REJOINDER OF ITALY

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

THE M/V "NORSTAR" CASE

THE REPUBLIC OF PANAMA *v.* THE ITALIAN REPUBLIC

REJOINDER OF ITALY

Volume 1
Rejoinder of Italy

13 JUNE 2018

TABLE OF CONTENTS

REJOINDER OF ITALY

CHAPTER 1
INTRODUCTION

1. This Rejoinder provides a response to the arguments articulated by Panama in its Reply of 18 February 2018 to Italy's Counter-Memorial of 11 October 2017. While Italy will analytically address the points made by Panama that require an answer in the dedicated sections of these pleadings, it nevertheless wishes to highlight already by way of introduction some features of Panama's Reply that affect its overall tenability.

2. First, Panama continues to ignore that the dispute between the Parties has been curtailed by the Decision of 4 November 2016 of the Tribunal. In light of that decision, only two provisions of the Convention are relevant to the present case: Article 87 and Article 300. Panama's attempts to extend the matter under contention beyond the clear limits identified by the ITLOS in the context of incidental proceedings is not only contrary to procedural principles identified on many occasions by this Tribunal, but frustrate the very purpose of the incidental proceedings phase.

3. Second, Panama has misconceived the meaning of paragraph 122 of the Decision of the Tribunal of 4 November 2016, in which the ITLOS decided that Article 87 and Article 300 of the Convention are *relevant* to the present dispute. Clearly, the fact that a provision is relevant for the purposes of establishing the jurisdiction of the Tribunal does not equate to a finding that such a provision has been breached. That is a matter reserved for the merits, namely for the present phase of the proceedings. Panama is surprisingly confused about this basic distinction, time and again. For instance:

(a) when it claims in its Reply, that Italy has argued that "Article 87 does not *pertain* to this case for several reasons".[1]

(b) when it claims that in its Counter-Memorial Italy is advancing on Article 87 the same arguments it used in the course of incidental proceedings and that "it is difficult to understand how this argument will achieve a different result this time".[2]

(c) when it attempts to counter Italy's position that freedom of navigation does not entail freedom of a legally detained vessel to reach the high seas, by simply referring to the Decision of the Tribunal in incidental proceedings, to remind Italy that "the Tribunal observed that [...] the Decree of Seizure [...] may be viewed as an infringement of the rights of Panama" under Article 87.[3]

4. For the sake of clarity, Italy is not contending that Article 87 is not relevant (or does not "pertain", to use Panama's word) to the present dispute. Italy is contending, and will later show, that Panama has neither explained, let alone proved, how the Decree of Seizure and the Request for its execution have breached Article 87.

---

[1] Panama's Reply, para. 6.
[2] Panama's Reply, paras. 63 and 185.
[3] Panama's Reply, para. 61.

5. Third, Panama has misinterpreted, or perhaps deliberately mystified, a surprising number of the positions that Italy has articulated in its Counter-Memorial, and, due to this, it has failed to provide pertinent counter-arguments to most of them. Limiting here only to the Introduction of Panama's Reply, Italy would like to bring the following to the attention of the Tribunal:

(a) At paragraph 21, Panama claims that Italy's defense to Panama's argument on abuse of rights in breach of Article 300 is based on the fact that "no one involved with the ship's operation was physically detained". This is clearly not the argument that Italy has made at paragraphs 185-202 of its Counter-Memorial.

(b) At paragraph 28, Panama asserts that Italy's argument according to which this Tribunal does not have jurisdiction to "consider the violation of [...] human rights instruments" is based on the fact that "all the defendants involved in the operation of the *M/V Norstar* were acquitted within a reasonable timeframe". Once again, this is nothing like Italy's argument, as articulated at paragraphs 215-232 of Italy's Counter-Memorial.

(c) At paragraphs 33 and 34, Panama claims that Italy is trying to re-litigate issues concerning exhaustion of local remedies already disposed of by the Tribunal in the incidental proceedings. This is again not the case. In the incidental proceedings, Italy argued exhaustion of local remedies as an objection to the jurisdiction of the Tribunal over Panama's claim. In the present phase of the proceedings, Italy is contending that Panama cannot make a substantive argument based on the procedural misconduct of Italian judicial authorities - including breach of fair trial - when it has not sought any form of domestic redress towards the alleged miscarriage of justice perpetrated by them. As stated by Professor Paulsson in his seminal work on denial of justice in international law, "since denial of justice implies the failure of a national legal system as a whole to satisfy minimum standards, the wrong does not occur until reasonable attempts have been made to secure the remedies available within that system".[4] And yet Panama accuses Italy that it "did not secure the rights of the individuals involved relevant to the situation [and that it] disregarded each individual's right to a fair trial or an effective remedy for an unreasonable length of time".[5]

(d) At paragraph 66, Panama reports Italy's argument that "an extraterritorial exercise of jurisdiction that does not determine any physical interference with the movements of a ship on the high seas does not constitute a conduct ordinarily able to breach Article 87".[6] Panama concludes from this statement that "Italy is explicitly admitting to the exercise of its jurisdiction extraterritorially, while arguing that it was fully justified in doing so."[7] Italy is obviously not admitting any extraterritorial exercise of jurisdiction, but making statements *arguendo* only, as it is apparent from reading the relevant passage in its context.[8] In any event, and for the sake of clarity, this is not a case about whether Italy exercised its jurisdiction extraterritorially – it is only a case concerning the alleged breach of Article 87.

---

[4] Jan Paulsson, *Denial of Justice in International Law* (CUP 2005) 130.
[5] Panama's Memorial, para. 136.
[6] Panama's Reply, para. 66.
[7] Panama's Reply, para. 67.
[8] Italy's Counter-Memorial, para. 7.

Regrettably, misconstructions of this sort of Italy's arguments are a leitmotiv of Panama's Reply.

6. Fourth, Panama has not articulated any explanation, let alone argument, with regard to the central question posed by the Tribunal in its Judgment of 4 November 2016, which constitutes the core of the dispute between the Parties. At paragraph 122 of the Decision, the Tribunal asked whether the Decree of Seizure by the Public Prosecutor at the Court of Savona and the request for its execution, (e.g. *as opposed to the execution of the Decree)*, could constitute an infringement of Panama's right to free navigation under Article 87. The only contention that Panama makes, which is however related to the question of the actual execution of the Decree and not to the Decree itself and the request for its execution, is that the freedom of navigation enshrined in Article 87 includes a right to gain access to the high seas, apparently even when the foreign ship is detained in the internal waters of a coastal State due to legal proceedings against the vessel. This argument flies in the face of the Tribunal's decision in the *Louisa* case.

7. Fifth, the focus of the dispute, as curtailed by the Tribunal, is the Decree of Seizure by the Public Prosecutor at the Court of Savona and the request for its execution, not the judicial proceedings in Italy concerning the *M/V Norstar*. Panama's continuous reference to the judgments rendered by the Italian courts,[9] and the acquittal of those involved in the *M/V Norstar*, is misplaced, as the focus of investigation of the Tribunal is not judgments rendered by the Italian courts. Panama's criticisms that Italy continues to "rely exclusively on the original arguments of the Italian Prosecutor, despite these having since been superseded by two competent Italian tribunals",[10] that "Italy relies not on the decision of its judicial authorities, but on the very source of this conflict, the Decree of Seizure"[11] and that "it is highly suspicious that Italy does not rely on its own judicial authorities but defers to just one of its public prosecutors, instead, precisely the one that ordered the seizure of the *M/V Norstar*",[12] is therefore entirely misplaced, and once again shows that Panama has misunderstood the actual extension of the dispute between the Parties.

8. Sixth, even if the focus of the dispute were the subsequent judgments of the Italian courts, Panama's interpretation of those judgments is affected by a misreading of the judgments, and a consequent logical fallacy. Panama's main point is that "[d]espite its own authorities concluding that the arrest of the *M/V Norstar* was unlawful, Italy still does not accept this fact".[13] Similarly, Panama states that the Italian judiciary "acted under the erroneous premise that a crime had been committee thorough the *M/V Norstar* in its territory. For this reason, Panama considers Article 87(1)(a) of the Convention to have been violated".[14] The truth is that no Italian court found that the arrest of the *M/V Norstar* was unlawful, but simply that the material elements of the crimes allegedly committed also through the *M/V Norstar* were not integrated. It is hard to understand how Panama jumps to the conclusion that, since the *M/V Norstar* was released and the people concerned acquitted *then* Italy must have breached Article 87. This is a most evident *non sequitur*.

