime was indirect, which had in turn purchased it from Arja SA and Scandinavian Bunkering AS, two companies incorporated in Norway. See *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 2, translating page 2 of the Italian version. The translation of the relevant passage from Italian reads as follows: "Its itinerary omitted the oil product was bought from the Norwegian companies 'ARJA SA' and 'SCANDINAVIAN BUNKERING AS'

34. Due to the *M/V Norstar*'s declaration that the fuel purchased in Livorno was meant to constitute the vessel's own ship store, said fuel was bought in exemption of excise duties ("accise") and VAT ("IVA").[8]

35. Contrary to the destination declared upon purchase, investigative activities by the Italian Fiscal Police revealed that the fuel was actually subsequently sold to Italian and other EU nationals, namely to entities subject to Italian fiscal law and EU and Italian custom regulations.[9] In particular, it emerged 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.

36. The sale of the marine oil loaded on the *M/V Norstar* in Livorno was brokered by Mr Silvio Rossi through his Rossmare Int'l.[10] Rossmare was also the company to which invoices of the sale of the fuel in Italy were addressed. Rossmare Int'l would subsequently bill the final purchasers of the fuel, that is, its clientele of leisure boats.[11]

37. The investigation carried out until that moment by the Italian Fiscal Police provided evidence of conduct potentially in breach of Italian criminal law. In particular, according to the Italian Fiscal Police, the conduct described above may have provided the basis for the following crimes:

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and then sold by those same companies to the NOR MARITIME BUNKER COMPANY Ltd from LA VALLETTA (MALTA) c/o the BORGHEIM SHIPPING COMPANY- SHIPBROKERS-PO Box 76 N3140 BORGHEIM (NORWAY)".

[7] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 2, translating page 2 of the Italian version. The translation of the relevant passage from Italian reads as follows: "In particular, the Nor Maritime, through Rossi Silvio (who claimed to be the agent of both Nor Maritime and Borgheim company), bought marine gasoil in Livorno's harbour and shipped it on the M/C NORSTAR on June 28th, 1997 and on August 12th, 1997, for a total amount of 844.000 litres completely duty and VAT free, as the fuel was declared to be used as ship's stores for M/C NORSTAR itself".

[8] *Ibid*.

[9] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 2, translating page 3 of the Italian version. The translation of the relevant passage from Italian reads as follows: "In short the fuel was actually bought by the ROSSMARE INTERNATIONAL Sas, also in the Community territory, using foreign shell companies (Nor maritime) in order to award it with a foreign final use (outside the Community) or [*using*] other loopholes (such as awarding a certain amount of oil as ship's stores while in fact it was meant to be traded) in order to buy the product tax-free. 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 set out in article 40 of the legislative decree 26/10/1995 number 504. All of this without any consideration for the use assigned to the fuel".

[10] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 2, translating page 3 of the Italian version. The translation of the relevant passage from Italian reads as follows: "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".

[11] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 2, translating page 3 of the Italian version. The translation of the relevant passage from Italian reads as follows: "the product released was invoiced to the ROSSMARE INTERNATIONAL Sas which in turn billed it to the various owners of the crafts (who were basically in touch with the Italian company only)".

(a) fiscal evasion of excise duties for mineral oils (Article 40(1)(b) of Legislative Decree no. 504/95);[12]

(b) smuggling (Article 292-295 of the Decree of the President of the Republic no. 43/73);[13]

(c) tax fraud with regard to the suspected violation of the custom duties on the imported fuels (Article 4(1)(f) of Law 516/82).[14]

38. The Italian Fiscal Police had reasonable grounds to suspect that these alleged criminal offences were part of a unitary criminal plan, put together by Mr Silvio Rossi and involving the participation and complicity of the management of foreign companies, including Intermarine, Nor Maritime and Borgheim Shipping, as well as of the masters of the *M/V Norstar*.

39. In summary, the alleged unitary criminal plan consisted in loading the *M/V Norstar* with fuel bought in the Italian port of Livorno in exemption of excise duties and VAT, for purposes of its subsequent resale to a clientele of Italian and EU leisure boats stationed on the high seas, which would then have re-entered Italian ports with the fuel on board, thus potentially eluding the payment of the fiscal duties due under Italian. The profitability of the operation would have been particularly high in consideration of the fact that 70% of the fuel's price was constituted at that time by VAT and excise duties.

40. A number of pieces of evidence collected during the investigation confirmed the suspicion of the existence of the criminal plan masterminded by Mr Rossi and executed also through the *M/V Norstar*. These included the circumstances that:

(a) Mr Silvio Rossi had overall control of the activity of the purchase of fuel in Livorno;[15]

(b) Rossmare Int'l s.a.s advertised on boating magazines and on *ad hoc* web sites the possibility to benefit from the supply of fuel in a duty-free regime;[16]

(c) Rossmare Int'l s.a.s paid in advance the expenses for the masters and the crew of the *M/V Norstar*, later obtaining the reimbursement from owner of the vessel;[17]

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[12] *Legislative Decree No. 504 of 26 October 1995, Article 40* (**Annex B**).

[13] *Decree of the President of the Republic No. 43 of 23 January 1973, Articles 2, 253-254 and 292-295*bis (**Annex C**).

[14] *Law Decree No. 429 of 10 July 1982, Article 4* (**Annex D**), as amended by *Law No. 516 of 7 August 1982, Article 1, amending Law Decree No. 429 of 10 July 1982, Article 4* (**Annex E**).

[15] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 7, translating page 11 of the Italian version. The translation of the relevant passage from Italian reads as follows: "Mr Rossi personally arrange the supply (notwithstanding the fact that it is done by foreign companies)".

[16] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 7, translating page 11 of the Italian version. The translation of the relevant passage from Italian reads as follows: "ROSSMARE preemptively advertises (on sailing magazines or on an internet website) the possibility of refueling with a duty-free product in international waters".

[17] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 4 and 7, translating respectively pages 4 and 11 of the Italian version. The translation of the

(d) Mr Rossi provided the crew of the *M/V Norstar* with a mobile phone at the expenses of Rossmare Int'l. The phone was used to convey instructions to the masters of the *M/V Norstar* on the activity of resale of fuel;[18]

(e) after the resale of fuel to Italian and other EU-flagged vessels, Mr Rossi issued false invoices addressed to non-EU nationals;[19]

(f) Mr Rossi was organising with other foreign (Belgian) partners the same kind of plan for the summer of 1998.[20]

41. On 24 September 1998 the Italian Fiscal Police transmitted the findings of its investigation to the Public Prosecutor of the Tribunal of Savona. Based on the information received, the Public Prosecutor registered a criminal case against Mr Rossi and others under number 1155/97/21 R.N.R.[21]

II.The scope and legal grounds of the Decree of Seizure

42. On 11 August 1998 the Prosecutor at the Tribunal of Savona issued a Decree of Seizure against the *M/V Norstar* based on Article 253 of the Italian Code of Criminal Procedure. According to Article 253:

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relevant passage from Italian reads as follows: "the Rossmare International Sas directly backed the expenses for the cabin crew of the lighter and the routine costs (such as food-maintenance costs) that are, according to what the owner of the Rossmare has declared, reimbursed by the Nor Maritime that in indirectly under control of the Rossmare itself […].
Mr Rossi paid in advance the expenses of the ship-master and crew of the NORSTAR (being then reimbursed by the ship-owner company)".

[18] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 4 and 7, translating respectively pages 4 and 11 of the Italian version. The translation of the relevant passage from Italian reads as follows: "the cabin crew of the Norstar in provided with a cell phone number 0337-260104 registered to the Rossmare International Sas that supports the related costs of membership and utilization […].
Mr Rossi provides (at the exprenses of ROSSMARE) to the Norstar ship-master a mobile phone through which receives instructions concerning the supplies to be provided to leisure vessels (due to the analysis of the mobile call traffic several EU yachtsmen which benefitted from the Norstar fuel have been identified)".

[19] *Notification of* notitia criminis *against Silvio Rossi and Others by the fiscal police of Savona, 24 September 1998* (**Annex A**), at 7, translating page 11 of the Italian version. The translation of the relevant passage reads as follows: "Mr ROSSI, fraudulently invoiced to non-EU subjects sales which were addressed to EU yacthsmen, with the clear intent of hiding that the actual addressee was someone not entitled to the customs allowance (even more, materially counterfeiting the supply receipts filled out by the NORSTAR ship-master)".

[20] *Order concerning the application for re-examination of the seizure of the Spiro F* (**Annex F**), translating page 10 of the Italian version. The translation of the relevant passage from Italian reads as follows: "Mr Rossi was organising, together with his Belgian partners, similar operation for the following Summer, whose purpose was arranging 'floating shops of duty-free goods'".

[21] *Decree of preventive seizure by the Judge of Preliminary investigations of the Tribunal of Savona, 24 February 1999* (**Annex G**), at 2. The translation of the relevant passage from Italian reads as follows: "as to the NORSTAR, reference should be made to the request for committal to trial, acquired in the proceedings, issued during the criminal proceedings commenced by the Office of the Public Prosecutor of Sanremo against several ship-owners and ship-masters which were re-fueled in evasion of taxes, as well as the investigation of the Fiscal Police contained in the Notification of notitia criminis of 24 September 1998 and the declarations of BIGIO Renzo attached therewith".

> "1. The judicial authority adopts, with motivated order, the seizure of the *corpus delicti* and of any other thing related to the crime and necessary to the assessment of the factual background of the case.
> 2. The things on or through which the crime was committed, as well as the product, profit or price of the crime, are to be considered *corpus delicti*".[22]

43. Panama maintains that:

> "Italy grounded its order and request for the arrest of the M/V Norstar in the application of its criminal law system and legal provisions, as identified in the Decree of Seizure number 1155/97/21, dated 11 August 1998, as well as in the wrongful conclusion that the activity the vessel was carrying out on the high seas [i.e.: bunkering] constituted a crime […].
>
> All the evidence filed with the Tribunal during the Preliminary Objections phase has shown that the activities for which the M/V Norstar was arrested were carried out on the high seas, beyond the territorial sea of Italy and, therefore, outside its jurisdiction, as its Decree of Seizure itself states […]. Thus, Italy knew that since the activity for which the M/V Norstar was arrested was conducted on the high seas, it did not have jurisdiction over the vessel […].
>
> 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, thereby preventing the Norstar's ability to navigate and conduct legitimate commercial activities therein, as well as by filing charges against the persons having an interest in the operations of the M/V Norstar, Italy violated the obligation to respect free navigation on the high seas accorded by the Convention".[23]

44. In truth, however, 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 sea. Rather, it was adopted in the context of proceedings concerning alleged offences that occurred within the Italian territory, as already envisaged by the Italian Fiscal Police, and described in paragraph 39, above.

45. This emerges from the text of the Decree of Seizure, which reads as follows:

> "Having regard to the criminal proceedings filed against ROSSI SILVIO and others for the offence pursuant to Articles 81(2) and 110 crim. code, Articles 40(1)(b) and 40(4) of Legislative Decree no. 504/95, Articles 292-295(1) of Decree of the President of the Republic no 43/3 and Article 4(1)(f) of Law no. 516/82, committed in Savona and in other ports of the State during 1997".[24]

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[22] *Italian Code of Criminal Procedure, Articles 253, 257, 262, 263, 324, 365 and 606* (**Annex H**), Article 253.
[23] Panama's Memorial, paras. 20, 24, 26 and 79; emphasis added.
[24] *Seizure order by the Public Prosecutor of the Tribunal of Savona, 11 August 1998* (**Annex I**), at 1; emphasis added.

46. The explanation of the conduct of the *M/V Norstar* is described in the Decree of Seizure in the following terms:

> "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. [...]
> [the customers of the *M/V Norstar*] willingly and consciously [gave] the sold product a destination that differs from the one for which the tax exemption was granted (with reference to products bought in Italy and Spain, which are then surreptitiously re-introduced 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".[25]

47. The crimes in connection with which the Decree of Seizure under Article 253 of the Italian Criminal Code was issued are particularised in the Decree of Seizure as follows:

> (a) avoiding the payment of excise duties on mineral oil under Article 40(1)(b) and 40(4) ("Sottrazione all'accertamento o al pagamento dell'accisa sugli oli minerali/ Avoidance of the ascertainment or payment of excise duty on mineral oils") of the Legislative Decree no. 504/95 containing the "Testo unico delle disposizioni legislative concernenti le imposte sulla produzione e sui consumi e relative sanzioni penali e amministrative (Act on production and consumption taxation and the relevant criminal and administrative fines)";[26]
>
> (b) smuggling under article 292 of the Decree of the President of the Republic no. 43/73, occurring in case of avoided payment of border's fees due for goods;[27]
>
> (c) stating in the income tax return or in the annexed budget or financial statement, income or other revenues, or expenses or other negative components, different from the real ones by utilizing documents certifying facts not true or putting in place a fraudulent behaviour with a view to evading income taxes or VAT or obtaining undue reimbursement for him/herself or for third parties (Article 4(1)(f) of Law no. 516/82).[28]

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[25] *Seizure order by the Public Prosecutor of the Tribunal of Savona, 11 August 1998* (**Annex I**), at 1; emphasis added.
[26] *Legislative Decree No. 504 of 26 October 1995, Article 40* (**Annex B**).
[27] *Decree of the President of the Republic No. 43 of 23 January 1973, Articles 2, 253-254 and 292-295*bis (**Annex C**), Article 292.
[28] *Law Decree No. 429 of 10 July 1982, Article 4* (**Annex D**), as amended by *Law No. 516 of 7 August 1982, Article 1, amending Law Decree No. 429 of 10 July 1982, Article* 4 (**Annex E**).

III. The circumstances of space and time related to the *M/V Norstar* when the Decree of Seizure was issued

48. As indicated previously, the Public Prosecutor of the Tribunal of Savona issued the Decree of Seizure on 11 of August 1998. On the same date, the Prosecutor requested the assistance of the Italian Ministry of Justice to have the Decree of Seizure transmitted by means of letter rogatory to the Office of the Spanish Prosecutor in Palma de Mallorca,[29] in whose internal waters the *M/V Norstar* was stationed. The Public Prosecutor had full knowledge of the fact that the *M/V Nostar* was in the internal waters of Palma de Mallorca: indeed, the letter rogatory was only and directly sent to the judicial authorities in Mallorca.

49. The execution of the Decree of Seizure was carried out by the Spanish Authorities on 25 September 1998, following a request from the competent Spanish Judge on the previous date.[30] It would appear, however, that already on 5 September, the same authorities had started the process of arrest of the *M/V Norstar*, moored off the Port of Palma de Mallorca. It appears that they did so with the assistance of Transcoma Baleares SA,[31] a service provider operating in the ports of Spanish islands .

50. It is not disputed that when the execution of the Decree of Seizure against the *M/V Norstar* commenced, and until its completion on 25 September, the vessel was in Palma de Mallorca's internal waters. Panama does not contest this.

51. However, the internal waters of Palma de Mallorca are also the place where the *M/V Norstar* was on 11 August 1998, at the time when the Decree of Seizure was issued by the Italian Public Prosecutor and the related request sent to the Italian Ministry of Justice for purposes of its transmission to the Spanish authorities. A number of pieces of evidence confirm this circumstance:

> (a) The *M/V Norstar* entered the internal waters of Palma in March 1998, months before the Decree of Seizure was issued, and it never left until 7 August 2015, when it was finally removed. This results in particular from a journal article that is part of the list of documents attached to Panama's Memorial (Annex 16), titled "News regarding the *M/V Norstar* arrest, from www.diariodemallorca.es, dated 8 August, 2015. In that article it is reported that "the ship, of Panamanian flag, entered Palma in March of 1998". It is further reported that "the Oil Tanker Norstar, which has been abandoned since 1998, was withdrawn yesterday [7 August 2015] from the facilities of the Port's technical services".
>
> (b) The *M/V Norstar* could not have left the internal waters of Palma de Mallorca because it had been in a state of abandonment since 14 April 1998, again, months before the Decree of Seizure was issued. This results from the same article attached to Panama's Memorial, quoted under a), above. According to the article, the *M/V Norstar*'s "state of abandon [*sic*] was such that the port police ha[d] found on several

[29] *International Letter Rogatory of the Tribunal of Savona to the Spanish Authorities, 11 August 1998* (**Annex J**).
[30] *Report of the seizure by the Spanish Authorities, 25 September 1998* (**Annex K**).
[31] *Report of the seizure by the Spanish Authorities, 25 September 1998* (**Annex K**), at 3, translating page 3 of the Italian version.

occasions people sleeping inside". The article further notes "the unmade beds, cereals on the table, and towels hung on the door hanger indicated the crew's rapid flight (sic) [and that] the sailors who were on board disappeared leaving the boat in the middle of the night".[32]

(c) Panama maintains that "[a]t the time of its arrest, the M/V Norstar was a seaworthy" vessel.[33] However, the truth is that the *M/V Norstar* was in such poor technical conditions that made it unfit for navigation outside the internal waters of Palma de Mallorca. This results in particular from a fax sent by Transcoma Baleares to Spanish Port Authorities in Palma de Mallorca, dated 7 September 1998, just weeks after the Decree of Seizure was issued. The fax 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.[34]

52. In conclusion, at all material times when the Decree of Seizure was issued, when the request was sent to the Italian Ministry of Justice for purposes of its transmission to the Spanish authorities and when the Decree of Seizure was finally executed, the *M/V Norstar* was stationed in the internal waters of Spain, and subject to Spain's jurisdiction.

IV. The conditional lifting of the Decree of Seizure

53. About four months after the execution of the Decree of Seizure, on 12 January 1999, an application to review and lift such measure was filed by the owner of the *M/V Norstar* with the Prosecutor of the Tribunal of Savona. The Prosecutor, on 18 January 1999, rejected the request, on evidentiary grounds. The operative part of the decision rejecting the request read as follows: "considering 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 [the request for release is refused]".[35]

54. After the first rejection on 18 January 1999, and only weeks after that date, another request for review and lift of the Decree of Seizure was addressed to the Italian authorities. This time the request was approved, subject to the payment of a security. While it has not been possible to locate the document authorising the release of the *M/V Norstar* in the Italian file, due to the passage of more than 18 years since the events, this is evidenced by a communication dated 11 March 1999, in which the Public Prosecutor of the Tribunal of Savona requested the Italian Embassy in Oslo to inform Intermarine that the *M/V Norstar* could be released.[36] The security to be provided for the release of the vessel amounted to 250 million Italian lire (about Euro 129,000.00), to be alternatively fulfilled by the provision of an appropriate guarantee.[37] Panama maintains that the ship-owner had been informed of this

[32] Panama's Memorial, Annex 16.
[33] Panama's Memorial, para. 23.
[34] *Report of the seizure by the Spanish Authorities, 25 September 1998* (**Annex K**), at 3.
[35] *Decree refusing the release of confiscated goods by the Public Prosecutor of the Tribunal of Savona, 18 January 1999* (**Annex L**), at 3, translating page 2 of the Italian version.
[36] *Ibid*.
[37] Panama's Memorial, Annex 8.

possibility on 29 June 1999;[38] however, Panama's own annexes show that he had been informed on 11 March 1999.[39]

55. Despite its authorised release, the *M/V Norstar* was never collected by its owner, due to his alleged inability to pay the required sum.[40]

V.The Judgment of the Tribunal of Savona of 13 March 2003

56. On 13 March 2003, the Tribunal of Savona delivered its Judgment on the criminal proceedings, acquitted the defendants and ordered the unconditional release and return to Intermarine of the *M/V Norstar*.[41]

57. Panama maintains that:

> "[T]he Criminal Court of Savona acknowledged the absence of a rationale for believing that an offence had been committed within its territorial waters and decided that any fuel purchased by leisure boats and stored on board outside the territorial sea line was not subject to import duties, thereby absolving the accused of all criminal charges".[42]

58. Panama's account of the reason for the acquittal is not accurate. In reality, the acquittal was based on the following grounds:

(a) first, with regard to the crime of "avoiding the payment of excise duties on mineral oil under Article 40(1)(b) and 40(4) of the Legislative Decree no. 504/95", on the basis that Italian fiscal law does not require a leisure vessel, supplied abroad in exemption of VAT and excise duties, to declare the fuel and pay customs upon return to Italian waters and harbours, unless such fuel is unloaded or consumed within the customs line;[43]

(b) second, with regard to the crime of "smuggling under article 292 of the Decree of the President of the Republic no. 43/73", on the basis that failure to mention the exempted fuel in the Ship's Bulletin does not constitute smuggling, since the relevant

[38] Panama's Memorial, para. 28.
[39] Panama's Memorial, Annex 8.
[40] Panama's Memorial, para. 28
[41] *Judgment by the Tribunal of Savona, 13 March 2003* (**Annex M**).
[42] Panama's Memorial, para. 29.
[43] *Judgment by the Tribunal of Savona, 13 March 2003* (**Annex M**), at 9, para. 5, translating page 11 of the Italian version. The translation of the relevant passage from Italian reads as follows: "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 […] 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".

provisions of Italian law (DPR n. 43/1973) do not contain an explicit provision sanctioning such failure, at least with regard to mineral oil products;[44]

(c) third, with regard to the crime of tax fraud under Article 4(1)(f) of Law no. 516/82, on the basis of lack of sufficient evidence as to whether the amount of gas oil re-imported reached the value threshold of criminal relevance established by Italian law (7,5 Million Italian Liras, or Euros 3873,00).[45]

59. Panama also maintains that "Italy failed to instruct Spain as to how to comply with its release order, so that no further action in this regard was taken".[46] In truth, however, the operative part of the Judgment of 13 March 2003, ordering the release of the *M/V Norstar* and the acquittal of the defendants, was readily transmitted on 18 March 2003 – just five days after the date of the decision – to the relevant Spanish authorities.[47] In the communication, the Tribunal of Savona requested the Spanish Authorities to inform the custodian of the ship of the release of the *M/V Norstar*, ensure the actual return of the vessel to the ship-owner and then send confirmation of the release to the Italian authorities.[48]

60. By letter dated 17 April 2003, the Spanish Judicial Authorities instructed the Provincial Maritime Service, an articulation of the Spanish Home Ministry, to lift the detention of the *M/V Norstar*, pursuant to the decision of the Italian Judicial Authorities. On 21 July 2003 the detention was consequently lifted by the Provincial Maritime Service, with Order No. 84/03. The following day, the Captain of the Provincial Maritime Service informed the competent Spanish Judicial Authorities that the detention of the *M/V Norstar* had been lifted, and attached the relevant documentation as evidence.[49]

61. Panama further maintains that:

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[44] *Judgment by the Tribunal of Savona, 13 March 2003* (**Annex M**), at 9, para. 5, translating page 10 of the Italian version. The translation of the relevant passage from Italian reads as follows: "[h]owever, the lack of an indication of the stores in the ship's manifest does not amount to smuggling as emerging from the following:
a) a formal violation such as the simple lack of an indication of customs-free goods in the manifest may not be included in the actually wide wording of Article 292 of the Consolidated Text punishing the evasion of border tax;
b) express provision is made for an offence punishable by a fine that is proportionate to the amount of evaded border tax – consequently it may not be applied to the goods imported under a customs-free regime – when the ship's manifest fails to indicate some of the items (Article 302 of Presidential Decree 43/73);
c) in the Consolidated Text 43/73 there is not a provision in place that is similar to Article 3 of Law 1409/56 punishing the transport of foreign manufactured tobacco without drawing up a ship's manifest by making reference to the provisions covering smuggling.".

[45] *Decree of the President of the Republic No. 43 of 23 January 1973, Articles 2, 253-254 and 292-295*bis (**Annex C**), Article 295*bis*.

[46] Panama's Memorial, para. 35.

[47] *Communication to the Spanish Authorities of the Judgment of 13 March 2003, 18 March 2003* (**Annex N**).

[48] *Ibid*. The translation of the relevant passage from Italian reads as follows: "I refer to the above-mentioned proceedings and I hereby forward 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. [...]
I therefore kindly request you to execute the above-mentioned release order and inform the custodian of the ship of the order.
Subsequently you should check whether the property has really been taken back and send me the relevant record".

[49] *Notification of the release of the M/V Norstar by the Spanish Authorities, 22 July 2003* (**Annex O**).

> "[Italy] neglected to contact either the ship owner, the charterer, or the flag state so that they could make the necessary arrangements in compliance with the judicial order of restitution to the party entitled".[50]

62. Panama's statement is yet another inaccurate depiction of the facts. In fact, on 21 March 2003, the Tribunal of Savona requested the Italian Ministry of Justice to transmit to the Norwegian company Intermarine a notification communicating the release of the *M/V Norstar*.[51] On 3 April 2003, the Italian Ministry of Justice also sought the judicial cooperation of the Norwegian Ministry of Justice to secure the delivery of all the relevant documents concerning the lift of the detention of the *M/V Norstar* to Mr. Morch.[52] The Norwegian Ministry of Justice confirmed to the Italian authorities by letter dated 23 July 2003 that on 2 July 2003 all the relevant documents and related communications were delivered to Mr. Morch.[53] The communications from the Italian authorities also informed the ship-owner that the vessel could be collected within thirty days from the receipt of such notification, after which, according to the applicable law, the judge might order the sale of the vessel by auction.[54]

63. Panama, while generally lamenting the lack of communication from the Italian authorities, characterises such notification as a "threat" to the ship-owner of the *M/V Norstar*.[55] On the contrary, the notification was a mandatory act, adopted in the interest of the ship-owner and required under Italian law in compliance with the principle of due process.[56]

64. The *M/V Norstar* was never collected by its owner.

VI.The decision of the Court of Appeal of Genoa of 25 October 2005

65. On 20 August 2003, the Public Prosecutor of the Tribunal of Savona appealed the Judgment of acquittal rendered by the Tribunal of Savona before the Court of Appeal of Genoa.[57]

66. Panama over and over again throughout its Memorial tries to convey the idea that the request of appeal somehow prevented the release of the *M/V Norstar* and aggravated the damages ensuing from the detention.

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[50] Panama's Memorial, para. 35.
[51] Panama's Memorial, Annex 12. The translation of the relevant passage from Italian reads as follows: "I Hereby, inform that the court of Savona – by proceeding of 14/03/03 – has ordered the release of the M/V 'Norstar' and its restitution to Intermarine AS Corporation".
[52] *Request for judicial cooperation by the Italian Ministry of Justice to the Norwegian Ministry of Justice, 3 April 2003* (**Annex P**).
[53] *Notification of the release of the M/V Norstar to Mr Morch by the Norwegian Ministry of Justice, 23 July 2003* (**Annex Q**)
[54] *Ibid*. The translation of the relevant passage from Italian reads as follows: "[a]ccording to the Italian Law, the deadline to withdraw the vessel is thirty days from the date of receipt of this communication. In case of non-withdraeal, the judge will order the sale".
[55] Panama's Memorial, para. 31.
[56] *Decree of the President of the Republic No. 115 of 30 May 2002, Articles 150-151* (**Annex R**).
[57] *Appeal by the Public Prosecutor of the Tribunal of Savona, 20 August 2003* (**Annex S**).

67. In its Application, Panama has claimed that:

> "[...] On 13 March 2003 the Criminal Court of Savona delivered its Judgment [...]. However the judgment was not full and final. The Italian Public Prosecutor appealed to the Court of Appeal of Genoa which judgment was finally delivered on October 2005 [...]".[58]

68. In the Memorial, it is stated that:

> "On 20 August 2003, before this threat was carried out, the Savona Public Prosecutor appealed the decision in front of the Court of Appeal of Genoa, despite having full knowledge of its illegal conduct when ordering and requesting the arrest of the M/V Norstar, as well as of the aggravation of the damages that would accrue for its unlawful decision over the passage of time".[59]

69. This is a grand mischaracterisation. The request of appeal concerned only, and exclusively, the acquittal of the individuals involved in the alleged criminal plan, but had no impact whatsoever on the question of the release of the *M/V Norstar*. Indeed, the operative part of the Judgment of the Tribunal of Savona regarding the release of the vessel never formed part of the Prosecutor's appeal.[60] Under Articles 565 and 648 of the Italian Code of Criminal Procedure, the release of the *M/V Norstar* therefore become irrevocable and final.