---

[9] Panama's Reply, paras. 45, 126-127, 161-168, 172-183.
[10] Panama's Reply, para. 187.
[11] Panama's Reply, para. 53.
[12] Panama's Reply, para. 100.
[13] Panama's Reply, para. 63.
[14] Panama's Reply, para. 31. See also para. 102.

9. Seventh, even in the event that the Decree of Seizure and the Request of its Execution were to be found by this Tribunal to constitute a breach of Article 87, it is evident that the damages that Panama complains of did not stem from the Decree or from the Request as such, but from their actual execution. This is confirmed by Panama in its own pleadings, when Panama states, for example, that "all damages caused have directly resulted *from the enforcement of the arrest of the M/V Norstar* [...]".[15] In the light of the Judgment of 4 November 2016, however, the actual execution of the Decree is not the matter that the Tribunal is investigating in these proceedings and, in any event, such actual execution is entirely compliant with Article 87 of the Convention, having occurred in an area of the sea where the *M/V Norstar*, as will be demonstrated, did not enjoy any freedom of navigation. In the case the Decree and the Request for its Execution were found, as such, to constitute a breach of Article 87, Panama would therefore still not be entitled to any damage.

10. Eight, it is disheartening for Italy that Panama should devote 20 paragraphs of its Reply (573-593) to criticize Italy's lack of cooperation in the present proceedings. Even when faced with the most peculiar requests from Panama, such as the one to share the entirety of its litigation file, Italy has sought a cooperative approach. Even with case law[16] and scholarship clearly stating that "the principle [of cooperation] is limited by its aim, which is to allow the fulfilment of the object and purpose of the proceedings, that is, a proper administration of justice. It obviously does not extend as far as to ask the parties to share information or to compromise their 'egoistic' interests as opposing parties. For this would again be incompatible with the object and purpose of the proceedings, which is litigation from the standpoint of contrary interests ('adversarial proceedings')";[17] even in these circumstances did Italy show a forthcoming approach, by coming up with the proposal that the parties could share a list of relevant documents in their folders, so as to allow Panama to verify if any document could be useful to it for establishing the truth.[18] Unfortunately, Panama has failed to recognize the extreme measure of cooperation that Italy has employed in this case, and has felt that the issue should be raised before the Tribunal in its Reply for reprimand.

11. In light of all the above, and in the interest of brevity and clarity, Italy will defer to its Counter-Memorial for its main arguments, and use the Rejoinder only to answer selectively certain points that need to be addressed in light of Panama's Reply. Each of the points indicated above will be developed further in this Reply, and constitute the main issues around which it will revolve.

---

[15] Panama's Reply, para. 405 (emphasis added).

[16] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, ICJ Reports 2008, p. 412, at 8-9, paras. 13-15.

[17] Robert Kolb, 'General Principles of Procedural Law' in Andrea Zimmermann, Karin Oellers-Frahm, Christian Tomuschat (eds), *The Statute of the International Court of Justice. A Commentary* (1st ed.; OUP 2006) 871, para. 60.

[18] *Italian Note Verbale of 11 October 2017* (**Annex A**).

CHAPTER 2
THE FACTS OF THE CASE

12. Italy has discussed at length the facts at the basis of the dispute in paragraphs 25-73 of its Counter-Memorial. While certain facts are uncontested between the Parties including, significantly, the place where the Decree of Seizure against the *M/V Norstar* was executed,[19] on other matters Panama and Italy markedly disagree. From Panama's Reply, it appears that these matters are: a) the basis for the ordering of the arrest and detention of the *M/V Norstar*; b) the place where the crimes were committed; c) the reasons why the *M/V Norstar* was released and the individuals acquitted; d) the physical conditions of the *M/V Norstar*; and e) the failure to retrieve the *M/V Norstar* by the owner and the communication concerning the release of the vessel. Italy wants to stress that not all these aspects are relevant for the determination of the limited dispute in the present case, that concerns merely the question as to whether Panama's freedom of navigation was breached by Italy under Article 87 of the Convention and, if so, whether this was done also in breach of Article 300. For the sake of completeness only, as a reconstruction of the facts, and without making any concession as regards the limited scope of the present dispute, as indicated above, Italy will also address issues that do not bear on the determination of whether a breach of Articles 87 and 300 has occurred.

I.The basis for the ordering of the arrest and detention of the *M/V Norstar*

13. Italy contends that the *M/V Norstar* was arrested within the framework of criminal investigations due to its being instrumental in committing suspected crimes of smuggling and tax evasion *in Italy*.[20] Panama challenges this and, by referring out of context to the words "bunkering" or "offshore bunkering" in a series of acts concerning the Italian domestic proceedings,[21] claims that the *M/V Norstar* was arrested due to the bunkering activities that it was carrying out on the high seas[22] and that "all of the evidence presented by Italy" confirm this proposition.[23] Also, Panama contends that it is only to fabricate a belated defence[24] in this case that "Italy has *now* raised suspicion (*sic*) that the *M/V Norstar* was involved in a smuggling and tax evasion operation",[25] and that "Italy has *now* chosen to redefine the bunkering activities of the *M/V Norstar* as smuggling and tax evasion".[26] In order to try and reinforce its claim, Panama also states that the people involved in the operation of the *M/V Norstar* were not charged with either the crime of smuggling or tax evasion[27] and that no trial was conducted on this basis.[28]

---

[19] Panama's Reply, para. 57.
[20] Italy's Counter-Memorial, paras. 36-37.
[21] Panama's Reply, paras. 157-170.
[22] Panama's Reply, paras. 44-48.
[23] Panama's Reply, para. 44.
[24] Panama's Reply, para. 189.
[25] Panama's Reply, para. 55 (emphasis added).
[26] Panama's Reply, para. 54 (emphasis added).
[27] Panama's Reply, para. 40.
[28] Panama's Reply, para. 42.

14. Panama also points to what it describes as a contradiction in Italy's pleadings, deriving from the fact that Italy describes the *M/V Norstar* as being involved in operations in international waters, and yet Italy alleges that the crimes of which it was suspected were committed within the Italian territory.[29]

15. Panama's contentions are denied by the plain text of the Decree of Seizure of the *M/V Norstar* issued in 1998, the core of the present dispute, which indicates without any doubt that the reason for the arrest and detention of the vessel was not the bunkering, but rather the fact that the *M/V Norstar* was considered the *corpus delicti* instrumental to the commission of crimes of tax evasion and smuggling. On this point, in the interest of brevity, Italy would like to simply refer the Tribunal to its arguments at paragraphs 42-47 of its Counter-Memorial. For ease of reference, however, it may be useful to recall the relevant passage of the Decree of Seizure which indicates the sort of criminal enterprise in which the *M/V Norstar* was suspected of being involved, and the actual reasons for which it was arrested.

> "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*. It was also found that the mv NORSTAR positions itself beyond the Italian, French and Spanish territorial seas, mostly inside the contiguous vigilance zone and promptly supplies with fuel (so called "offshore bunkering) mega yachts that are exclusively moored at EU ports. *Thus, they willingly and consciously give the sold product a destination that differs from the one for which the tax exemption was granted (with reference to products bought in Italy and Spain, which are then surreptitiously reintroduced into Italian French, and Spanish customs territory), while being fully aware that the product will certainly be subsequently introduced into Italian territory and that no statement for customs purposes is issued by the purchasers*".[30]

16. If there were still to be doubts as to the fact that the *M/V Norstar* was not arrested for bunkering, these are dispelled by the authentic interpretation of the Decree of Seizure provided by the Italian prosecuting authorities, which held that:

> "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 yachtsmen were fraudulently addressed on the basis of an agreement between ROSSI and ARVE)".[31]

---

[29] Panama's Reply, para. 41.

[30] *Seizure order by the Public Prosecutor of the Tribunal of Savona, 11 August 1998* (**Annex B**), at 1 (emphasis added).

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

17. And 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 actual being bunkering".[32]

18. Also, it is difficult to understand how Panama can claim that people involved in the operation of the *M/V Norstar* were not charged with either the crime of smuggling or tax evasion[33] when the very International Letter Rogatory sent by the Tribunal of Savona to the Spanish Authorities opens with a very eloquent statement: "the Judicial Authority is prosecuting several Italian and foreign nationals for the offences of criminal association aimed at smuggling mineral oils and tax fraud".[34] These included, for instance, the Master of the *M/V Norstar*, as the International Letter Rogatory confirms.

19. Last, as is further discussed in the paragraphs just below, there is absolutely no contradiction in stating that the *Norstar*'s main area of operations was the high seas, and that yet the crimes that it was thought to be instrumental in committing occurred on the Italian territory. Just like any ship, the *M/V Norstar* had several links with the Italian territory. As explained in the Counter-Memorial, Italy is the place where the *M/V Norstar* was loaded with gasoil bought in exemption of Italian excise duties and 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.[35]

II. The place where the alleged crimes were committed

20. In the course of its Memorial and Reply, Panama contends that the *M/V Norstar* was arrested with regard to activities carried out on the high seas. In order to try and substantiate this position in its Reply, Panama quotes excerpts from the Italian investigative reports and other documents which led to the arrest of the *M/V Norstar*. For instance, at paragraphs 133 of its Reply, Panama once again highlights that the Italian authorities had found that the *M/V Norstar* "positions itself in international waters" to carry out "off shore bunkering activities". Similar language is reported from the Criminal Offence Report Communication, from which Panama quotes at paragraph 134 of its Memorial. Panama also stresses that the Decree of Seizure confirmed that the *M/V Norstar* positioned itself beyond the territorial waters.[36] Italy has addressed at length this position in its Counter-Memorial at paragraphs 27-73, to which it wishes to refer the Tribunal with respect to the argument that the *M/V Norstar* was prosecuted for crimes that under Italian law were considered to have been committed in Italy.[37]

---

[32] *Appeal by the Public Prosecutor of the Tribunal of Savona, 20 August 2003* (**Annex D**), at 2, translating page 2 of the Italian version.
[33] Panama's Reply, para. 40.
[34] *International Letter Rogatory of the Tribunal of Savona to the Spanish Authorities, 11 August 1998* (**Annex E**).
[35] Italy's Counter-Memorial, para. 135.
[36] Italy's Counter-Memorial, para. 142.
[37] Italy's Counter-Memorial, paras. 42-47 and 102-137.

III. The reasons why the *M/V Norstar* was released and the individuals acquitted

21. A large part of Panama's arguments is based on the consideration that, since the *M/V Norstar* was released, and the people involved in its operation eventually acquitted, *then* Italy must have committed a breach of Article 87. In trying to substantiate this position, which, as will be shown, is a most evident *non-sequitur*, Panama tries to advance the claim that the *M/V Norstar* was released, and those involved acquitted, because the suspected criminal activities in which the ship was involved occurred on the high seas. In sum, the picture that Panama tries to misleadingly portray is one in which the Italian courts released the *Norstar* and acquitted the crew because the vessel was operating on the high seas and therefore Italy exercised its jurisdiction extraterritorially. For example, Panama claims at paragraph 45 of its Reply that "those courts [Italian courts] have found that the *M/V Norstar* operated in international waters and determined that, since Italy does not have a contiguous zone, none of its activities could be considered unlawful on the basis of their locus".[38] In similar terms, Panama argues: "after it has been proven that the arrest order was held to be illegal by Italy itself, is it not a contradiction for Italy now to state the opposite? The illegality of the arrest derives from the fact that it was based on activities performed [...] [on] the high seas".[39]

22. In addressing this position, Italy will unpack Panama's claim in its constitutive elements. First, Italy will show that Panama is fundamentally wrong in describing the rationale why the *M/V Norstar* was released. Then, it will briefly explain how Panama's logic whereby the release of the ship and the acquittal of those involved equals to a finding by Italian courts that the vessel was arrested in breach of Article 87, is affected by a grave fallacy.

23. Preliminary, however, Italy would like to stress once again that the arguments that follow are without prejudice to the fundamental point that the dispute between the Parties in the present case does not concern the motives, intentions and reasoning of conduct by the Italian courts with respect to the *M/V Norstar.* It concerns the much narrower question of whether the Decree of Seizure, and the Request for its execution, as such, constituted a breach of Articles 87 and 300 of the Convention.

24. As regards the first line of Panama's argument, Italy would like to stress that the *M/V Norstar* was not released (*i.e.*, the Decree of Seizure was not lifted) because it concerned activities carried out by the *M/V Norstar* on the high sea. While, for the reasons specified in the Counter-Memorial,[40] it has not been possible for Italy to locate the order of conditional lifting of the arrest of the *M/V Norstar*, it is fair to presume that the conditional release of the *M/V Norstar* was authorized because there was no need to hold the vessel any longer for probative purposes (*i.e.*, the acquisition of evidence concerning the *M/V Norstar* had been completed). This emerges clearly from the previous decision of the Public Prosecutor in Savona, dated 18 January 1999, in which the magistrate, in rejecting Panama's original request for release of the *M/V Norstar*, held that it was still necessary to hold the vessel for probative purposes, since there were investigative exigencies related to the potential recognition of the ship.[41] The lifting of the Decree of Seizure had nothing to do with the

---

[38] Panama's Reply, para. 45.
[39] Panama's Reply, paras. 102-103.
[40] Italy's Counter-Memorial, paras. 53-55.
[41] Italy's Counter-Memorial, para. 53 and note 35.

location of vessel, or the fact that its activities were carried out on the high seas (as opposed to Italy's territorial waters). It only followed from the completion of the investigation.

25. Also the acquittal of those involved in the operation of the *M/V Norstar* is not a consequence of the fact that the Italian judge realized that Italy was exercising jurisdiction extraterritorially, as Panama is attempting to say. The acquittal derives from the fact that the material elements of the crime of smuggling and tax evasion were not met in the case. The reasons for the acquittal are indicated in full in Italy's Counter-Memorial at paragraph 58. Also the passages of the judgment rendered by the Tribunal of Savona, that Panama quotes in its Reply, confirm that the acquittal was an acquittal on the merits.[42] Indeed, as Italy has already shown in its Counter-Memorial,[43] the Italian Tribunal held that:

> "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 […]
> [T]he 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".[44]

26. The Judgment rendered by the Tribunal of Savona, that Panama tries to quote to support its position, in reality does nothing but confirm Italy's case. The same conclusion is reached by the Court of Appeal of Genova, on which again Panama tries to rely in support of its arguments. The Court found that the crimes that the *M/V Norstar* was considered instrumental in committing were not actually committed because "a recreational vessel may load abroad fuel constituting ship's stores, both in case of foreign goods and Italian exported goods, and is relieved from paying duties upon returning in the waters of Italian ports, unless it is unloaded or consumed inside the customs borderline".[45] Since it was not proved that fuel was unloaded or consumed inside the customs borderline, the Italian Court found that the

---

[42] Panama's Reply, para. 126.
[43] Italy's Counter Memorial, paras. 56-64.
[44] *Judgment by the Tribunal of Savona, 13 March 2003* (**Annex F**), at 9, para. 5.
[45] Panama's Reply, para. 176.

material elements of the crime of smuggling and tax evasion were not integrated. Nothing more can be inferred from this acquittal on the merits.

27. If, as Panama tries to portray by placing continuous emphasis on the fact that the *M/V Norstar* was stationing on the high seas and the fuel purchased by leisure boats was not consumed within Italy,[46] the Italian courts had thought that the arrest of the *M/V Norstar* was unlawful due to the fact that it constituted an extraterritorial exercise of Italian jurisdiction, the consequence would have not been an acquittal of those involved *on the merits*. Rather, the Italian courts would have *declined their jurisdiction*. And indeed, according to Article 6 of the Italian Criminal Code,[47] the criminal jurisdiction of Italian courts, except for extraordinary cases not engaged in this matter, only extends over crimes committed in the territory of the State. It is worth noting that according to Article 20 of the Code of Criminal Procedure, a declaratory of lack of jurisdiction can happen at any stage of the proceedings, including during the preliminary investigations.[48]

28. Panama's reliance on the decision of the Italian courts to try and substantiate the alleged extraterritoriality of the exercise of Italy's jurisdiction is therefore misplaced, quite apart from the issue, which is discussed at length below, that an extraterritorial exercise of jurisdiction not resulting in an arrest on the high seas would not ordinarily constitute a breach of Article 87.