70. The Court of Appeal of Genoa delivered its Judgment in response to the request for appeal by the Prosecutor on 25 October 2005. In the Judgment, the Court confirmed the decision of acquittal rendered by the Tribunal of Savona, because the acts of which the defendants were accused did not constitute a criminal offence.[61]

71. The fate of the *M/V Norstar* is revealed by Panama's annexes. Italy has learnt from Panama's Memorial that the *M/V Norstar* was removed from the harbour of Palma de Mallorca in August 2015, following a public auction approved by the local Port Authority. Global PGM, a company active in the recycling sector, bought it for converting the vessel into steel.[62]

72. As regards those involved in the criminal proceedings, only two of the accused were actually crew of the *M/V Norstar*: Mr Tore Husefest, a Norwegian national; and Mr Renzo Biggio, an Italian national. Both Mr Husefest and Mr Biggio held the position of Masters. From the very beginning of the proceedings in 1999, Mr Husefest and Mr Biggo, like all the

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[58] Panama's Application, para. 8.
[59] Panama's Memorial, para. 32; footnotes omitted.
[60] *Appeal by the Public Prosecutor of the Tribunal of Savona, 20 August 2003* (**Annex S**), at 6, translating page 5 of the Italian version. The translation of the relevant passage from Italian reads as follows: "For These Reasons […] We ask that the Court of Appeal in Genoa, amend the judgment under appeal, and convict ROSSI SILVIO, BIGGIO RENZO, MELEGARI BRUNO, MORCH ARVE ENAIR, HUSEFEST TORE, BOCCHIOLA MASSIMO e FALZON JOSEF and sentence them to the punishment requested in the appeal trial".
[61] *Judgment by the Court of Appeal of Genoa, 25 October 2005* (**Annex T**), at 7-9, translating pages 7-9 of the Italian version.
[62] Panama's Memorial, Annex 16.

other accused, were never placed under any form of custody, nor suffered any other deprivation or restriction of personal liberty.

73. This is confirmed by the fact that the letter rogatory sent to the Spanish Authorities does not list any determination by the Public Prosecutor aimed at restricting the personal freedom of those accused of the crimes.[63] In addition, the records of the interrogatories of the accused carried out by the Italian Prosecutor, dated 27 December 2002, bear the indication "libero presente", namely "free and present", next to the name of Mr Biggio; and "libero contumace" namely "free and absent" next to the name of Mr Husefest. This signifies that both Mr Biggio and Mr Husefest were "libero", that is to say, not subject to any measure limiting their personal freedom; Mr Biggio was present at the interrogatory; Mr Husefest was absent and only represented by his lawyer.[64]

[63] *International Letter Rogatory of the Tribunal of Savona to the Spanish Authorities, 11 August 1998* (**Annex J**).
[64] *Verbatim record of the hearing by the Tribunal of Savona, 27 December 2002* (**Annex U**).

CHAPTER 3
PANAMA'S CLAIM CONCERNING THE ALLEGED BREACH OF ARTICLES 87

Introduction

74. In this Chapter Italy responds to Panama's claim that Italy has violated Article 87 of the Convention. In **Section I** Italy explains that when the Decree of Seizure was issued and executed, the *M/V Norstar* was not entitled to the right to freedom of navigation under Article 87(1), because it was in the internal waters of Spain. Since the *M/V Norstar* did not enjoy the right to freedom of navigation in the first place, no violation of that right can have occurred; in **Section II** Italy explains that, contrary to Panama's arguments, the crimes that were targeted by the Decree of Seizure did not occur on the high seas, and Italy's legislation was never applied extraterritorially; in **Section III** Italy explains the reasons why Article 87(2) has not been breached – and could not have been breached – by Italy in the present case.

I.Article 87 of UNCLOS is not breached in the present case because the *M/V Norstar* was not exercising its freedom of navigation when the Decree of Seizure was issued or executed

75. Italy's case is that when the Decree of Seizure against the *M/V Norstar* was issued, its request for execution transmitted to the Spanish Authorities, and at 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.

76. For purposes of this section, the first question to address is what kind of conduct Article 87(1) typically proscribes. Further to that, it is necessary to verify in what area of the sea this typical conduct took place with respect to the *M/V Norstar*.

77. Article 87(1) of UNCLOS on "Freedom of the high seas" reads, for the relevant part, as follows:

> "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"

78. Freedom 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.[65]

79. The correlation between freedom of the high seas and unimpeded movement of the ship emerges with clarity from the Memorandum of the UN Secretariat to the International Law Commission at the commencement of its work on the Law of the Sea, in the following terms:

> "L'idée essentielle contenue dans le principe de liberté de la haute mer est l'idée d'interdiction d'*interférence de tout pavillon dans la navigation* en temps de paix".[66]

80. The typical situation in which Article 87(1) of the Convention would be violated would be the case 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. Already in 1921, the Tribunal in the *Wanderer* case between the United Kingdom and the United States held that:

> "The fundamental principle of the international maritime law is that no nation can exercise a right of *visitation and search* over foreign vessels pursuing lawful vocation on the high seas, except in time of war or by special agreement".[67]

81. Also, the case law of this Tribunal shows that when the breach of Article 87(1) has been invoked, the disputed facts have typically involved conduct by a coastal State amounting to physical interference with the navigation of a foreign vessel.

82. In the "Arctic Sunrise" case, the violation of Article 87 lamented by the Netherlands consisted "[i]n boarding, investigating, inspecting, arresting and detaining the 'Arctic Sunrise'".[68]

83. In the *M/V "Saiga"* case, the conduct complained of consisted in

> "[…*I*]*nter alia* the attack on the m/v "Saiga" and its crew in the exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and the removal of the cargo of gasoil […]".[69]

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[65] Albert J. Hoffmann, *Navigation, Freedom of*, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (OUP 2012, vol. VII), at 572; Tullio Treves, *Navigation*, R.J. Dupuy, D. Vignes, *A Handbook on the New Law of the Sea* (Nijhoff 1991, vol. 2), at 836 ("The concept of freedom of navigation […] amounts to the fact that each State is entitled to claim – apart from the exceptions provided for by international law – that ships flying its flag should suffer no interference from other States").

[66] *Mémorandum presenté par le Sécretariat* (A/CN:4/32), in *Yearbook of the International Law Commission*, 1950, vol. II, p. 69; emphasis added ("The essential idea contained in the principle of freedom of the high seas is the idea of prohibiting any *interference by any flag in navigation*, in peace time, with any other flag").

[67] *Owners, officers and men of the "Wanderer" v. United States* (United Kingdom v. United States of America), 9 December 1921, R.S.A., VI, pp. 69-77.

[68] *"Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 230, para. 33.

84. In the *Volga* case, Russia complained that Australian forces had, while the *Volga* was on the high seas, boarded the ship, apprehended it, and directed it under escort of a military warship to change its course.[70]

85. In their Separate opinion to the Judgement of the Tribunal of 4 November 2016, Judges Wolfrum and Attard clarified that freedom of navigation is first and foremost to be interpreted as freedom from enforcement actions. In their words:

> "Considering 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".[71]

86. The Opinion goes on to notice that:

> "The decisive point is that article 87 protects against enforcement actions undertaken by a State different from the flag State which hinder the freedom of movement of the vessel concerned".[72]

87. While 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. Freedom of navigation is first and foremost to be interpreted as freedom from enforcement actions.

88. For the purposes of the present section 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).

89. In this regard, the spatial scope of application of the freedom of navigation as set out in Article 87(1) is clearly curtailed by the Convention. Freedom of navigation is not a right enjoyed by States in all maritime zones, but rather on the high seas; namely, on

> "[A]ll parts of the sea that are not included in the exclusive economic zone, in the territorial sea or *in the internal waters* [emphasis added] of a State, or in the archipelagic waters of an archipelagic State".[73]

90. Article 58(1), in addition, extends the freedom of navigation of the high seas to the Exclusive Economic zone.

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[69] *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadine v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, para. 28.
[70] *The "Volga" Case (Russian Federation v. Australia)*, Prompt Release, Application submitted by the Russian Federation, paras. 6-12 (available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_11/application_russ_fed_eng.pdf).
[71] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Joint separate opinion of Judges Wolfrum and Attard, ITLOS Reports 2016, para. 34; emphasis added.
[72] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Joint separate opinion of Judges Wolfrum and Attard, ITLOS Reports 2016, para. 38; emphasis added.
[73] Article 86 of UNCLOS.

91. The typical conduct which would substantiate an interference with the freedom of navigation under Article 87(1) did not take place in an area of the sea where the *M/V Norstar* enjoyed freedom of navigation under UNCLOS. At the time when the Decree of Seizure of the *M/V Norstar* was executed by Spain, in September 1998, the vessel was neither on the high seas, nor in the Exclusive Economic Zone of a Coastal State; it was in the internal waters of Palma de Mallorca, that it had entered voluntarily in March 1998 and where it had been stationing for a number of months.

92. Panama does not challenge that the Decree of Seizure was executed when the *M/V Norstar* was in the internal waters of Spain.[74] In addition, Italy demonstrated that also the issuance of the Decree of Seizure, and the request for its transmission to Spain, occurred at a time when the vessel was in the internal waters of Palma de Mallorca.

93. Ultimately, the Decree of Seizure of the *M/V Norstar* was issued and executed when the vessel was not in areas of the sea where it enjoyed the right to freedom of navigation; therefore, no breach of Panama's freedom of navigation can be said to have occurred.

94. Panama does not appear to agree with Italy's reasoning when it alludes to the possibility that "interventions" occurring in an area of the sea where a vessel would not enjoy freedom of navigation could still be in breach of Article 87(1). According to its Memorial:

> "[E]fforts of States 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 as efforts to unlawfully arrest a vessel in port with the goal to preclude the vessel from returning to the high seas".[75]

95. Panama also claims that:

> "By ordering and requesting the arrest of the M/V Norstar, [...], thereby preventing the Norstar's ability to navigate and conduct legitimate commercial activities therein, [...] Italy violated the obligation to respect free navigation on the high seas accorded by the Convention".[76]

96. And it goes on to complain that:

> "If Italy had respected Article 87 [...] it would have allowed the M/V Norstar continued access to the high seas".[77]

97. However, according to the case law of this Tribunal, the freedom of navigation enshrined in Article 87(1) cannot be interpreted to mean that a vessel is protected against coastal State measures that prevent it to leave a port in order to gain access to the high seas.

98. As the ITLOS has stressed in its decision in *Louisa*,

[74] Panama's Memorial, para. 66.
[75] Panama's Memorial, para. 82; emphases added.
[76] Panama's Memorial, para. 79; emphasis added.
[77] Panama's Memorial para 94

> "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".[78]

99. Therefore, as a matter of law, the *M/V Norstar*'s inability to leave the port of Palma de Mallorca does not constitute a breach of Article 87(1); even if the *M/V Norstar* had such a right to leave port under Article 87(1) – which it did not have – it is doubtful that it could have exercised it in the factual circumstances of this case.

100. Indeed, it would have been extremely difficult, if not impossible, for the *M/V Norstar* to leave Spanish internal waters, due to the state of abandonment and dismay in which she had versed since April 1998. Panama's contention that the request of arrest of the *M/V Norstar* "prevent[ed] the Norstar's ability to navigate and conduct legitimate commercial activities" is a gross mystification of the truth, and fails already at the level of assessment of the facts. As recalled in **Chapter 2** of this Counter-Memorial, the vessel had critical structural deficiencies that prevented its movement and was even at some point abandoned by its crew, becoming a makeshift shelter for homeless people.[79] In the circumstances, the *M/V Norstar*'s freedom of navigation was much more theoretical than real.

101. In conclusion, both at the time when the Decree of Seizure was issued and the request for its execution transmitted to the Spanish Authorities, and at the time of the actual execution of the Decree of Seizure, the *M/V Norstar* was not exercising any freedom of navigation, because it was in Spanish internal waters. Nor is Panama's argument that freedom of navigation entails freedom to leave the internal waters of a Coast State tenable under the case law of the Tribunal. Lastly, even if Panama were right in claiming that freedom of navigation entails the right for a vessel to leave a port to take to the high seas, the facts of this case demonstrate that the *M/V Norstar* was not actually in a position to leave Spanish internal waters, due the conditions of dismay in which it versed.

II. The Decree of Seizure concerns alleged crimes whose locus of commission was not the high seas

102. In the previous subsection, Italy has argued that the question of the compliance with Article 87(1) is to be assessed on the basis of the area of the sea where a vessel is when the typical conduct that can constitute a breach of Article 87(1) occurs. Italy's position is that, having the Decree of Seizure against the *M/V Norstar* been issued and executed when the vessel was in an area of the sea where it did not enjoy freedom of navigation, there cannot be any breach of Article 87(1).

103. However, since Panama's entire Memorial revolves around the contention that the violation of Article 87 derives from Italy's extension of jurisdiction extraterritorially, this subsection demonstrates that, in any event, the Decree of Seizure of the Italian Prosecutor targeted alleged crimes whose locus of commission was not the high seas.

[78] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, para. 109.
[79] *Supra*, para. 51.

A. The territorial scope of the Italian fiscal and custom legislation

104. Panama claims that "Italy cannot unilaterally criminalize conduct that occurs on the high seas, outside its territory".[80] It goes on to state that "Article 87 of the Convention precludes Italy from extending the application of its custom laws and regulation to the high seas".[81] It is not clear what Panama means by the use of the term "criminalize" and by the saying that Italy extended its laws to the high seas. In the ordinary meaning of the expression, criminalising conduct on the high seas, or extending a State's law to the high seas, would indicate the adoption of legislation whose scope of territorial application extends to maritime areas where a State would not be entitled to exercise its jurisdiction.

105. Panama's assertions about Italy's criminalisation of conduct that occurs on the high seas are wrong. The scope of the Italian legislation on which the Decree of Seizure was based is strictly territorial.

106. This is fully in line with the general principle of territoriality enshrined in the Italian Penal Code.

107. According to Article 3:

> "Italian criminal law is binding for each person, national or foreigner alike, residing on the territory of the State, save the exceptions envisaged by domestic public law or international law".[82]

108. According to Article 6:

> "Whosoever commits a crime on the territory of the State shall be punished in accordance with the laws of Italy".[83]

109. The notion of "territory of the State" is contained in Article 4(2) of the Italian Penal Code, as follows:

> "For the purposes of criminal law "territory of the State" is deemed to be the territory of the "Republic", [that of the colonies] and any other place subject to the sovereignty of the State. Ships and aircraft of Italy are deemed to be territory of the State whenever they may find themselves, unless they are subject, in accordance with international law, to a local foreign law (2, 3, 4 Code of Navigation)".[84]

110. Any derogation from the principle of territoriality under Italian criminal law is exceptional in nature.[85]

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[80] Panama's Memorial, para. 65.
[81] Panama's Memorial, para. 87.
[82] *Italian Criminal Code, Articles 3, 4, 6, 7, 8, 81 and 110* (**Annex V**), Article 3.
[83] *Italian Criminal Code, Articles 3, 4, 6, 7, 8, 81 and 110* (**Annex V**), Article 6.
[84] *Italian Criminal Code, Articles 3, 4, 6, 7, 8, 81 and 110* (**Annex V**), Article 4(2).
[85] *Italian Criminal Code, Articles 3, 4, 6, 7, 8, 81 and 110* (**Annex V**), Articles 7 and 8.

111. There is nothing in the laws and regulations on which the Decree of Seizure was based that derogates from the general principle of territoriality. This is true of all the laws under which charges involving the *M/V Norstar* were brought.

112. In particular, Article 2 of the Decree of the President of the Republic of 1973, No. 43, under which the third charge was brought, clearly defines the geographical scope of custom law as follows:

> "[T]he territory delimited by the customs border constitutes the customs territory.
> The territorial waters fall within the scope of the customs territory, except for the use and consumption of machineries, materials and other products under Article 132. For the purpose of custom duties, waters enclosed between the *lido* and the baseline pursuant to Presidential Decree No. 816 of 26 April 1977 are assimilated to territorial waters".[86]

B. The Decree of Seizure did not target the *M/V Norstar*'s bunkering on the high seas

113. In its Application and Memorial Panama asserts time and again that the reason for the arrest and detention of the *M/V Norstar* was bunkering on the high seas.

114. For example, at paragraph 5 of its Application, Panama sustains that:

> "The Decree said that the business of supplying oil offshore to mega yachts constituted a criminal act under various articles of Italian Criminal law and thereby making money avoiding customs".[87]

115. In its Memorial, Panama further states that:

> "[I]n arresting a vessel *for carrying out bunkering* [emphasis added] on the high seas, Italy violated the principle of the freedom of the high seas and Panama's freedom of navigation therein, contravening Article 87 of the Convention)".[88]

116. Panama insists that:

> "In exercising its criminal jurisdiction to apply or enforce its customs laws in relation to the bunkering activities to the M/V Norstar, Italy did not act in conformity with its obligation towards Panama under Article 87 of the Convention [...]".[89]

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[86] *Decree of the President of the Republic No. 43 of 23 January 1973, Articles 2, 253-254 and 292-295*bis (**Annex C**), Article 2.
[87] Panama's Application, para. 5.
[88] Panama's Memorial, para. 78.
[89] Panama's Memorial, para. 83.

117. Panama's claim that the Decree of Seizure was "for carrying out bunkering"[90] is entirely misconceived. As indicated in **Chapter 2** of Italy's Counter-Memorial, neither 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 because it was *corpus delicti* of an alleged series of crimes consisting essentially in smuggling and tax evasion.

118. This results from the domestic proceedings in question in which the investigations, the prosecution, and the acquittal of the defendants, were all based on the application of Italian legislation concerning alleged crimes carried out exclusively on the Italian territorial waters and/or territory. This also emerges explicitly from the plain reading of the following documents, that Panama appears to have ignored:

(a) First, the Decree rejecting the request for release of the *M/V Norstar* dated 18 January 1999. The text of the Decree reads:

> "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 ROSSI and ARVE)".[91]

(b) Second, the Appeal from the Public Prosecutor of the Tribunal of Savona dated 18 August 2003. The text of the Appeal reads: "the defendants, by mutual consent, had carried out an activity that seemingly was bunkering",[92] while adding that:

> "[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".[93]

119. Panama also spends a lot of words of its Memorial to explain that bunkering on the high seas is a lawful activity.[94] Italy does not obviously contest that this is the case. However, it also wishes to stress that by lingering so much on the lawfulness of bunkering, something which is uncontested between the Parties, Panama is only trying to shift the focus away from the real matter in dispute. The pages that follow offer a correct characterisation of the alleged crimes that led to the Decree of Seizure against the *M/V Norstar*.

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[90] Panama's Memorial, para. 83.

[91] *Decree refusing the release of confiscated goods by the Public Prosecutor of the Tribunal of Savona, 18 January 1999* (**Annex L**), at 2, translating page 1 of the Italian version.

[92] *Appeal by the Public Prosecutor of the Tribunal of Savona, 20 August 2003* (**Annex S**), at 2, translating page 2 of the Italian version.

[93] *Ibid.*

[94] Panama's Memorial, paras. 72 and 81.

C. 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.

120. In its Judgment of 4 November 2016, the Tribunal held that:

> "[T]he 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".[95]

121. Italy acknowledges that during the incidental proceedings the parties did not discuss in detail the scope of application of the Decree of Seizure and that, in the context of preliminary arguments brought by the parties, the Tribunal considered that such Decree of Seizure regarded activities of the *M/V Norstar* on the high seas. For purposes of the discussion on the merits of whether Article 87 has been breached, however, Italy will explain that the Decree of Seizure did not target the activities conducted by the *M/V Norstar* on the high seas.

122. In its Memorial, Panama seems to ignore this, and repeatedly asserts that Italy subjected the *M/V Norstar* to the extraterritorial application of its legislation in relation to activities carried out by the vessel when it was on the high seas.

123. In particular, Panama maintained that:

> "By arresting the Norstar, Italy applied its laws extraterritorially".[96]

124. It also argued that:

> "If Italy had respected article 87 [...], it would have allowed the M/V Norstar continued access to the high seas. The Convention would mean very little if any state were permitted to order and request the arrest of any foreign vessel for an alleged violation occurring outside its jurisdiction".[97]

125. During the hearings on the Preliminary Objections raised by Italy, Counsel for Panama stated that:

> "Italy also failed to concede that its judiciary's decision to release the Norstar was based on the fact that none of the offences with which it was charged were sustained because, in order to criminally prosecute the Norstar it was necessary to prove the locus where the activity complained

[95] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 122; emphasis added.
[96] Panama's Memorial, para. 65.
[97] Panama's Memorial, para. 94; emphasis added.

> of occurred and that if this were outside the territorial waters no offence would have been committed".[98]

126. Once again, Panama puts forward an erroneous narrative of the legal grounds at the basis of the Decree of Seizure. Here, again, it must be noted that the Decree of Seizure targeted alleged fiscal and customs offences carried out in areas that were subject to Italy's full jurisdiction. There can be no doubt about this, as it emerges from the following considerations:

127. First, according to Italian law:

> "A 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".[99]

128. In light of this, and on the basis of the facts narrated by Italy in **Chapter 2**,[100] the crimes considered by the Prosecutor were crimes committed on the territory of Italy.

129. Second, the Order itself indicated that the crimes were committed on the Italian territory:

> "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) , 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 <u>implied infringements of the customs and tax legislation as a result of the previous sale of smuggled goods in the State territory</u> […]".[101]

130. Third, the Letter Rogatory of the Tribunal of Savona to the Spanish Authorities of 11 August 1998 explains that the main ground justifying the investigations by the Italian Authorities and the Decree of Seizure was:

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[98] ITLOS/PV.16/C25/3/Rev.1, at 22, lines 17–22.
[99] *Italian Criminal Code, Articles 3, 4, 6, 7, 8, 81 and 110* (**Annex V**), Article 6.
[100] *Supra*, paras. 37 and 47.
[101] *Seizure order by the Public Prosecutor of the Tribunal of Savona, 11 August 1998* (**Annex I**), at 1, translating page 1 of the Italian version; emphasis added.

> "[T]he fact that Mr Rossi was fully aware that many bunkering operations were specifically aimed at concomitantly and illegally re-introducing the product into the territory of the Community" (specifically, Italy).[102]

131. Fourth, the Tribunal Judgment of 13 March 2003 of the Tribunal of Savona stressed that,

> "[I]t [was for the] domestic jurisdiction to establish whether goods have been introduced into a customs area or the territorial sea in breach of customs rules".[103]

132. Fifth, contrary to Panama's statement,[104] 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.[105]

133. In sum, the *M/V Norstar* was arrested to secure evidence which was necessary in order to ascertain whether the defendants had committed certain crimes on the Italian territory.

134. As indicated in **Chapter 2**, the aim of the Italian authorities was to ascertain the existence of a criminal plan articulated as follows: first, the purchase of gasoil by the *M/V Norstar* in the Italian port of Livorno, avoiding the payment of excise duties and VAT; second, the sale of the same gasoil to a clientele of leisure boats, made up of Italian and EU nationals, on the high seas through false invoices and in the knowledge that the fuel would be reintroduced into the Italian territorial waters; third, the re-introduction of the gasoil into the Italian territorial waters, hence avoiding the payment of customs duties.[106]

135. In summary, Italy is the place where the criminal conduct under investigation began, with the *M/V Norstar* being loaded with gasoil bought in exemption of excise duties; Italy is the place where the crimes of smuggling and tax evasion were allegedly perfected at the moment of the re-introduction of such gasoil, in violation of Italian custom and criminal laws.

136. What emerges from this is that, had the fuel which was purchased through bunkering been consumed, or resold, on the high seas or outside the Italian territorial waters, the Italian authorities would not have ordered the seizure of the *M/V Norstar*.

137. For the reasons specified above, Panama's argument on the extraterritorial application of Italian legislation to the *M/V Norstar* is not tenable.

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[102] *International Letter Rogatory of the Tribunal of Savona to the Spanish Authorities, 11 August 1998* (**Annex J**), at 4, translating page 6 of the Italian version; emphasis added.
[103] *Judgment by the Tribunal of Savona, 13 March 2003* (**Annex M**), at 7, para. 3, translating page 10, para. 3, of the Italian version; emphasis added.
[104] *Supra*, para. 125, quoting ITLOS/PV.16/C25/3/Rev.1, at 22, lines 17–22.
[105] *Supra*, para. 58.
[106] *International Letter Rogatory of the Tribunal of Savona to the Spanish Authorities, 11 August 1998* (**Annex J**), at 4, translating page 6 of the Italian version.

III. Article 87(2) sets out obligations for Panama and cannot be invoked against Italy in the present dispute

138. Panama's reliance on the second paragraph of Article 87 is equally misplaced.[107] According to Panama's Memorial,

> "[…T]he order and request of arrest made by Italy adversely affected the use of the high seas by the Panamanian vessel and all the persons involved in its operation.
>
> The general principle of the Latin maxim *sic utere tuo alienum non laedas* applies in the sense that a State should not cause or permit ships flying its flag to do things on the high seas that interfere, whether maliciously or unreasonably, with the interests of other users. […]
>
> 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".[108]

139. Under Article 87(2), the freedoms of the high sea:

> "[S]hall 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".

140. 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.

141. Therefore, Italy has not violated paragraph 2 of Article 87 of the Convention, either.

[107] Panama's Memorial, para. 79.
[108] Panama's Memorial, paras. 96-98.

CHAPTER 4
PANAMA'S CLAIM CONCERNING THE ALLEGED BREACH OF ARTICLE 300

Introduction

142. In its Memorial Panama states that "Italy has not fulfilled the obligations assumed by it under Article 87 of the Convention in good faith".[109] It articulates its claim on breach of Article 300 in a number of scattered statements. These appear to fall into four main arguments:

(a) First, Italy has not acted in good faith because it has breached Article 87.[110]

(b) Second, Italy has not acted in good faith by waiting several years before arresting the *M/V Norstar*, and by doing so in the internal waters of Spain;

(c) Third, "Italy has not acted in good faith by delaying these proceedings [and] failing to respond to communications"[111] and due to its conduct in the context of the domestic criminal proceedings concerning the *M/V Norstar*.

(d) Fourth, "Italy has exercised its jurisdiction in a manner which constitutes an abuse of rights".[112]

143. This Chapter counters each of these arguments, and Panama's other statements. **Section I** addresses Panama's contention that Italy has breached Article 300 of the Convention as a consequence of the alleged violation of Article 87. **Section II** deals with the Panamanian argument that the time and space of the arrest of the *Norstar* demonstrate Italy's bad faith. **Section III** addresses Panama's allegation that Italy was not in good faith in the conduct of the diplomatic exchanges with Panama, as well as of the domestic proceedings pertaining to the *M/V Norstar* and those involved in its operation. Lastly, **Section IV** addresses Panama's argument that Italy has abused its rights under the Convention.

I. Panama's claim that Italy has breached Article 300 as a consequence of having breached Article 87

144. According to Article 300 of the Convention:

> "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms

[109] Panama's Memorial, para. 100.
[110] Panama's Memorial, para. 114.
[111] Panama's Memorial, para. 103.
[112] Panama's Memorial, Chapter 3, Section III, Subsection 4.

> recognized in this Convention in a manner which would not constitute an abuse of right".[113]

145. In its Memorial, Panama claims that "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".[114] It goes on to say that

> "In the case under consideration, 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".[115]

146. Panama's argument is that Italy has breached Article 300 with regard to Article 87, *because* it has breached Article 87. Without prejudice to Italy's arguments on the absence of a breach of Article 87 indicated earlier, Panama's position on Article 300 is entirely misconceived. 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. This conclusion is not tenable, and Panama is unable to provide any authority in support of its argument.

II. Panama's claim concerning the time and space circumstances of the arrest of the *M/V Norstar*

147. Out of the many claims that Panama makes to evidence that Italy has not fulfilled in good faith its obligations under Article 87, only two actually bear some connection with freedom of navigation under this provision.

148. First, Panama claims that 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.

149. Second, by ordering and requesting the arrest of the *M/V Norstar*, prior to the date its Judiciary decided the release of the vessel and the acquittal of those involved in its operation, and just before the *M/V Norstar* was about to sail to the high seas, Italy did not act in good faith either, but in a disproportionate manner, to the detriment of Panama as a sovereign state, as well as to all the persons having an interest on its registered vessel. Italy took advantage of the fact that the vessel was docked in port, which made the arrest and detention easier, to unlawfully extend its jurisdiction to acts committed on the high seas.

150. 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.

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[113] Article 300 of the Convention.
[114] Panama's Memorial, para. 108.
[115] Panama's Memorial, para. 114.

151. As to the first contention, Italy explained at length in **Chapters 2 and 3** of the Counter-Memorial that the *M/V Norstar* was not arrested and detained due to the bunkering activities that it was carrying out on the high seas; on the contrary, it 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 involvement in the crimes specified above. If 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.

152. Panama's second contention is equally not indicative of any bad faith, but only that Italy acted in full compliance with the law. 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.