29. In more general terms, Panama's point seems to be that if a criminal investigation is commenced concerning a ship which results in its arrest, and then, for whatever reason, that investigation reveals that the activities in which the ship was involved do not amount to criminal conduct, by this fact the arrest must have been in breach of UNCLOS, in particular, in this case, of Article 87. Apart from frustrating the basic principles of criminal justice, from a purely public international law perspective this is a most evident *non sequitur*. The legality of the arrest of a vessel under Article 87 must be assessed on the basis of the requirements of Article 87, that is to say, if the arrest interfered with the ship's freedom of navigation. It must not be assessed under the prism of whether the alleged crimes were later found to have been actually committed, or else. Indeed, the arrest of a ship could be in violation of Article 87 of UNCLOS even if the alleged crimes committed by those on board were found to actually have occurred.

IV. The physical conditions of the *M/V Norstar*

30. In its Counter-Memorial, Italy has argued that the *M/V Norstar* was, at the time when the Decree of Seizure was issued and executed, in a state of dismay and abandonment, to the point of having become a makeshift shelter for homeless people.[49] Italy has argued this point on the basis of evidence that Panama itself has submitted in its pleadings to prove its case, and whose probative value it is now trying to diminish by branding it as third hand evidence.[50] Also, Italy has relied on a document by Transcoma Baleares dated 7 September

[46] Panama's Reply, paras. 127-128 and 176-77.
[47] *Italian Criminal Code, Article 6* (**Annex G**).
[48] *Italian Code of Criminal Procedure, Articles 20, 253, 548 and 606* (**Annex H**), Article 20.
[49] Italy's Counter-Memorial, para. 51.
[50] Panama's Reply, para. 422.

1998, just weeks prior to the arrest of the *M/V Norstar*, which, in describing the ship to the Spanish Port Authorities in Palma de Mallorca, recorded a broken anchor, the lack of any fuel and the breakdown of one of the main generators.[51] Despite Panama's claim, therefore, it does not remain "untenable and unproven" that the ship was in poor condition even before the date of its arrest.[52]

31. Italy has focused on the poor state of the *M/V Norstar*, and on the fact that it was unseaworthy even before the time of its arrest for two reasons: a) first, to show that it was impossible for the *M/V Norstar* to leave the port and for it to be on the high seas when the Decree of Seizure and the Request for its execution were issued, so that a breach of Article 87 must be excluded, being Article 87 a provision not applicable to ships in internal waters; b) to show that Panama has grossly overestimated the amount of any damage it claims that it has suffered allegedly due to Italy's conduct.[53]

32. In its Reply, Panama continues to claim that the *M/V Norstar* was a seaworthy ship before its arrest, and that Italy has misconstrued the facts of this case.[54] However, none of the evidence produced by Panama indicates that the *M/V Norstar* was a seaworthy vessel.

(a) With respect to the news article referred to by Italy, Panama has claimed that: "Italy has used a description of the vessel in 2015 to suggest that it was also in poor condition on the date of its arrest in 1998, which remains untenable and unproven".[55] In fairness, however, the news article refers to the state of the vessel in 1998 indicating that the *M/V Norstar* was in a state of abandonment, when it asserts that "the Oil tanker Norstar, which *was abandoned since 1998* (emphasis added), was withdrawn yesterday (7 August 2015) from the facilities of the Port's technical services".[56] Also, the document by Trascoma Baleares mentioned at paragraph 30 above, dated 7 September 1998, records the state of dismay of the ship at that time.

(b) At paragraph 422, Panama notes that the Statement of Detention of the *M/V Norstar* and the Lieutenant of the Provincial Maritime Service did not depict "such a disastrous condition at the time of the arrest, even noting that the Captain resides in the M/V Norstar". Had the reported evidence described the physical conditions of the *M/V Norstar* in terms not compatible with Italy's description of the vessel, Panama could have challenged the validity of Italy's account. However, the truth is that the evidence relied upon by Panama do not address at all the question of the state of the *M/V Norstar*. Panama's assumption is that if no reference was made to the "squalor and abandonment Italy has referred to" then such squalor and abandonment must be non-existent. This is, as said, nothing but an unsupported supposition. In addition, the fact that the Captain was reported to live in the *M/V Norstar* does not prove in any way the ship's ability to navigate out in the open sea and to leave the port. A captain could well live in a ship which is permanently moored in port, unseaworthy and in dismay.

---

[51] Italy's Counter-Memorial, para. 51.
[52] Panama's Reply, para. 427.
[53] Italy's Counter-Memorial, paras. 288-294.
[54] Panama's Reply, paras. 418-436.
[55] Panama's Reply, para. 427.
[56] Italy's Counter-Memorial, para. 51. See also Panama's Reply, para. 426.

(c) In order to prove the seaworthiness of the vessel, and the fact that it was regularly used and in operation before the execution of the Decree of Seizure, Panama claims that the ship was delivered to the charterer on 20 May 1998, based on a charter agreement dated 10 May 1998 (about three months before the Decree of Seizure was issued). It was then allegedly loaded in Algeria and used in the summer of 1998 in international waters off the coasts of Spain. However, Panama attaches no evidence in support of its statement and Italy has not been able to locate proof of either the charter contract of 10 May 1998 or of the delivery of 20 May, or of the cargo loaded in Algeria in the annexes to Panama's pleadings. The only document that Panama attaches is a list of clients that the *M/V Norstar* allegedly supplied in the summer of 1998. However, the document is only a generic list that has no probative value with respect to Panama's claim. Nowhere does the document state that the alleged clients indicated in the list were supplied in the summer 1998. In addition, the document is dated May 2001, *i.e.* three years after the alleged events. This casts further doubts on the document, which, as it also emerges from its title, is not a contemporaneous document but was created after the arrest of the *M/V Norstar*, in the context of a request for damages.

(d) Panama claims that the fax sent by Trascoma Baleares to the Spanish Port Authorities on 7 September 1998 could at most be considered hearsay evidence, and that Panama's photographs attached to the Reply are a correct depiction of the conditions of the *M/V Norstar*. However, the fax that Panama criticizes is a formal, contemporaneous written document sent to the Spanish Authorities. The photos attached by Panama on the other hand are not even dated, and it is impossible to ascertain at what point of the life of the *M/V Norstar* they were taken, or in what context. As such, they have no probative value.

V. The failure to retrieve the *M/V Norstar* by the owner and the communication concerning the release of the *Norstar*

33. In its Counter-Memorial, Italy has explained how both in 1999 and in 2003, the ship-owner could have collected the vessel due to the lift of the order of arrest (conditionally in 1999, and unconditionally in 2003), and yet failed to do so. In its Reply, Panama claims that "there is no evidence that either the shipowner or Panama had ever declined to take back the vessel in either instance".[57] Panama's main claim is that neither the Spanish nor the Italian authorities coordinated and developed "an orderly procedure for the *M/V Norstar*'s transfer to its owner".[58] While both the conditional release of the vessel in 1999 and the unconditional release of 2003 are discussed in the section of this Reply concerning damages, as they concern issues related to the interruption of the causal link between the alleged illegal act and the damages, the release of the vessel in 2003 requires an assessment also at the level of facts. This is the case because Panama bases its arguments primarily on the consideration that it was never informed about the release of the ship by Italian authorities.

34. For ease of reference, it may be useful to recall in summary the relevant sequence of events as described by Italy in its Counter-Memorial:

[57] Panama's Reply, para. 440.
[58] Panama's Reply, para. 443.

> "[T]he 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".[59]

35. Panama's first argument is that, essentially, by letter 415/02 Rg of 18 March 2003, Italy did not notify either Panama or the ship-owner directly, but it notified the Spanish authorities so that they could act upon the order of release and in turn inform the custodian of the vessel about the release.[60] A few observations can be made with regard to this statement.

36. First, there is nothing improper in the fact that Italy informed the Spanish authorities, so that they could in turn inform the custodian of the ship. It must be recalled that the arrest of the *M/V Norstar* was executed by the Spanish authorities further to a request by Italy pursuant to the European Convention on Mutual Assistance in Criminal Matters of 1959, which sets out the forms of judicial cooperation between State parties in the field. It is pursuant to that Convention and the cooperation that it requires that Italy has duly informed the Spanish authorities about the order of release, so that it could be executed.