153. Panama's allegations that Italy did not act in good faith are unsubstantiated and apodictic, and based on mere presumptions. However, already in the *Lac Lanoux* Arbitration, it was affirmed that "there is a general and well-established principle of law according to which bad faith is not presumed".[116]

154. This principle has been repeatedly affirmed since. In *Fisheries Jurisdiction case*, Judge Weeramantry explained that: "[t]here is a presumption of good faith in all State actions".[117] Similarly, in his declaration to the Judgment of this Tribunal in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Provisional Measures)*, Judge Anderson explained that: "good faith is to be presumed in litigation, just as in diplomatic relations in accordance with the principles of the United Nations Charter".[118]

155. In the circumstances, Panama's claim also fails to meet the required standard of proof.

III. Panama's claim that Italy has not acted in good faith due to its conduct during negotiations and Italian domestic proceedings

156. According to Panama,

> "[…] 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 87 finds application to this case".[119]

[116] *Lake Lanoux Arbitration (France v. Spain)*, [1957] ILR 24, at 126.
[117] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Dissenting Opinion of Vice-President Weeramantry, *I.C.J. Reports* 1998, p. 496, at para. 37.
[118] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, Declaration of Judge Anderson, ITLOS Reports 2003, p. 32, para. 3.
[119] Panama's Memorial, para. 102.

157. Despite claiming that Article 300 finds application to this case as regards Article 87, Panama makes a number of allegations of breach of good faith that do not relate in any way to Article 87. On the contrary, these concern, on the one hand, the question of Italy's conduct the negotiations with Panama before and during international proceedings before this Tribunal; and, on the other, the question of Italy's conduct during Italian domestic proceedings. In particular, Panama claims that:

> "Italy has not acted in good faith by delaying these proceedings [and] failing to respond to communications […]".[120]

158. Italy breached the duty of good faith by:

> "[N]eglecting to release the vessel when its own courts had decided that no crime had been committed" and by "detaining the vessel as corpus delicti for an unreasonable period of time and disregarded (sic) the decisions of its own courts".[121]

159. Italy would also have acted in bad faith, "by bringing the persons involved in the operation of the M/V Norstar to trial", by "letting criminal proceedings endure for 5 years" and by not offering any compensation to the accused of the crime, despite their acquittal.[122]

160. Finally, according to Panama, by keeping the *res* under its jurisdiction and authority without effectively returning it to any of the entitled person(s) in a timely manner, in spite of the clear and definitive orders by its own judicial authorities to do so, Italy would also have failed to in good faith.

A. Panama's claims fall outside the jurisdiction of the Tribunal

161. Panama makes all these allegations under a general heading of its Memorial titled "Italy has not fulfilled in good faith its obligations under the Convention".[123] However, Panama's general reference to Italy's "obligations under the Convention" disregards not only Panama's own statement that Article 300 is relevant in the context of Article 87, but also the Tribunal's Judgment of 4 November 2016.

162. In that Judgment, the Tribunal curtailed the scope of the dispute between the Parties. At paragraph 132, the Tribunal stated that:

> "[A]rticle 87 of the Convention concerning the freedom of the high seas is relevant to the present case. The Tribunal considers that the question arises

[120] Panama's Memorial, para. 103.
[121] Panama's Memorial, para. 124.
[122] Panama's Memorial, para 115.
[123] Panama's Memorial, page 31.

> as to whether Italy has fulfilled in good faith the obligations assumed by it under Article 87 of the Convention […]".[124]

163. In light of the decision of the Tribunal, and of Panama's own admissions, the assessment of Italy's conduct, for purposes of ascertaining a possible breach of Article 300, must be carried out with respect to the obligations assumed by Italy under Article 87, and not with respect to any obligation that Italy has assumed under the Convention.[125]

164. Italy's conduct in its negotiations with Panama and in the context of Italian domestic proceedings do not engage obligations assumed by Italy under Article 87. Therefore, Italy's conduct in its diplomatic negotiations with Panama and in the context of Italian domestic proceedings fall outside the dispute between the Parties as identified by the Tribunal in its Judgment of 4 November 2016.

B. Panama invokes Article 300 as a stand-alone provision

165. Without prejudice to the above arguments, in its Judgment of 4 November 2016, the Tribunal ruled that:

> "[I]t is apparent from the language of Article 300 of the Convention that Article 300 cannot be invoked on its own".[126]

166. In so doing, the Tribunal aligned itself with its constant case law. In the *Virgina G* case, the Tribunal also clarified 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".[127]

167. The Tribunal further explained that:

> "[I]t is the duty of an applicant when invoking article 300 of the Convention to specify the concrete obligations and rights under the Convention, with reference to a particular article, that may not have been fulfilled by a respondent in good faith or were exercised in a manner which constituted an abuse of right".[128]

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[124] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 132; emphasis added.
[125] *Infra*, paras. 193-198.
[126] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 131. Similarly, *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, para. 137.
[127] *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, para. 398; emphasis added.
[128] *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, para. 399.

168. Even if, *arguendo* only, the Tribunal had not limited the relevance of Article 300 to the obligations assumed by Italy under Article 87, Panama would still have failed to identify what provisions of the Convention Italy would have violated by the conducts indicated in paragraphs 157-160 above. Panama invokes Article 300 as a stand-alone provision, contrary to the constant case law of this Tribunal on the interpretation of Article 300. In the circumstances, Panama's claim that Italy's conduct during the negotiations with Panama constitutes a breach of Article 300 should be rejected.

C. Italy's conduct is not suggestive of any lack of good faith

169. Without prejudice to arguments made above, Panama's allegations that Italy's conducts indicated in paragraphs 157-160 are in breach of good faith are also devoid of any grounds on their merits. Once again, Panama's allegations are based on factually wrong statements and they do not meet the evidentiary standard that is necessary to displace the presumption of good faith in state conduct.

1. Italy's conduct before and during these proceedings

170. Panama's first allegation is that Italy breached good faith by "delaying these proceedings".[129] That Italy has delayed these proceedings is a patently false statement. Italy has conducted itself with the utmost cooperation *vis à vis* Panama before the Tribunal. It is regretful that Panama should make such gratuitous accusations, without pointing to one single event in support of its argument.

171. In addition, any 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. 14 years in total have elapsed since Panama first invoked the commencement of international proceedings, and their actual commencement. There is no doubt that these proceedings are late. But there is equally no doubt that any delay is to be imputed to the choices made by Panama, in its capacity as Claimant in the present case.

172. In fact, 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.[130] Panama decided willingly to continue in its attempts to negotiate with Italy, in circumstances where there was no obligation to do so, and even when the prospects of a negotiated settlement were non-existent.

[129] Panama's Memorial, para. 114.

[130] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, para. 48: "Malaysia was not obliged to continue with an exchange of views when it concluded that this exchange could not yield a positive result".

173. As the Tribunal itself noted,

> "Panama was justified in assuming that to continue attempts to exchange views could not have yielded a positive result and that it had thus fulfilled its obligation under article 283 of the Convention".[131]

174. Panama's allegation that Italy is responsible for the delaying of these proceedings also flies in the face of the fact that Panama's declaration under Article 287 of the UNCLOS, conferring jurisdiction to this Tribunal, was only made on 29 April 2015. The declaration under Article 287 was a fundamental legal pre-requisite for the commencement of "these proceedings", and one that was only and exclusively for Panama to fulfil.

175. Panama also argues that Italy's non-response to Panama constitutes a breach of good faith.[132] A number of considerations have to be made with respect to this statement.

176. First, Panama claims that

> "There is no excuse for [Italy's] failure to respond to any of the Panamanian efforts to communicate".[133]

177. 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. Italy felt that:

> "[I]t [did] not fail to respond to diplomatic communications from Panama on the matter in issue, it simply did not respond to Mr Carreyó since he was not vested with powers to negotiate with Italy over the facts of the present case".[134]

178. Italy went on to note that, in its opinion,

> "Mr Carreyó [did not have] the authorization to represent Panama in diplomatic dealings with Italy […]".[135]

179. Even if Italy's position proved wrong as a matter of law, this does not mean that there was no reason for Italy other than bad faith, as Panama suggests, not to respond to the communications.

180. Panama also argues that it

> "[…N]ow knows that Italy's silence reflects an intentional lack of good faith on its part and that, by not answering any of the communications sent

[131] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 217.
[132] Panama's Memorial, para. 114.
[133] Panama's Memorial, para. 121.
[134] *Written Observations and Submission of the Republic of Italy in reply to observations and submissions of the Republic of Panama*, para. 9.
[135] ITLOS/PV.16/C25/1, at 13, line 30.

> concerning the wrongful arrest of the M/V Norstar, and particularly by concealing this, Italy acted contrary to Article 300 of the Convention".[136]

181. The tautological nature of Panama's statements is striking. All Panama does with its argument is to declare that it now "*knows*" that Italy's silence is reflective of lack of good faith – to conclude apodictically that Italy acted contrary to the duty of good faith under Article 300. 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.[137]

2. Italy's conduct in the context of Italian domestic proceedings

182. Panama also claims that certain conduct by Italy in the context of the domestic criminal proceedings are indicative of Italy's lack of good faith. The wrong factual assertions, and the lack of any evidence that prove bad faith in Italy's conduct, are a common denominator also of these claims.

183. First, according to Panama, Italy detained the vessel for an unreasonable period of time, failed to release it when Italy's courts had decided that no crime had been committed and to return it to its owners. These affirmations are factually wrong, as **Chapter 2** has already discussed. 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.

184. Second, Panama claims that Italy brought the persons involved in the operation of the *M/V Norstar* to trial, let criminal proceedings endure for 5 years and did not offer any compensation to the accused of the crime after acquittal. Once against, Panama misconceives both the facts, and the law. The Italian judicial system provides for mechanisms of compensation for those who feel they have suffered a damage due to legal proceedings;[138] 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, suggestive of a lack of good faith.

IV. Panama's claim that Italy has abused its rights in breach of Article 300

185. Panama claims in its Memorial that Italy has exercised its jurisdiction in a manner that constitutes an abuse of rights.

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[136] Panama's Memorial, paras. 121-122.
[137] *Supra*, paras. 153-154.
[138] *Written Observations and Submission of the Republic of Italy in reply to observations and submissions of the Republic of Panama*, paras. 121 and 154-156.

A. A claim concerning abuse of rights in breach of Article 300 is not part of the present dispute

186. The question as to whether Italy abused its rights in violation of Article 300 is not one that falls within the scope of the dispute between Panama and Italy before this Tribunal, based on the Judgment of the Tribunal of November 4, 2016. It is worth recalling, once more, that in paragraph 132 the Tribunal held that:

> "[T]he 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".[139]

187. Whereas the second sentence of the paragraph indicates that Article 300 is relevant to the dispute between the Parties, the first sentence qualifies this relevance. In particular, Article 300 is relevant only as regards the assessment of whether Italy has fulfilled in good faith the obligations assumed by it under Article 87 of the Convention.

188. Panama tries to blur the notion of abuse of right and the notion of good faith by saying that they are closely related.[140] The fact that two provisions are closely related, however, does not mean that they are the same. The obligations imposed by Article 300 can be distinguished as:

(a) Obligations to fulfil obligations in good faith;

(b) Obligations not to abuse rights.

189. In line with this, when a Tribunal decides that Article 300 is relevant to a certain dispute, it also specifies which one of the two obligations prescribed by Article 300 becomes relevant, unless both are relevant.

190. The Annex VII Tribunal in the *Chagos Marine Protected Area Arbitration* case, for instance, found that Article 300 was relevant to the dispute, and that the Tribunal's jurisdiction encompassed Article 300 "insofar as it relate[d] to the abuse of rights".[141]

191. In the present case, similarly, the Tribunal has limited the relevance of Article 300 to the question has to whether Italy has fulfilled in good faith its obligations.

192. Therefore, the question of Italy's alleged abused of rights is beyond the jurisdiction of the Tribunal in this case.

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[139] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 132.
[140] Panama's Memorial, para. 107.
[141] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, para. 323(d).

B. Panama invokes Article 300 as a stand-alone provision also as regards abuse of rights

193. Without prejudice to the argument just made, Panama is also mistaken in the manner it has invoked Article 300. Panama declares that

> "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".[142]

194. Panama's invocation of Article 300 in this manner fails on two counts.

195. First, Panama fails to consider that the Tribunal has curtailed the application of Article 300 to Article 87 only, and not generally "to the manner of the exercise of the right of jurisdiction recognized by the Convention".

196. Second, even if Article 300 was relevant beyond Article 87, Panama has still 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.

197. 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. The Tribunal in the *Chagos* case explained that

> "With respect to Article 300 and the abuse of rights, the Tribunal agrees with the Parties that a claim pursuant to Article 300 is necessarily linked to the alleged violation of another provision of the Convention".[143]

198. The duty to be specific in identifying to which provision Article 300 is linked is not respected by invoking a general incompatibility of a State's actions with *the manner of the exercise of the right of jurisdiction recognized by the Convention,* considering that a large part of the Convention is devoted to disciplining the manner of exercise of rights and jurisdiction.

C. Italy has not abused any right with respect to Article 87

199. 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.

200. 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. A recent commentary to UNCLOS explains that:

> "[I]t becomes evident that the prohibition against the abuse of rights becomes relevant in situations where international legal norms provide the

[142] Panama's Memorial, para. 125.
[143] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, para. 303.

> actors with a broad, perhaps almost unlimited, discretionary power to exercise a right".[144]

201. This is clearly not the case in the present dispute: Article 87, which is invoked by Panama, does not confer any right or jurisdiction to Italy in the present dispute, but only places obligations on Italy *vis à vis* Panama. In particular, it is Panama, as a Claimant in this case, that invokes a breach of its freedom of navigation, and it is to Panama only that Article 87 of UNCLOS confers rights in the present dispute.

202. In the same context, Panama argues that Italy "breached [Article 300] 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".[145] As already explained in **Chapter 3**,[146] the 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 once again 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.

[144] Killian O'Brian, *Article 300. Good faith and abuse of rights*, in Alexander Proelß, *United Nations Convention on the Law of the Sea. A Commentary* (Hart, 2017), at 1942.
[145] Panama's Memorial, para. 126.
[146] *Supra*, paras. 138-141.

CHAPTER 5
OTHER CLAIMS BY PANAMA THAT ARE EITHER OUTSIDE THE JURISDICTION OF THE TRIBUNAL, OR INADMISSIBLE

Introduction

203. In its Memorial, Panama claims that Italy has breached Articles 92, 97(1) and 97(3), of the Convention.[147]

204. It also claims that Italy has breached international norms regarding the protection of human rights.

205. In the pages that follow Italy demonstrates that both the claims related to Articles 92, 97(1) and 97(3), and the claim regarding human rights either do not fall within the jurisdiction of the Tribunal, or are inadmissible. **Section I** deals with the alleged breach of Articles 92, 97(1) and 97(3); **Section II** addresses the alleged breach of human rights provisions.