37. Second, the fact that letter 415/02 Rg of 18 March 2003 was not notified to Panama or the ship-owner, does not mean that the ship-owner was not otherwise informed of the release. At paragraph 463 of its Reply, Panama candidly admits that on 26 March 2003 (*i.e.* six days after the letter that Panama complains that it has not received",) "the ship owner received a document identified as R.G. 415/02 dated 21 March 2003 [...] which was the decision of 13/14 March 2003 that ordered that the seizure of the motor vessel Norstar be revoked and the vessel returned to Intermarine A.S. and the caution money released".[61] The document from the Tribunal in Savona could not have been clearer, as it read: "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".[62]

38. In addition to all of the above, it must be stressed that the ship-owner would have been informed of the decision of the Tribunal in Savona and on the unconditional lifting of the order of arrest also from its counsel before Italian courts. Indeed, according to Article 548 of the Italian Code of Criminal Procedure, a judgment is duly notified to the parties and their representatives, so that there can be no doubt about the ship-owner's knowledge about the outcome of the domestic proceedings.[63]

39. The diligence of the Italian authorities in communicating the release of the vessel to all those interested in the *M/V Norstar* is further proven by a request for the judicial cooperation of the Norwegian Ministry of Justice sent on 3 April 2003, aimed at securing the delivery of all the relevant documents concerning the lift of the detention of the *M/V Norstar* to Mr. Morch. The Norwegian Ministry of Justice confirmed to the Italian authorities by letter

---

[59] Italy's Counter-Memorial, paras. 56-64.
[60] Panama's Reply, para. 462.
[61] Panama's Reply, para. 463.
[62] *Communication from the Tribunal of Savona to Mr Morch concerning the restitution of the M/V Norstar, 21 March 2003* (**Annex I**).
[63] *Italian Code of Criminal Procedure, Articles 20, 253, 548 and 606* (**Annex H**), Article 548.

dated 23 July 2003 that on 2 July 2003 all the relevant documents and related communications were delivered to Mr. Morch.[64] Panama does not contest that Italy made all the efforts to secure the appropriate communication, but claims that one document, dated 21 July 2003, also concerning the release of the ship, did not reach Mr. Morch. While this may be the case, this does not refute the fact that by 26 March, at the latest, the owner of the ship was duly notified of the release of the vessel, and this original notification was followed by at least another notification to the same effect, on July 2. To this, one must add the notification of the release of the vessel that, while not on record due to passage of several years, certainly the Tribunal in Savona must have sent to the ship-owner's counsel. In conclusion, the Italian authorities reached out at least three times to the owner of the ship to inform him about the release of the vessel. It is not clear what further action Panama would expect that Italy should have done in this regard.

40. In its Reply, Panama tries to create prejudice against Italy by stating that, since Italy did not answer Panama's communications sent to Italy since 2001, Panama had no knowledge that the ship had been released.[65] Two observations are in order:

41. First, the first communication to Italy from Mr Carreyó, dated 15 August 2001,[66] was sent at a time when criminal proceedings were still on-going. The question posed by Mr Carreyó in that communication, namely whether Italy was ready to release the vessel, therefore, pre-dates the Decision of the Tribunal of Savona of 2003, which led precisely to the release of the vessel and of which Panama complains not having been informed.

42. Second, Italy was in any event under no obligation to inform Panama about the release, since the *M/V Norstar* being privately owned by Mr. Morch, was not a State-owned vessel. But aside from that, Mr Carreyó, now Agent for Panama, has been well aware of the situation concerning the *M/V Norstar* at least since before 2 December 2000,[67] when he was vested with the power to trigger a prompt release procedure under Article 292 of the Convention; and he kept following from close the developments concerning the *M/V Norstar*, as it emerges from the letter of 3 August 2004 in which he asked Italy for damages.

43. In fact, in its Note verbal to Italy, dated 31 August 2004,[68] Panama attached the letter in question in which Mr Carreyó wrote that "[a]s a consequence of the sentence of Savona Tribunal dated 13.03.2003, the vessel has been released, but, being a wreckage due to the long seizing period, the owners cannot take hold of her […]".[69]

---

[64] Panama's Memorial, para. 62 and annexes thereto.
[65] Panama's Reply, paras. 483-484.
[66] *Letter sent by Mr Carreyó to the Italian Minister of Foreign Affairs, 15 August 2001* (**Annex J**).
[67] *Document of full powers issues by the Republic of Panama in favour of Mr Carreyó with regard to a prompt release procedure before ITLOS, 2 December 2000* (**Annex K**).
[68] *Note Verbale A.J. No. 2227 sent by the Ministry of Foreign Affairs of Panama to Italy, 31 August 2004* (**Annex L**).
[69] *Letter sent by Mr Carreyó to the Italian Embassy in Panama, 3 August 2004* (**Annex M**).

CHAPTER 3
THE ALLEGED BREACH OF ARTICLE 87

44. At paragraph 122 of its Decision of 4 November 2016, the Tribunal has curtailed the dispute between the Parties as concerning the question as to whether the Decree of Seizure and the Request for its Execution (*as opposed to the actual execution of the Decree*) may be seen as an infringement of Article 87 of the Convention with regard to activities conducted by the *M/V Norstar* on the high seas. In its Counter-Memorial,[70] Italy has argued that the Decree of Seizure and the Request for its execution do not constitute a breach of Article 87 because *conduct ordinarily able to breach Article 87 is conduct that results in a physical and material interference with the navigation of a ship* (namely, the execution of the Decree). When this kind of conduct was put in place by the Spanish authorities acting upon request of the Italian authorities, the *M/V Norstar* was docked in Spanish internal waters. Since the physical and material interference with the movement of the *M/V Norstar* – that is to say, the execution of the Decree – occurred in an area of the sea where ships do not enjoy freedom of navigation, Italy's position is that no breach of Article 87 has occurred. For the full arguments on this issue, Italy wishes to refer to paragraphs 75-86 of its Counter-Memorial. A few points are however addressed below.

I.The nature of the activities ordinarily able to breach Article 87

45. Panama does not directly challenge Italy's proposition according to which conduct ordinarily able to breach Article 87 is conduct that results in a physical and material interference with the navigation of a ship (namely, the execution of the Decree).

46. However, Panama calls into question the relevance of the case law quoted by Italy to prove its point: the *Wanderer*, the *Arctic Sunrise*, the *Volga* and the *Saiga*.[71] Panama's position is that this case law is irrelevant because the breach of Article 87 that was argued in those cases concerned ships not in port. The fact that the ships were not in port only proves Italy's argument: that a breach of Article 87 can only be argued with regard to ships that are on the high seas (or, by virtue of Article 58 of the Convention, in the exclusive economic zone).

47. In addition, Panama says nothing about the nature of the conduct that in those cases was considered to be in breach of Article 87. In the *Wanderer* case, this conduct was "visitation and search".[72] In the *Artic Sunrise*, the lamented conduct was "boarding, investigating, arresting and detaining".[73] In *Saiga*, the conduct complained of was attack, arrest, detention, and the removal of the cargo.[74] In the *Volga* case, the conduct consisted in apprehension, boarding, and diversion under military escort. In all these cases, the conduct complained of was conduct resulting in a physical and material interference with the

[70] Italy's Counter-Memorial, paras. 75-86.
[71] Italy's Counter-Memorial, paras. 78-86.
[72] Italy's Counter-Memorial, para. 80.
[73] Italy's Counter-Memorial, para. 84.
[74] Italy's Counter-Memorial, para. 83.

navigation of a ship, at a time when, as recognized by Panama, the "vessels were [...] *on the high seas*".[75]

48. As already indicated in its Counter-Memorial, and reinstated here, freedom of navigation must be interpreted first and foremost as freedom from enforcement actions.[76] Italy recognizes that there may be circumstances in which conduct that falls short of enforcement action could potentially, and exceptionally, be in breach of Article 87, and affect ships on the high seas. However, Panama has not explained in any way, to the point of not even engaging with this issue at all, how the mere Decree of Seizure and the request for its execution have breached Panama's freedom of navigation, and have limited its freedom of movement, or interfered with it, *while on the high seas*.

49. Panama's lack of arguments is not surprising, since in fact the Decree of Seizure and the request for its execution simply have not interfered with Panamas' freedom of navigation in any way

50. The section below[77] explains why freedom of navigation cannot be interpreted as an absolute right to have access to the high seas. For the purposes of the present section, Italy wishes to make four fundamental points:

(a) In its Counter-Memorial, Italy has proved that the *M/V Norstar* had entered the port of Palma de Mallorca in March 1998, months before the date of the Decree of Seizure of 11 August, and that never once did it leave the Spanish waters in the period between March 1998 and the date when the Decree was executed.[78] Put in other words, at the time when the Decree was issued and at the time of the request for execution, as well as at the time of the execution of the Decree, the *M/V Norstar* was not in an area of the seas where it enjoyed the freedoms enshrined in Article 87. Hence, there is no way in which Article 87 could have been breached with respect to the *M/V Norstar*. For a more complete discussion of this matter, Italy would like to refer the Tribunal to paragraph 51 of its Counter-Memorial.

(b) Panama challenges the factual evidence produced by Italy and claims that the *M/V Norstar* was a seaworthy vessel in operation before the date of its arrest. While Italy has shown the reasons why Panama's alternative reconstruction is not tenable, it wishes to stress, *arguendo only*, that also under Panama's accounts of the facts, the Decree of Seizure and the Request for its execution have not determined a breach of Article 87.The evidence produced by Panama never shows that the *M/V Norstar* was actually navigating in areas of the seas where it enjoyed freedom of navigation on the dates when the Decree of Seizure was issued, and on the date of the Request for its Execution. Even assuming that the *Norstar* was seaworthy and able to leave the port of Palma, there is no evidence that it was actually out of Palma's port.

(c) Even if Panama managed to prove that the vessel was on the high seas at the time when the Decree of Seizure and the Request for Execution were issued, Panama's own pleadings show that these judicial acts determined no interference whatsoever with the vessel's freedom of navigation. At paragraph 431 of its Reply,

[75] Panama's Reply, para. 91 (emphasis added).
[76] Italy's Counter-Memorial, para. 87.
[77] *Infra*, Chapter 3, Section II.
[78] Italy's Counter-Memorial, para. 51.

Panama declares that the *M/V Norstar* "was not in bad conditions until its arrest, but she was in good working order *and performing her usual operations*". If, as Panama says contrary's to Italy argument, the *M/V Norstar* was *performing her usual operations* - that is to say, selling oil on the high seas as it had always done - until the date of the arrest, this would only confirm that the issuance of the Decree of Seizure and the Request for its Execution did not interfere in any way with the freedoms of Panama under Article 87. At paragraph 436 of its Reply, Panama is even more explicit in admitting that "up until the date of the *enforcement* of the arrest order, the vessel had been operating with complete normalcy".[79] By Panama's own admission, the Decree of Seizure and the Request for its Execution had no impact on the *M/V Norstar* even if it were to be proven, which it has not been, that at the time of their issuance the tanker was carrying out its operations on the high seas.

(d) That the Decree of Seizure and the Request for Execution did not interfere with the freedom of the *M/V Norstar* even if Panama should manage to prove that it was on the high seas, is proven by the fact that the *M/V Norstar* was not even aware of the existence of a Decree of Seizure and of a Request of Execution, until the moment the Decree was actually executed when the vessel was in Spanish waters. This reflected the rationale of the prejudgment measure in question. As established by the Italian Supreme Court of Cassation:

> "Pursuant to Article 431 of the [Italian] Code of Criminal Procedure, the report of a seizure is attached to the case file, and can constitute evidence; as a sudden act lacking prior notice, seizure cannot be repeated. *The effectiveness of seizure depends upon the secrecy of its issuance and promptness of its execution*. It cannot be effectively repeated, since the element of surprise is its inherent feature and may not be renewed".[80]

Similarly, according to the Tribunal of Milan:

> "The contemporary notification of impending investigations pursuant to Article 369bis of the Code of Criminal Procedure to the person under investigation is not a precondition for the lawful execution of a probative seizure, since it would frustrate the effectiveness of the seizure, which is an unexpected act of investigation".[81]

The secrecy of the Decree of Seizure and of the Request for Execution before the actual execution confirm that, and explains why, even if the *M/V Norstar* had been in operation at the time of their adoption and transmission, its activities on the high seas were not affected by these judicial acts.

(e) In this regard, even the fact that the Decree of Seizure referred to a right of hot pursuit by Italy under Article 111 of the UNCLOS, that would have allowed the arrest of the ship on the high seas, is irrelevant.[82] It is immaterial to the present dispute to determine whether Italy would have been authorized to arrest the *M/V Norstar* on the

[79] Panama's Reply, para. 436 (emphasis added).
[80] *Italian Court of Cassation, Sixth Criminal Section, Judgment No. 182, 14 November 1991 (Maxim)* (**Annex N**) (emphasis added).
[81] *Tribunal of Milan, Judgment of 18 October 2002 (Maxim)* (**Annex O**).
[82] Panama's Reply, paras. 144-147.

high seas due to a right of hot pursuit, for the simple fact that not only was the Decree not enforced when the vessel was on the high seas, but the ship was not even aware of its existence until it was actually executed. In other words, until the decree was executed against the *M/V Norstar*, in Spanish waters, the Decree was a mere internal act of the Italian investigative and judicial authorities, which did not produce any effect on the *Norstar*'s freedom of navigation.

II. The notion of freedom of navigation

51. The essence of Panama's main counterargument concerning Article 87 is that freedom of navigation is a right enjoyed by vessels regardless of where they are on the sea. In particular, according to Panama, freedom of navigation is a right that a State enjoys also in internal waters, because it includes *freedom to gain access to the high seas*.[83] In Panama's own words "the consequence of Italy's wrongful arrest would have been the same no matter where the arrest took place, because it would have impeded the *M/V Norstar*'s freedom to sail or navigate on the high seas in any case".[84]

52. Panama's argument is partly textual, and based on the title of Article 87, named "Freedom *of* the High Seas" as opposed as "Freedom *on* the High Seas";[85] partly based on one authority,[86] according to which freedom of navigation "includes the rights of ships to enter upon the oceans and to pass them unhindered by efforts of other states or entities to prohibit their use or to subject it to regulations unsupported by a general consensus among states".[87] Panama uses the word *absolute* to describe a ship's freedom of navigation in port, and concludes that "the law of the sea clearly states that a vessel enjoys the right to freedom of navigation at all times, and everywhere, even when it is moored".[88] Italy wishes to make a few observations with regard to Panama's position.

53. Preliminary, Italy needs to remind Panama once again that the Tribunal has curtailed the scope of the dispute to the question as to whether the Decree of Seizure, and the request for execution can be considered a breach of Article 87. Even assuming, *arguendo only,* that Article 87 could be interpreted as guaranteeing a ship an unlimited right to take to the high seas, also when subject to legal proceedings in a coastal State, the compression of this right in the case of the *M/V Norstar* would not have derived from the Decree of Seizure, or from the Request for its Execution – rather, from its actual execution. Once again, therefore, Panama's entire argument is misplaced and irrelevant *vis à vis* the question in dispute between the parties.

54. On the merits, Panama's position is flawed and the case law of this Tribunal confirms it. As already indicated by Italy in its Counter-Memorial, in the *Louisa* case, the ITLOS ruled that:

---

[83] Panama's Reply, para. 74.
[84] Panama's Reply, para. 13.
[85] Panama's Reply, para. 67.
[86] The other two authorities relied upon by Panama (Bardin and Rayfuse) are not relevant in the context of the present argument, because neither of them deals with the question as to whether freedom of navigation under Article 87 can be interpreted to mean freedom to gain access to the high seas.
[87] Panama's Reply, para. 71.
[88] Panama's Reply, para. 70.

> "[A]rticle 87 of the Convention deals with the freedom of the high seas, in particular the freedom of navigation, which applies to the high seas and, under article 58 of the Convention, to the exclusive economic zone. It is not disputed that the M/V "Louisa" was detained when it was docked in a Spanish port. Article 87 cannot be interpreted in such a way as to grant the M/V "Louisa" a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it".[89]

55. Two things can be evinced from this passage: a) that, contrary to Panama's contention, Article 87 does not apply everywhere, but only *applies to the high seas and, under article 58 of the Convention, to the exclusive economic zone*; b) that, again, contrary to Panama's contention, *Article 87 cannot be interpreted in such a way as to grant a vessel a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it.* The *M/V Norstar*'s case falls squarely within this statement.