I.The claims under Articles 92, 97(1) and 97(3)

206. In its Memorial, Panama claims that:

> "[B]y 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). The assertion of invocation [*sic*] of jurisdiction from a State additional to the flag State unavoidably results in international friction".[148]

207. 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. And indeed, Panama is precluded from asking the Tribunal to make such a declaration.

208. At paragraph 132 of the Judgment of 4 November 2016, the Tribunal delimited the scope of the dispute between the Parties in the present case. It held that:

> "[…T]hat 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

[147] Panama's Memorial, para. 92.
[148] Panama's Memorial, para. 92.

> 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".[149]

209. By 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. The question as to whether Articles 92, 97(1) and 97(3), have been violated, therefore, falls outside the jurisdiction of the Tribunal, as delimited by it in the context of incidental proceedings.

210. At the same time, Panama is precluded from enlarging the dispute before the Tribunal by making new claims in its Memorial that do not feature in its Application. In the *Louisa* case, the Tribunal explained that:

> "[W]hile 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".[150]

211. In the same case, the Tribunal ruled that in order for a new claim to be admitted "it [...] must arise directly out of the application or be implicit in it".[151]

212. This position is in line with the case law of the International Court of Justice. In *Certain Phosphate Lands in Nauru* (Nauru v. Australia), quoting its own case law, the Court held that

> "[I]t is not sufficient that there should be links between [the original claim and the additional one] of a general nature. Additional claims, must have been implicit in the application (*Temple of Preah Vihear*, Merits, I.C.J. Reports 1962, p. 36) or must arise 'directly out of the question which is the subject-matter of that Application' (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, I.C.J. Reports 1974, p. 203, para. 72)".[152]

213. 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".[153]

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[149] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 132.
[150] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, para. 143.
[151] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, para. 142.
[152] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, *I.C.J. Reports* 1992, p. 240, para. 67.
[153] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, para. 143.

214. As such, Panama's claims under Articles 92, 97(1) and 97(3), are outside the scope of the jurisdiction of the Tribunal in the present case and their late introduction into the dispute is not admissible.

II.The claims concerning human rights

215. In its Memorial, Panama claims that:

> "[B]y 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".[154]

216. Panama's claim does not fall within the jurisdiction of the Tribunal.

217. According to Article 287 of the Convention, the Tribunal has jurisdiction over any dispute concerning the interpretation or application of UNCLOS. 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.

218. This emerges clearly from Panama's Memorial, and in particular from the Submissions of Chapter 5.

219. In the course of the Memorial, Panama lists a number of provisions external to the Convention, that Italy would have violated. These include Article 17 of the Universal Declaration of Human Rights;[155] Articles 17 and 54 of the Charter of Fundamental Rights of the European Union;[156] Articles 1 and 2 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms;[157] Articles 4 of Protocol 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms.[158]

220. In its submissions, Panama then asks the Tribunal to

> "[F]ind, declare and adjudge [...] that [...] Italy has breached [...] other rules of international law, such as those that protect the human rights and

[154] Panama's Memorial, para. 133.
[155] Panama's Memorial, para. 139.
[156] Panama's Memorial, paras. 140-141.
[157] Panama's Memorial, paras. 142-143.
[158] Panama's Memorial, para. 148.

> fundamental freedoms of the persons involved in the operation of the M/V Norstar".[159]

221. However, the Tribunal does not have jurisdiction to make such a finding in the circumstances of the present case.

222. An Annex VII Tribunal has recognised this with clarity in the *Artic Sunrise* case. At paragraphs 197 and 198 of the Judgment, the Tribunal explained as follows:

> "The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context. This is not, however, the same as, nor does it require, a determination of whether there has been a breach of Articles 9 and 12(2) of the ICCPR as such. That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime. In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons. This Tribunal does not consider that it has jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions".[160]

223. Italy contends that the same considerations apply, *mutatis mutandis*, to the present case.

224. Without prejudice to this, by alleging that Italy has violated human rights, Panama advances an entirely new argument that was not part of Panama's original application. In this regard, Italy wishes to recall the same arguments made in paragraphs 206-214 of this Chapter with respect to Articles 92, 97(1) and 97(3).

225. In light of the above, Panama's claims regarding the alleged human rights violations committed by Italy fall outside the jurisdiction of the Tribunal and are, in any event, inadmissible.

226. Whereas, for the reasons explained in the previous paragraphs, Italy does not feel that it is necessary to engage in a detailed discussion of the content of the human rights provisions

[159] Panama's Memorial, para. 260(2).
[160] *Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation)*, PCA Case No. 2014–12, Award on the Merits, 14 August 2015, paras. 197–198; emphasis added.

invoked by Panama, it still wishes to stress that its conduct was in full compliance with due process of law and the general considerations of humanity that apply in the law of the sea.[161]

227. Panama claims that Italy has breached rights such as personal freedom, right to a fair trial, the procedural right to an effective remedy and actual reparations.[162] It also complains that Italy has violated these human rights with respect to the *M/V Norstar*'s "owner, the charterer, the captain and its crew".[163] It further states that "Italy breached its international obligations concerning the human rights [...] of the persons involved or interested in the operation of the M/V Norstar".[164] A few considerations are necessary in this regard.

228. First, as regards personal freedom and right to a fair trial, the notion of detention for purposes of the Convention was identified by the Tribunal in the *Camouco* and *Monte Confourco* cases. In *Camouco*, the Tribunal considered as detention circumstances in which the Master of the ship was placed under court supervision and unable to leave the country due to his passport having been taken away from him.[165] In *Monte Confourco*, the Tribunal similarly held that taking away the passport and preventing someone to leave a country amounted to detention.[166]

229. In the present case, not even this "broad" definition of detention was met: not only were the captains of the *M/V Norstar* never imprisoned; they were also never subject to any form of restriction of their personal freedom, to the point, that the Italian Judicial Authorities informed the accused that they would be tried *in absentia*, had they not been physically present at trial.[167] Any claim concerning the legitimacy of the detention of the crew members of the *M/V Norstar* is therefore not tenable because no measure of restriction of liberty was ever adopted with respect to them in the first place. This is despite the fact that a deprivation of liberty would have been entirely legitimate in the context of criminal proceedings. Also, Panama's claim that Italy has breached fair trial,[168] are, not only not articulated by Panama, but also entirely devoid of any ground on their facts.

230. Second, as regards the right to an effective remedy, in the *Tomimaru* case, the Tribunal explained that the confiscation of a vessel should not "be taken through proceedings inconsistent with international standards of due process of law".[169] In giving substance to this notion, the Tribunal explained that a decision to confiscate

> "[S]hould not be taken in such a way as to prevent the ship owner from having recourse to available domestic judicial remedies, or as to prevent the

[161] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment, ITLOS Reports 1999, p. 10, para. 155. See also *Corfù Channel case*, Judgment of April 9, 1949, *I.C.J. Reports* 1949, p. 4, at 22.
[162] Panama's Memorial, para. 134.
[163] Panama's Memorial, para. 147.
[164] Panama's Memorial, para. 133.
[165] *"Camouco" (Panama* v. *France)*, Prompt Release, Judgment, ITLOS Reports 2000, p. 10, para. 71.
[166] *"Monte Confurco" (Seychelles* v. *France)*, Prompt Release, Judgment, ITLOS Reports 2000, p. 86, para 90.
[167] *Decree of commitment for trial by the Tribunal of Savona, 8 November 2001* (**Annex W**), translating page 4 of the Italian version ("warning the accused that were they not to be present, they will be tried *in absentia*").
[168] Panama 134; para 136.
[169] *"Tomimaru" (Japan* v. *Russian Federation)*, Prompt Release, Judgment, ITLOS Reports 2005-2007, p. 74, para 76.

> flag State from resorting to the prompt release procedure set forth in the Convention".[170]

231. In the present case, any compression of the right to free enjoyment of property has been in the context, and subject to the guarantees, of criminal proceedings governed by the Italian Code of Criminal Procedure; the owner of the *M/V Norstar* has not been prevented "from having recourse to available domestic judicial remedies" to seek the release of the *M/V Norstar*, but rather has exercised them successfully;[171] also, as indicated in the Preliminary Objections, the owner of the *Norstar*, alongside the other accused, could have filed domestic proceedings in Italy to seek compensation for any damage allegedly suffered due to the Italian criminal trial, but failed to do so.[172]

232. Therefore, not only are Panama's claims concerning human rights beyond the jurisdiction of the Tribunal, and in any event inadmissible; they are also devoid of any ground on their merits.

[170] *Ibid.*
[171] *Supra*, para. 53-54.
[172] *Written Observations and Submission of the Republic of Italy in reply to observations and submissions of the Republic of Panama*, paras. 121 and 154-156.

CHAPTER 6
PANAMA'S CLAIM CONCERNING THE REPARATION FOR DAMAGES

Introduction

233. In the previous Chapters to this Counter-Memorial, Italy has argued that its conduct with respect to the arrest and detention of the *M/V Norstar* has been in compliance with the Convention.

234. In the event that the Tribunal should disagree with Italy's arguments and hold that a breach of UNCLOS has in fact occurred, Italy devotes this Chapter to the question of the reparation of the damages sought by Panama. For these purposes, this Chapter is arranged in two Sections.

235. **Section I** discusses the question of the causality between the alleged unlawful conduct of Italy and the damages invoked by Panama. To this end, **Subsection I** addresses in general terms the question of causality in the international law of State responsibility; **Subsection II** argues that several heads of damages invoked by Panama are not tied by a causal nexus to Italy's conduct; **Subsection III** explains that, if a causal link has at some point existed between Italy's conduct and the damages sought by Panama, this link was interrupted by the owner of the *M/V Norstar*'s own conduct.

236. **Section II** discusses the question of the quantification of the damages, in the event that any is found to be causally linked to Italy's conduct. For these purposes, **Subsection I** addresses the ship-owner's contribution to the damages allegedly suffered by Panama and his failure to mitigate them; **Subsection II** disputes the legitimacy and the quantum of each of the heads of damages claimed by Panama.

I.The establishment of a causal link is a necessary condition of a claim for damages

A. The causal link in the international law of State responsibility

237. In 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.

238. Article 31(1), of the International Law Commission (ILC) *Draft Articles on State Responsibility* provides, to this end, that a State is under an obligation to make full reparation for injury only if such injury is "caused" by its internationally wrongful act.[173]

[173] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 91, commentary to Article 31, para. 1.

239. The existence of the causal link between the unlawful conduct and the injury is not to be lightly presumed. This in turn defines the scope of compensable injuries. As emphasised by the ILC:

> "It is only '[i]njury [...] caused by the internationally wrongful act of a State for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act".[174]

240. Furthermore, the relationship between the conduct and the damage is described by the ILC in the following terms: the damage must be "direct", "proximate", "foreseeable", "consequential", and must not be too "remote", "speculative", or "uncertain".[175] In other words, the damage for which compensation can be sought must be direct consequence of the wrongful conduct of a respondent.

241. In line with this, in the *M/V Virgina G* case, this Tribunal explained that only damages that are "direct consequences"[176] and that are connected by a "direct nexus"[177] to the conduct in breach of UNCLOS can be compensated. This approach is in line with previous case law of international tribunals. For instance, in the *Dix* case, it was held that

> "Governments, like individuals, are responsible only for the proximate and natural consequences of their acts. International as well as municipal law denies compensation for remote consequences".[178]

242. In Panama's Memorial, the issue of the link between the alleged breaches of UNCLOS committed by Italy and the damages claimed is addressed summarily, and in terms that are not respectful of the principle of direct causation. Paragraphs 168-169 read as follows:

> "[…W]ould damages have occurred if Italy had not ordered and requested the arrest of the M/V Norstar? Or, is there anything which could preclude the treatment of the order and request of arrest issued by Italy as the cause of the damages? […] 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. Without such an order the responsibility and claim for damages would have not ensued".[179]

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[174] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 92, Commentary to Article 31, para. 9; emphasis added.
[175] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 92, Commentary to Article 31, para 10.
[176] *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, para. 435.
[177] *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, para. 436.
[178] *Dix case*, Opinion of the American-Venezuelan Commission, *R.I.A.A.* 1903-1905, Vol. IX, p. 119; emphasis added.
[179] Panama's Memorial, paras. 168-169.

243. On the basis of this sweeping statement and broad interpretation of causal connection, Panama claims very extensive damages from Italy. In particular, Panama requests that Italy should pay damages that include

> "[T]he 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".[180]

244. In the pages that follow, Italy will demonstrate that the damages claimed by Panama, and for which Panama claims compensation, are either not at all tied by a relationship of direct causality to the alleged breach of the Convention; or, that, if any direct causal link existed, it has been interrupted by the ship-owner's own conduct.

B. Several heads of damages complained of by Panama do not bear any connection with a breach of the Convention

245. In the *Virginia G* case, the Tribunal addressed the question of the existence of a causal link between the damages sought by Panama and Guinea Bissau's conduct in the following terms:

> "With regard to the repairs to the vessel, the 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".[181]

246. The same reasoning, *mutatis mutandis*, would apply to Panama's claim with respect to Italy in the present case. In particular, Italy contends that several heads of damages do not have a causal connection with Italy's alleged breach of the Convention, or that, in any event, any connection would be so remote as to not constitute the required "proximate and natural consequences" of Italy's actions.[182]

247. The 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*;[183] and the damages stemming from the loss of the cargo suffered by the charterer.[184]

248. In **Subsection II** of **Section II** Italy will signal when a direct link cannot be said to exist with regard to the single heads of damages invoked by Panama.

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[180] Panama's Memorial, para. 181.
[181] *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, para. 442.
[182] *Dix case*, Opinion of the American-Venezuelan Commission, *R.I.A.A.* 1903-1905, Vol. IX, p. 119.
[183] Panama's Memorial, paras 195-199.
[184] Panama's Memorial, para. 230.

C. The interruption of the causal link between Italy's conduct and the damages suffered by Panama

249. If 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.

250. Case 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*.

251. In the *Administrative decision No. II* case, the arbitral Tribunal held as follows:

> "It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, *provided there is no break* in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act".[185]

252. Similarly, the Second Report on State Responsibility prepared by Professor Arangio-Ruiz, refers to the requirement of a "clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed".[186]

253. Panama wonders whether "there [is] anything which could preclude the treatment of the order and request of arrest issued by Italy as the cause of the damages […]".[187] Despite Panama's rhetoric, the answer is not in the negative. The answer is in the affirmative because Panama's conduct has broken any causal link that may have existed between Italy's alleged acts and the damages suffered.