56. In his dissenting opinion in the Provisional measures phase of the *Louisa* case, though concurring with the majority view on the point at issue, Judge Cot further explained that:

> "Article 87 covers freedom of the high seas and, in particular, freedom of navigation. But the existence of a basic freedom does not prohibit the coastal State from exercising the powers of its police and judiciary in its own territory. It is as if the First Amendment of the United States Constitution, which guarantees the right of assembly, had prevented the police from arresting a gentleman suspected of bootlegging in 1930s Chicago because he was going to attend a peaceful meeting on prohibition".[90]

57. Similarly, Judge Wolfrum held that:

> "It is hard to imagine how the arrest of a vessel in port in the course of national criminal proceedings can be construed as violating the freedom of navigation on the high seas. To take this argument to the extreme it would, in fact, mean that the principle of the freedom of navigation would render vessels immune from criminal prosecution since any arrest of a vessel, under which ground whatsoever, would violate the flag State's right to enjoy the freedom of navigation".[91]

58. However, Panama tries to distinguish the *Louisa* case from the *M/V Norstar* case on the fact that the *M/V Louisa* was arrested due to activities carried out in the internal waters of Spain, while the *M/V Norstar* for activities on the high seas,[92] and claims – wrongly – that the

---

[89] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, para. 109.
[90] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Dissenting Opinion of Judge Cot, ITLOS Reports 2008-2010, p. 93, para. 21.
[91] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Dissenting Opinion of Judge Wolfrum, ITLOS Reports 2008-2010, p. 77, para. 22.
[92] Panama's Reply, para. 82.

Tribunal has endorsed its reasoning in the Judgment of 4 November 2016.[93] Quite apart from the fact that the focus of the prosecuting authorities in *M/V Norstar*, as explained, was crimes committed *in Italy*, the distinctions that Panama tries to draw are irrelevant. As noted by Judge Cot in the passage immediately below the one indicated above:

> "The Parties argued about the location of the alleged criminal activities. Internal waters? Territorial sea? Exclusive Economic Zone? The Applicant maintained that its scientific research activities had been conducted within the area covered by the Spanish permit, i.e., the internal waters and the territorial sea. The Respondent did not dispute this. *But is the issue truly relevant? If the arrest and diversion of the ship had taken place in internationally regulated waters, the rules concerning innocent passage and those covering arrest, search and diversion in the Exclusive Economic Zone might have been invoked. But such was not the case. No enforcement occurred outside the port, i.e., beyond internal waters*".[94]

59. Also on the front of scholarship, the very same authorities on which Panama tries to rely, disprove its argument that freedom of navigation encompasses an absolute right to gain access to the high seas for any vessel. Rayfuse for instance, discussing Article 87, notes that:

> "[T]he right of exit [from port] is [...] subject to the right of the port state to condition departure and to arrest vessels in port for breaches of its law, in accordance with its normal legal process".[95]

60. Wendel, that Panama also quotes, acknowledges that the right to gain access to the oceans can be limited subject to regulations supported by a general consensus among states.[96]

61. Kohen explains that a Costal State cannot:

> "[I]mpede the freedom of navigation of foreign vessels by *arbitrarily* preventing them from leaving their internal waters. An arbitrary detention of a foreign vessel by a coastal State, after having allowed it to enter its internal waters and/or call a port, cannot but be a blatant breach of the freedom of navigation in other maritime areas".[97]

62. In one passage, contradicting its previous argument that a ship in port acknowledges absolute freedom of navigation (to gain access to the high seas) Panama itself acknowledges that freedom of navigation "would be meaningless if States could *indiscriminately* arrest vessels in port without justification".[98]

---

[93] Panama's Reply, Chapter 3, Section V, paras. 184-196.
[94] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Dissenting Opinion of Judge Cot, ITLOS Reports 2008-2010, p. 93, para. 22 (emphasis added).
[95] Rosemary Rayfuse, 'The Role of Port States' in Robin Warner, Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016), 72.
[96] Panama's Reply, para. 71.
[97] Marcelo G. Kohen, 'Is the Internal Waters Regime Excluded from the United Nations Convention on the Law of the Sea?' in Lilian del Castillo Laborde (ed), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea* (Brill 2015), 122 (emphasis added).
[98] Panama's Reply, para. 74 (emphasis added).

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

64. In addition, as discussed in the Counter-Memorial, at the time when the Decree of Seizure was issued and executed, the *M/V Norstar* had been continuously and uninterruptedly in the port of Palma de Mallorca for about 4 months, and, anyway, was in a state of complete dismay.[99] From the date of 14 April 1998, again months before the Decree of Seizure was issued, the ship was in a state of abandonment. In its conditions, the *M/V Norstar* was not in a position to exercise any freedom of navigation, as it appears highly improbable, if not entirely impossible, that it would have been able to leave the Spanish port. And in fact, as shown by Italy, the *M/V Norstar* never left the port.

[99] Italy's Counter-Memorial, paras. 99-100.

CHAPTER 4
THE ALLEGED BREACH OF ARTICLE 300

I.Introduction

65. Italy has articulated a number or arguments to counter Panama's allegations that Italy has breached the duty of good faith set out by Article 300. These are explained in full at paragraphs 142-202 of Italy's Counter-Memorial, to which Italy would like to refer the Tribunal. In extreme summary, however, these arguments are:

(a) Panama cannot claim that a breach of Article 300 is an automatic consequence of the breach of a provision of the Convention (in this case Article 87), or else that a violation of the Convention would always entail a breach of Article 300.[100]

(b) The vast majority of the examples through which Panama tries to substantiate a breach of good faith bear no connection with Article 87, and therefore fall beyond the scope of the dispute as curtailed by the Tribunal.[101]

(c) Even if Article 300 were relevant beyond Article 87, Panama has failed to identify any provision of the Convention with respect to which Article 300 would have been breached, and has rather invoked Article 300 as a stand-alone provision.[102]

(d) All of the conduct that Panama claims are indicative of lack of good faith on Italy's part are not, on their merits, contrary to good faith.[103]

66. By way of introduction, Italy regrets having to show once again how Panama continues to systematically misinterpret and mystify Italy's arguments. Panama's take away of the whole set of Italy's arguments is that "concerning the application of article 300 to this case, Italy argues that Panama has not established a link between this provision and any other provision of the convention that shows that Italy has violated the rights of another State protected under the Convention".[104]

67. Clearly, this is a completely wrong summary of Italy's arguments, as a reading of the relevant passages of Italy's Counter-Memorial demonstrates.[105] As shown above, Italy has argued, in a subordinate manner and arguendo that "*even if* Article 300 was relevant beyond Article 87 [which is not, given the Decision of the Tribunal of November 2016 that limits the relevance of Article 300 to 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

[100] Italy's Counter-Memorial, paras. 144-146.
[101] Italy's Counter-Memorial, paras. 156-164.
[102] Italy's Counter-Memorial, paras. 165-168.
[103] Italy's Counter-Memorial, paras. 147-155 and 169-185.
[104] Panama's Reply, para. 200.
[105] Italy's Counter-Memorial, paras. 193-198.

jurisdiction under the Convention".[106] This is quite different from the way Panama tries to portray Italy's arguments.

68. Italy does not intend in this Rejoinder to go through all the arguments that it has articulated in its Counter-Memorial and that Panama, by way of misinterpretation of mystification, has failed to properly address. The sections that follow therefore focus on those aspects that Italy feels need to be addressed of Panama's Reply.

II.The breach of Article 300 as an automatic consequence of the breach of Article 87

69. In its Counter-Memorial, Italy has argued that "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".[107]

70. It appears that Panama has not objected to Italy's statement in its Reply, and that therefore it agrees with Italy's position.

III.Conduct related to Article 87

71. In its Counter-Memorial, Italy explained that out of all the conducts that Panama claims are evidence of Italy's bad faith in breach of Article 300, only two bear a possible connection with Article 87, and hence fall within the jurisdiction of the Tribunal in the present case.

(a) First, that even if Italy had long known that the *M/V Norstar* was active in the bunkering activities, Italy waited until 1998 to arrest the *vessel*;[108]

(b) Second, that Italy waited until the *M/V Norstar* was in the port of Palma to arrest the vessel, so as to make the arrest easier.[109]

72. These matters will be addressed later on. Preliminary, Italy would like to focus its attention on Panama's position based on *effet utile*, which Panama discusses in a section named "the relationship between Article 87 and 300"[110] and therefore, presumably, with a view to arguing the existence of such a relationship.

---

[106] Italy's Counter-Memorial, para. 196 (emphasis added).
[107] Italy's Counter-Memorial, para. 146.
[108] Italy's Counter-Memorial, para. 148.
[109] Italy's Counter-Memorial, para. 149.
[110] Panama's Reply, Chapter 4, Section II, p. 33.