254. This has happened a) when the owner of the *M/V Norstar* failed to retrieve the vessel after its release was authorised in 1999; or b) in any event, when the owner of the *M/V Norstar* failed to retrieve the vessel after the Judgment of the Tribunal of Savona in 2003, that ordered its unconditional release.

1. The failure to retrieve the M/V Norstar *in 1999*

255. As discussed in **Chapter 2**, 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. He made the release conditional upon the payment of a security of 250 million liras (about 145,000$ or 125,000€). The owner of the *M/V Norstar* did not go on to retrieve the ship because, according to Panama, he was unable to pay such amount of money.[188] The reason for

[185] *Administrative Decision No. II (United States-Germany), R.I.A.A.* 1923, Vol. VII, p. 23
[186] *Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur* (UN Doc. A/CN.4/425), in *Yearbook of the International Law Commission*, 1989, Vol II, Part. 1, p. 2, at pp. 12-13, para. 37.
[187] Panama's Memorial, para. 168.
[188] Panama's Memorial, para. 28.

this is said to be that "the long detainment had consequently led to a loss of all its source of income".[189]

256. In making the release of the vessel conditional upon the posting of a bond, the Prosecutor acted in compliance with the provisions of the Italian Code of Criminal Procedure.[190] These, in turn, are consistent with the established practice according to which release of a vessel that has been seized by a coastal State can be made subject to the "posting of a reasonable bond or other financial security".[191] In requesting the payment of a security, therefore, the Prosecutor acted in a reasonable and proportionate manner, and in conformity with the principles of international and domestic law.

257. Not only was the request to pay a bond legitimate and justified, but also the amount was entirely reasonable. In the *M/V "Saiga"* case, the Tribunal discussed the test of reasonableness to assess the legitimacy of the quantum of a bond under Article 292 of the Convention. It held that:

> "[T]he criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable".[192]

258. In the *Camouco* case, the Tribunal further explained that the criteria to take into account to assess whether a bond is reasonable:

> "[I]nclude the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form".[193]

259. In the present case, the *M/V Norstar* was seized as *corpus delicti* during criminal proceedings concerning alleged serious crimes, namely smuggling and tax evasion.

260. In addition, the amount of the requested bond was significantly lower than what is normally required in the context of criminal proceedings involving the arrest of a foreign vessel. These bonds are normally in the region of at least one million Euros. The bond requested by the Public Prosecutor was approximately 10 % of this sum.

261. In more details, in the *M/V "Saiga"* case, the ITLOS added further $ 400,000 to a security constituted of gasoil amounting to approximately $ 1 Million, subjecting the release of the vessel to the payment of a total of $ 1.4 million.[194] In the *Camouco* case, the ITLOS

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[189] *Ibid.*

[190] *Italian Code of Criminal Procedure, Articles 253, 257, 262, 263, 324, 365 and 606* (**Annex H**), Articles 262-263.

[191] Articles 73(2) and 292(1) UNCLOS. Also *"Monte Confurco" (Seychelles v. France)*, Prompt Release, Judgment, ITLOS Reports 2000, p. 86, para. 41.

[192] *M/V "Saiga" (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, Judgment, ITLOS Reports 1997, p. 16, para. 82.

[193] *"Camouco" (Panama* v. *France)*, Prompt Release, Judgment, ITLOS Reports 2000, p. 10, para. 67.

[194] *M/V "Saiga" (Saint Vincent and the Grenadines v. Guinea)*, Prompt Release, Judgment, ITLOS Reports 1997, p. 16, paras. 35 and 85.

considered that a bond equalling 8 million French Francs (about 1.2 million Euros) was reasonable;[195] in the *Monte Confourco* case, the Tribunal set the bond at 18 million French Francs[196] (about 2.7 million Euros).

262. As regards Panama's statement that the owner could not pay the requested 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*.

263. In 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.

264. Lastly, with respect to the "long detainment" that Panama complains of, Italy wishes to note that a) the owner only filed a request for the release of the vessel on 12 January 1999; and b) the release of the vessel, upon the posting of a bond, was communicated to the Italian Embassy in Oslo, for purposes of further communication to the owner, on 11 March 1999.[197] Even if Panama contends that the decision regarding the release was communicated on 29 June 1999,[198] in contrast with Annex 8 of its Memorial, the fact remains that only about 5 months passed between the ship-owner's request for release and the actual knowledge by him of the release. This is hardly a "long detainment" able to deprive a shipping company of all of its income.

265. In conclusion, Panama cannot claim that the damages that it has suffered are the consequence of Italy's Decree of Seizure. On the contrary, they are the direct consequence of the owner's choice not to pay a bond that was justified, in line with established practice, and entirely reasonable as to its amount.

2. The failure to retrieve the M/V Norstar *after the Judgment of the Tribunal of Savona of 2003*

266. Without prejudice to Italy's argument that the causal link – if at all existent – 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.

267. As illustrated in **Chapter 2**, the Tribunal of Savona: acquitted all the defendants in the case; 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.[199]

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[195] *"Camouco" (Panama* v. *France)*, Prompt Release, Judgment, ITLOS Reports 2000, p. 10, para. 74.
[196] *"Monte Confurco" (Seychelles v. France)*, Prompt Release, Judgment, ITLOS Reports 2000, p. 86, para. 93.
[197] Panama's Memorial, Annex 8.
[198] Panama's Memorial, para. 28.
[199] *Supra*, paras. 56-64.

268. In these circumstances, any damage suffered by Panama in connection with the arrest and detention of the vessel after 2003 has not been caused by the conduct of Italy, but rather by the conduct of the owner of the *M/V Norstar*.

II. Quantification of damages

A. Contributory fault and the duty to mitigate

269. In the previous paragraphs, Italy has shown that the ship-owner's conduct subsequent to the arrest and detention of the *M/V Norstar* determined an interruption of the causal link between the Decree of Seizure and the damages claimed by Panama.

270. Should the Tribunal find that the ship-owner's conduct has not interrupted the causal link in the terms described above, 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.

271. According to well established principles of international law, in the quantification of the compensation owned to an injured party, consideration must be given to the contribution of the victim to the injury.[200]. The principle of contributory fault or comparative fault has crystallised in Article 39 of the ILC Draft Articles on State Responsibility. This reads:

> "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought".[201]

272. As explained by the ILC, "to hold the author State liable for reparation of all of the injury would be neither equitable nor in conformity with the proper application of the causal link theory",[202] when the unlawful act of the State played a decisive but not an exclusive role in the production of the injury.

273. The circumstances envisaged by ILC under Article 39 are precisely those

> "[W]here the damage has been caused by the internationally unlawful act of the State, [...] but where the victim, either an injured State or any natural or juridical person in relation to whom reparation is sought, has materially

[200] *Case of the S.S. "Wimbledon"* (United Kingdom, France, Italy & Japan v. Germany), Judgment, 17 August 1923, in *P.C.I.J. Series A*, No. 1. See also the ICJ in the *LaGrand* case: "[t]he Court recognizes that Germany may be criticized for the manner in which these proceedings were filed and for their timing […]" (*LaGrand case* (Germany v. United States of America), Judgment, *I.C.J. Reports* 2001, p. 466, para. 57)). Conscious of the consequences of the late submission of the claim, the Court took "these factors into consideration had Germany's submission included a claim for indemnification" (*ibid*, para. 116).

[201] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 109, Article 39.

[202] ILC, *Report of the International Law Commission on the work of its forty-fifth session (3 May-23 July 1993)* (UN Doc. A/48/10), in *Yearbook of the International Law Commission*, 1993, Vol. II, Part 2, p. 4, at p. 59, Commentary to Article 6*bis*, para. 6.

> contributed to the injury by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as "contributory negligence", "comparative fault", "faute de la victime", etc.".[203]

274. The principle of contributory fault also applies to the question of the allegedly wrongful arrest of a ship by a State. It is telling that, among the examples used by the ILC to describe the contribution of an injured State to the damage, the following situation is indicated:

> "[I]f a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition".[204]

275. The ILC Articles also attest to the existence of a principle of mitigation of damages, in the following terms:

> "[A] failure to mitigate by the injured party may preclude recovery to that extent".[205]

276. Conduct aimed at mitigating damages is expected from any victim of a wrongful act, regardless of whether that victim has contributed to the injury, or if it is entirely innocent.[206]

277. In the present case, the owner of the *M/V Norstar* has contributed with his conduct to the causation of the damage and, in any event, has failed to mitigate any damage that may have been caused. This conduct consists of the following actions or omissions:

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[203] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 109, Commentary to Article 39, para. 1.

[204] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 110, commentary to Article 39, para. 4.

[205] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 92, commentary to Article 31, para. 11. See note 467: "In the WBC claim, a UNCC panel noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused" report of 15 November 1996 (S/AC.26/1996/5/Annex) (see footnote 461 above), para 54". The principle of mitigation of damages was also recognized by the ICJ in the *Gabcikovo-Nagymaros Project* case: "Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that 'It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained'. It would follow from such a principle 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" (*Gabčikovo-Nagymaros Project (HungarylSlovakia)*, Judgment, *I.C.J. Reports* 1997, p. 7, at pp. 48-49, para. 68).

[206] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 92, commentary to Article 31, para. 11.

(a) In 1999, the owner of the *M/V Norstar* failed to pay the reasonable security required by the Italian Prosecutor at the Tribunal of Savona, which would have determined the immediate release of the vessel;

(b) While Panama claims that the owner of the *M/V Nostar* was not in a position to pay the required sum of money, he never sought to either have decision to subject the release to the payment of a bond reviewed; nor to have the amount of the bond re-determined. Domestic judicial remedies would have been available to this end. Under Article 263, paragraph 5, of the Code of Criminal Procedure, an appeal could have been brought against the decision of the Public Prosecutor before the judge in charge of the preliminary investigations.[207] Had the appeal been unsuccessful, a further appeal on a point of law may have been lodged in accordance with the settled case law of the Court of Cassation. In addition, under Articles 257 and 324 of the Code of Criminal Procedure it would have been possible to request a full review the Decree of Seizure before the Court of the capital of the province where the office of the judicial authority which ordered the measure is situated.[208]

(c) A prompt release procedure under Article 292 of the Convention would have been available to try and secure the immediate release of the *M/V Norstar*. Both Panama and the owner of the vessel could have activated a request for prompt release, but chose not to do so.

(d) In 2003, the owner failed to retrieve the vessel, after its unconditional release by the Tribunal of Savona. According to Panama, this happened because the restitution of the *M/V Norstar* was "impossible" for the following reasons: "because the vessel was already a total loss due to the five years that Italy had allowed to elapse"; because Italy did not provide "the essential maintenance work to keep it operative"; "because no efforts were made to update the ship's certificates and class designation".[209]

278. First, Panama fails to explain how the bad conditions of the ships that Panama claims made the restitution of the vessel "impossible". In addition, it must be specified that it was not for Italy to provide for the essential maintenance works to keep the *M/V Nostar* operative, nor to update the ship's class certificate and designation. Any complaint concerning the modalities of the enforcement of the Decree of Seizure, and possible damages ensuing from it, should not be addressed to Italy. As indicated in the Separate Opinion of Judge Ndiaye, appended to the Judgement of the Tribunal of 4 November 2016 while

> "[I]t is Italy which is responsible for the actions of the Spanish authorities, carried out in its name […]. Spain was accountable only for the manner in which the seizure was carried out; that is for the protection of the integrity of the vessel and crew when seized".[210]

[207] *Italian Code of Criminal Procedure, Articles 253, 257, 262, 263, 324, 365 and 606* (**Annex H**), Article 263.
[208] *Italian Code of Criminal Procedure, Articles 253, 257, 262, 263, 324, 365 and 606* (**Annex H**), Articles 257 and 324.
[209] Panama's Memorial, note 31.
[210] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Separate Opinion of Judge Ndiaye, ITLOS Reports 2016, p. 25; emphasis added.

279. The owner of the *M/V Norstar* failed to resort to any other 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*. In particular, 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.[211]

280. 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.

281. In light of all of the above, if the Tribunal should find that the causal link between the conduct of Italy and the damaged allegedly suffered by Panama is existent and has not been interrupted, both the form of reparation and the quantum of the compensation should take into account Panama's contribution to the damage, and the absence of any effort whatsoever to mitigate damages.

282. In making this claim, Italy is supported by the Commentary to Article 39 of the ILC Draft Articles, in as much as it states that:

> "The conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation [emphasis added]. This is consonant with the principle that full reparation is due for the injury — but nothing more – arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach".[212]

B. The single head of damages invoked by Panama

283. In opening, Italy wishes to draw 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. Indeed, the quantification of damages does not escape the general rule of evidence according to which *onus probandi incumbit actori*.

284. The correct allocation of the burden of proof in international law is illustrated by the ICJ in the *Military and Paramilitary Activities* case, where the Court held:

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[211] Italy's *Written Preliminary Objections under Article 294, paragraph 3, of the United Nations Convention on the Law of the Sea*, para. 12.

[212] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 110, commentary to Article 39, para. 2; emphasis added.

> "[U]ltimately […] it is the litigant seeking to establish a fact who bears the burden of proving it".[213]

285. The modalities through which Panama quantifies its claim fall short of the necessary standard of proof, and Italy considers that Panama has not discharged the burden placed on it by rules on evidence.

286. In addition to not satisfying the burden of proof, Panama's assessment fails to meet any standard of neutrality. Rather, it seems guided by the aim of inflating at all costs the sums allegedly due to it by Italy. While it is understandable that a Claimant may use criteria for assessing a damage that are favourable to it, this exercise should not be carried out in a manner that obliterates any objectivity of the estimation. For example, Panama quotes in its Memorial that, in line with ITLOS' judgement in the *M/V "Saiga" (No. 2)* case,[214] it will apply alternative interest rates of 3, 6 or 8% to the sums allegedly owned by Italy.[215] However, what Panama does in reality is to apply – in all cases but one[216] – the highest interest rate of 8%. This is hardly in line with ITLOS' decision in *M/V "Saiga" (No. 2)*, in which the highest interest rate of 8% was only used with regard to the value of the gasoil, and an interest rate of 6% was applied generally.[217]

287. In the pages that follow, Italy will address each of the head of damages invoked by Panama.

C. Loss and damages suffered by the owner of the *M/V Norstar*

1. Damages as substitution for the loss of the M/V Norstar

288. In its Memorial Panama argues:

> "The claim for damages regarding the total loss of the M/V Norstar therefore amounts in total to: 625,000.00 USD with interest at the rate of 8%, and payable from 25 September 1998".[218]

289. Panama bases its evaluation on a document named "Statement for estimation of value of M/V "Norstar" by CM Olsen dated 4 April 2001" (the "Olsen Document").[219] Mr CM Olsen, the author of the Olsen Document, appears to be a broker based in Norway.[220] The

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[213] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports* 1984, p. 392, para. 101.
[214] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment, ITLOS Reports 1999, p. 10, para. 173
[215] Panama's Memorial, para. 186.
[216] Panama's Memorial, paras. 248 ff.
[217] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment, ITLOS Reports 1999, p. 10, para. 173.
[218] Panama's Memorial, para. 199.
[219] Panama's Memorial, para. 195.
[220] Panama's Memorial, Annex 5.

Olsen Document provides an assessment that is inaccurate and disproportionate, on the basis of three considerations.

290. First, the assessment was not based on a physical inspection of the *M/V Norstar* and/or examination of its class records. In particular, the Olsen Document recognised that:

> "[W]e have not physically inspected the vessel and/or her class records. 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 relvant information given is correct".[221]

291. An estimation based on these premises is necessarily flawed, both methodologically and in terms of the outcome of the assessment. In this regard, the Olsen Document itself calls into question its own accuracy.[222]

292. Second, and in connection with the point just made, it appears that, in the absence of any physical examination of the vessel, the Olsen Document may have been affected by Panama's statement that: "[a]t the time of the seizure on 24 September 1998, the M/V Norstar was in very good condition".[223] Panama also asserts that when the *M/V Norstar* was released in 2003 "it was in a very bad state, no longer seaworthy, and lacking valid certificates and class designation",[224] and was "a total loss for the owner".[225]

293. Italy has no reason to doubt that this was the state of the *M/V Norstar* at time of its release; however, Panama has not produced evidence that five years before the vessel was in much better state. On the contrary, as Italy has demonstrated in **Chapter 2**,[226] the *M/V Norstar* was in anything but good conditions: it was in a state of abandonment and dismay in the Port of Palma de Mallorca, with one engine not working, broken parts and used as a makeshift shelter for homeless people.[227]

294. Third, and without prejudice to the critical faults of the Olsen Document identified above, Panama confuses the criteria used for estimation of the damage for the direct loss with the criteria used for estimation of *lucrum cessans*, on which it devotes another section of its Memorial. The Olsen Document, in fact, states:

> "This estimation of value is given under the condition that the vessel is entertained under a minimum 4 years time charter at a rate of US DOLLAR 2.850,- (twothousandandeighthundredandfifty00/100) pd/pr for the first year and with natural escalation for each additional year".[228]

[221] *Ibid.*; emphasis added.
[222] *Ibid.*
[223] Panama's Memorial, para. 195.
[224] Panama's Memorial, para. 196.
[225] Panama's Memorial, para. 198.
[226] *Supra*, para. 51.
[227] Panama's Memorial, Annex 16; *supra*, para. 51.
[228] Panama's Memorial, Annex 5, p. 2.

*2. Damages for loss of revenue to the owner (*lucrum cessans*)*

295. In its Memorial Panama states as follows:

> "In accordance with the Loss-of-profit Calculation the loss of revenue from 25 September 1998 up to June 2010 was 11,675,484.39 USD. Interest in the amount of 8% per annum must be paid on top of this amount".[229]

296. Article 36(2) of the ILC Draft Articles on State Responsibility provides that compensation shall cover loss of profits (*lucrum cessans*) "insofar as it is established".[230] International adjudicative bodies have traditionally been cautious in approaching compensation for loss of profits, since such compensation requires the existence of a direct causal link between the conduct and the loss of profits.[231] As a rule, international tribunals award compensation for loss of profits only if the loss is the result of the ordinary course of events having their origin in the wrongful act.

297. In the *Diallo* case, the International Court of Justice opined that loss of income can in general terms determine a right to compensation; however, it clarified that such loss of income has to be proven. In the circumstances of the case before the Court, the person claiming compensation had received a certificate of indigence from Guinea, signaling that he was unemployed. As a consequence, the Court held:

> "Guinea also does not explain to the satisfaction of the Court how Mr. Diallo's detentions caused an interruption in any remuneration that Mr. Diallo might have been receiving in his capacity as gérant of the two companies […].
> Under these circumstances, Guinea has not proven to the satisfaction of the Court that Mr. Diallo suffered a loss of professional remuneration as a result of his unlawful detentions".[232]

298. In addition to having failed to prove the existence of any causal link between Italy's conduct and its lost profit, Panama has also failed to provide any objective quantification of the profits allegedly lost. Indeed, Panama's claim is remarkably deficient in terms of its evidence.

299. First, Annex 18, in which Panama quantified its loss of profits, is simply a list of figures drawn up without any explanation, let alone any objective criteria, whose soundness either Italy or this Tribunal could review.

300. Second, Panama's projected profits are entirely speculative in nature and based on events that are, at best, uncertain. Panama has at times to rely on the argument that written

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[229] Panama's Memorial, para. 210.
[230] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 31, at p. 98, Article 36.
[231] *Supra*, paras. 237-244.
[232] *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, *ICJ Reports* 2012, p. 324, paras. 45-46.

evidence was erroneous, so as to try and demonstrate its claims on loss of profits.[233] With regard to the Charter Party Agreement, for instance, Panama's Memorial states as follows:

> "On the one hand, it must be presumed [emphasis added] 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 by twice exercising the option of renewal for one year (until 26 June 2005). […]
> The option of two, one-year contract extensions had been verbally agreed to by Mr. Arve Einar Mørch (Chairman of the Board of the owner) and Mr. Petter E. Vadis (Managing Director of the owner) and the charterer's Managing Director, Mr. Frithjof Valestrand, at the conclusion of the original charter party. Although the written contract erroneously described this in the following way: "Owners agree to let and Charterers agree to hire the vessel for a period of 5 (five) years time charter with Charterers option for further 1 (one) option 1 (one) year".[234]

301. Third, Panamas' figures are in any event unrealistic and affected by a serious exaggeration of the estimated profits that the *M/V Norstar* was able to generate.

302. For instance, Panama maintains that the owner would have profited from the use of the vessel for 365 days a year for several years.[235] This is hardly realistic, given the fact that every ship requires, at least, periodical dry-docking for maintenance and administrative purposes. Moreover, the Time Charter Party produced by Panama provides that "owners have the right and obligation to dry-dock the vessel at regular intervals of 24 months".[236] As such, 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.

303. Also, in basing the assessment of loss of profit on the ship-owner's income, 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 fails to consider costs related, *inter alia*, to: a) maintenance and dry-docking of the ship which, under the Time Charter Party, were the responsibility of the ship-owner;[237] b) safety, such costs stemming from IMO's guidelines; c) corporate taxes and other taxes or duties.

3. Continued payment of wages

304. According to Panama, after the seizure of the vessel, the owner had to pay wages to the crew until the end of December 1998, without being able to finance these expenditures through charter income. Consequently, in its Memorial Panama states:

> "The amount thus represents an additional loss for the owner, which must also be reimbursed by Italy. Furthermore, interest in the amount of 8% per

[233] Panama's Memorial, para. 207.
[234] Panama's Memorial, para. 205.
[235] Panama's Memorial, Annex 18.
[236] Panama's Memorial, Annex 2, at 5, para. 22, line 299.
[237] Panama's Memorial, Annex 2, at 5, para. 22, line 304.

> annum must be added. The following gross amount is therefore asserted: 19,100.00 USD with interest at the rate of 8 %, payable from 01 January 1999".[238]

305. Once again, no direct causal link exists between Panama's alleged loss and Italy's conduct.[239] In addition, no evidence is provided to ground these assertions.

4. Legal fees

306. Panama requests the Tribunal to order that Italy should pay all its legal expenses with regard to proceedings related to the arrest and detention of the *M/V Norstar*.

307. According to Panama, these legal fees include: i) Legal fees for Abogados Bufete Feliu, Palma de Majorca (12.200,00 USD); ii) Legal fees for the period between the arrest and the application made before the International Tribunal for the Law of the Sea (33,405.83 USD plus 19.838,15 EUR); iii) Legal fees in relation to the procedure before the Tribunal (20,796.00 USD plus 95.551,48 EUR).[240] On these sums, Panama charges interests at 8%.

308. First, as regards proceedings before this Tribunal, Article 34 of the ITLOS Statute provides that "unless otherwise decided by the Tribunal, each party shall bear its own costs". In its case law, this Tribunal has never departed from this rule.

309. According to Panama,

> "[I]n this case, having due regard to the conduct deployed by Italy along all these years of disputes there are sufficient reasons that the Tribunal should consider for a departure from the above mentioned general rule and 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".[241]

310. Italy 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.

311. Second, as regards the other legal expenses invoked in Panama's Memorial, it is apparent that they also relate to the present case before the ITLOS, as Panama itself is aware.[242] As such they would also fall in the same category of costs under Article 34 of the rules of the Tribunal.

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[238] Panama's Memorial, Chapter IV, Part II, Section 3 ("Continued payment of wages").
[239] *Supra*, paras. 237-244.
[240] Panama's Memorial, Chapter IV, Part II, Section 4 ("Legal fees").
[241] Panama's Memorial, para. 188.
[242] Panama's Memorial, para. 218. See for instance the costs for lawyers Mr Carreyò and Remé Rechtsanwalte up to the preparation of the legal action before the Tribunal

5. Payment due for fees and taxes to the Panama Maritime Authority

312. In its Memorial, Panama states:

> "The owner owes to the Panama Maritime Authority in fees and taxes for the M/V Norstar, in the total amount of 122,315.20 USD as itemized in a Certification from the Panama Maritime Authority dated 30 March 2017. The amount thus represents an additional loss for the owner, which must also be reimbursed by Italy. The damages shall therefore also be asserted in the name of the State of Panama. The following gross amount is therefore asserted as compensation in damages for the fees and taxes paid and to be paid to the Panama Maritime Authority: 122,315.20 USD".[243]

313. The absence of the causal link between Italy's conduct and the damages claimed in this regard by Panama is manifest. The fees due to the Panama Maritime Authority are not linked to the economic activity of a ship. They stem from the fact that a particular ship is registered in the Panamanian ship registry. Therefore, the fact that the ship-owner owes a total amount of 122,315.20 USD is in no way linked to the alleged Italian wrongful act. Were the *M/V Norstar* never seized, the ship-owner would have had to pay the fees nonetheless.

D. Loss and damages suffered by the charter of the *M/V Norstar*

1. Loss and damage compensation for the cargo

314. In its Memorial Panama states:

> "At the time of the seizure, the M/V Norstar had a cargo of 177,566 mt gas oil with a value of 612 USD per mt on board. The value of the cargo on the date of the seizure on 24 September 1998 therefore was 108,670.39 USD. This gas oil should have been surrendered by Italy to the charterer. Instead, the gas oil was recycled or disposed of. Therefore, 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. The claim for damages relating to the loss of the cargo is therefore: 108,670.39 USD".[244]

315. Panama has never provided evidence as to whether any fuel was loaded on board the *M/V Norstar* at the time of its seizure, the amount of fuel loaded (if any), and its price. The only evidence available to Italy that could have shed light on this question, namely the Report of Seizure by the Spanish Authorities dated 25 September 1998,[245] does not indicate that any fuel was loaded on boar the vessel when it was seized.

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[243] Panama's Memorial, para. 222.
[244] Panama's Memorial, para. 230.
[245] *Report of the seizure by the Spanish Authorities, 25 September 1998* (**Annex K**).

*2. Loss and damage for loss of revenue (*lucrum cessans*)*

316. According to Panama:

> "The claims for damages regarding the charterer's lost profit […] amount in total to: 1,010,136.98 USD".[246]

317. First, as specified in paragraphs 237-244, 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.

318. Second, Panama's claims are entirely unsubstantiated and speculative in nature. Italy wishes to refer the Tribunal to the same considerations made with respect to the speculative estimation that Panama advances with regard to the ship-owner's *lucrum cessans*.

319. Third, Panama's estimates are in any event not credible, based as they are on the oral assertions of individuals who were involved in the operation of the *M/V Norstar* and in the alleged criminal plan in which it was involved. This emerges with clarity from Panama's Memorial, where Panama states:

> "The amount of the loss of revenue can in this instance only be estimated because documents relating to the profits realized by the chartered are no longer available. […]
> In the period from 1998 to 2005, however, the charterer of a vessel such as the M/V Norstar could easily expect a profit of at least 150.000,000 USD per annum through off shore bunkering of megayachts.
> As an agent/operator in the business of offshore bunkering of megayachts in the Mediterranean, Mr Silvio Rossi has confirmed this".[247]

E. Material and non-material damage to natural persons

320. In its Memorial, Panama claims compensation from the material and non-material damages suffered by a number of individuals connected with the *M/V Norstar*, including those who had a very feeble connection with the ship. The claims concern psychological damage, reputational damage and loss of jobs.

321. In regard to Panama's claims, Italy wishes to note that, as indicated in previous section of this Chapter, there is no causal connection between the criminal proceedings instituted against the individuals mentioned in Panama's Memorial, and the alleged violation by Italy of Article 87 of the Convention. Proceedings against those individuals would in any event have been carried out, quite apart from the question of the seizure of the *M/V Norstar*, that was seized as *corpus delicti*. Borrowing and paraphrasing from Panama's rhetorical question - would the damages have occurred if Italy had not ordered and requested the arrest

[246] Panama's Memorial, para. 235.
[247] Panama's Memorial, paras. 233-234.

of the *M/V Norstar*? If the damages that Panama claims are connected to criminal proceedings involving the natural persons involved in the operation of the *M/V Norstar*, the answer is most certainly in the affirmative. Those proceedings would have happened independently of the arrest of the *M/V Norstar*, and of any Decree of Seizure issued with respect to it.

322. For the same reasons, all the legal expenses claimed by Panama in connection with those proceedings are also not the consequence of the arrest or detention of the *M/V Norstar*, and as such cannot be claimed by Panama in the context of these proceedings.

CERTIFICATION

Pursuant to Articles 63(1) and 64(3) of the Rules of the Tribunal, I hereby certify that the copies of the present Counter-Memorial, including the documents contained in Volume 2 of the Counter-Memorial, are true copies and conform to the original documents, and that the translations into English made by the Italian Republic are accurate translations.

Ms. Gabriella Palmieri, State Attorney
Agent of the Italian Republic

11 October 2017

SUBMISSIONS AND RELIEF SOUGHT

323. 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.

Ms. Gabriella Palmieri, State Attorney
Agent of the Italian Republic

11 October 2017