A. *Effet utile*

73. Panama starts its argument by recalling authorities on Article 26 of the Vienna Convention on the Law of Treaties, according to which "every treaty in force is binding upon the parties to it and must be performed by them in good faith".[111] Italy no doubts agrees with the authorities quoted by Panama, but still fails to see how those authorities assist Panama in drawing a link between Article 87 and Article 300. There is no doubt, as Sir Gerald Fitzmaurice stated, and Panama reported, that "a treaty must be carried out in good faith, and so as to give it a reasonable and equitable effect according to the correct interpretation of its terms".[112] There is also no doubt that this statement does not advance in any way Panama's argument that Italy has breached Article 300 with respect to Article 87. And, indeed, at the end of its reasoning, Panama is forced to resort to an apodictic statement according to which "by ordering the improper arrest of the *M/V Norstar* in Palma, for activities carried out on the high seas, and by failing to compensate for this action, Italy has not fulfilled its obligation of good faith".[113]

74. After attempting this argument, Panama tries to run another argument, which is well summarized by Panama itself: "it is crucial to use the concept of good faith to interpret article 87 and link it with Article 300 of the Convention".[114] Also, "Panama asks the Tribunal to interpret Article 87 in a broad manner [...] *so as to recognize a material breach of Article 87* in light of the concept of good faith".[115] What Italy understands from the way Panama articulates its reasoning is essentially that Article 87 should be given, in light of the principle of good faith, an expansive interpretation, so that the Tribunal can find that a link exists between Article 87 and Article 300 and that "Italy frustrated the object of the Treaty – namely, freedom of navigation".[116] There are three main issues that weigh crucially against Panama's argument.

75. First, Panama misinterprets the Convention, and the very Judgment of 4 November 2016, in trying to rely on Article 300 in order to substantiate a breach of Article 87. As explained profusely,[117] and confirmed by the Tribunal in 2016,[118] a breach of Article 300 cannot be argued autonomously. If this is the case, a breach of Article 300 cannot be precedent to (and used to prove) a violation of an autonomous provision of the Convention. Establishing a link between Article 87 and Article 300 requires ascertaining first that Article 87 has been violated and then, if this violation has occurred in breach of Article 300. The proper approach is exactly the reverse of what Panama tries to do.

76. Second, Panama is fundamentally confused about the notion and meaning of good faith under Article 300. Article 300 of the Convention represents a substantive standard of good faith against which to measure conduct of States Parties to the Convention. It is the equivalent in UNCLOS of the general principle codified in Article 26 of the Vienna Convention on the Law of Treaties. This is confirmed by the Nordquist Commentary to the UNCLOS, which states as follows:

---

[111] Panama's Reply, para. 204.
[112] Panama's Reply, para. 204.
[113] Panama's Reply, para. 204.
[114] Panama's Reply, para. 215.
[115] Panama's Reply, para. 214 (emphasis added).
[116] Panama's Reply, para. 215.
[117] Italy's Counter-Memorial, paras. 165-168.
[118] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 131.

> "[T]he reference to "good faith" in article 300 reflects Article 2, paragraph 2, of the UN Charter and the fundamental rule *Pacta sunt servanda*. Article 26 of the Vienna Conventions of 1969 and 1986 formulate this rule in relation to a treaty in lapidary form: "Every treaty in force is binding on the parties to it and must be performed by them in good faith".[119]

77. Panama, however, treats good faith under Article 300 of the Convention as an interpretative canon, and not as a substantive standard. This emerges clearly from Panama's own statements, indicated above.[120] And indeed, Panama quotes case law concerning not good faith in its substantive dimension, but as a hermeneutical standard. For instance, Panama refers to the case *Territorial Dispute between Chad and Lybia*, and refers to a passage in which the International Court of Justice commented that "in accordance with customary international law, reflected in Article 31 of the Vienna Convention [as opposed to Article 26 of the same Convention], a treaty must be *interpreted* in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose".[121] It is not the purpose of Article 300 of the UNCLOS to provide hermeneutical standards, and therefore, without prejudice to what Italy already explained, this notion of good faith cannot be used to create links between Article 87 and Article 300. This disqualifies at the root, the entire argument on *effet utile* that Panama tries to rely on. *Effet utile*, indeed, is an interpretative canon. Panama agrees on this point,[122] and so does scholarship.[123]

78. Third, even assuming, *for the sake of the argument*, that the purpose of Article 300 were to provide hermeneutical standards, Panama is fundamentally mistaken in identifying the object and the purpose of UNCLOS as guaranteeing freedom of navigation. Panama claims in particular that "by failing to abstain from acts which frustrate *the object and purpose of the freedom of navigation delineated by the Convention*, Italy further breached the tenets of good faith".[124] The Convention does not promote freedom of navigation above any other value. On the other hand, it is a compromise between a set of different, and oftentimes opposing values, such as the rights of Coastal States to exercise their jurisdiction and sovereignty, and freedoms of general interest to the international community, such as freedom of navigation. As noted by Prof. Tommy Koh, for example,

> "The Convention represents a carefully negotiated package of balances between the rights and interests of the coastal State, on the one hand, and the rights and interests of the international community, on the other".[125]

79. In similar terms, according to Nordquist:

---

[119] Myron H. Nordquist, *United Nations Convention on the Law of the Sea 1982*, Volume V (Brill 1989) 152, para. 300.4.

[120] "It is crucial to use the concept of good faith to interpret article 87 and link it with Article 300 of the Convention"; "Panama asks the Tribunal to interpret Article 87 in a broad manner (…) so as to recognize a material breach of Article 87 in light of the concept of good faith". See *supra*, para. 74.

[121] Panama's Reply, para. 208, quoting Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, p. 6, at 19-20, para. 41.

[122] Panama's Reply, para. 210.

[123] Matthias Herdegen, 'Interpretation in International Law', in *Max Planck Encyclopedia of Public International Law* (March 2013) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e723> accessed 13 June 2018, paras. 6 and 30-31.

[124] Panama's Reply, para. 207 (emphasis added).

[125] Tommy Koh, 'Setting the Context: A Globalized World' in Myron H. Nordquist, John Norton Moore, Robert C. Beckman and Ronán Long (eds), *Freedom of Navigation and Globalization* (Brill 2015) 6.

> "[The] Convention [is set] up as a constitution, so to speak, for the seas, a general code of conduct for States in maritime spaces; and in doing so it lays down an order of priorities for the *different uses and interests involved and to be reconciled*".[126]

80. Fourth, and without prejudice to all that has been explained above, Panama is fundamentally mistaken in believing that the interpretative canon of *effet utile* authorizes a broad interpretation of Article 87. Specifically, Panama asks the Tribunal to "interpret Article 87 in a broad manner, in light of the principle of *effet utile*". However, as noted by the International Law Commission:

> "The Commission took the view that [...] the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation [...]. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty".[127]

B. The failure to arrest the *M/V Norstar* before 1998

81. As mentioned previously, Panama considers it to be a breach of Article 300 with respect to Article 87, the fact that Italy waited until 1998 to arrest the ship, despite the fact that this had been involved in bunkering operations since 1994.[128] Panama's position is essentially that "[h]aving accepted that during all those years Italy did not take any steps to criminally prosecute any of the persons involved in this activity, its decision to suddenly treat the *M/V Norstar*'s actions as a crime could hardly be considered as good faith".[129]

82. This position has already been discussed at paragraph 151 of the Counter-Memorial, where it was explained that it was not until 1998 that investigative activities carried out by the Italian fiscal authorities suggested the involvement of the *M/V Norstar* in a possible criminal enterprise. Panama does not advance any new argument to counter this explanation in its Reply. It limits itself to claiming that "Italy has not offered any explanation for having waited such a long period during which the *M/V Norstar* carried out the same activities, before initiating the arrest".[130] In fact, Italy has provided an explanation. In the interest of brevity, Italy would like to refer the Tribunal to the relevant parts of the Italian Counter-Memorial, except to stress here that the fact that Italy was not concerned by the bunkering activities of the *M/V Norstar* confirms that the *M/V Norstar* was not arrested for the

---

[126] Myron H. Nordquist, *United Nations Convention on the Law of the Sea 1982*, Volume I (Brill 1985) 461, para. 15(a) (emphasis added).

[127] ILC, 'Document A/6309/Rev.l: Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session', in *Yearbook of the International Law Commission*, 1966, vol. II, p. 219, para. 6, commenting Article 27 on interpretation.

[128] Panama's Reply, paras. 221 and 250-254.

[129] Panama's Reply, para. 354.

[130] Panama's Reply, para. 252.

bunkering, but only when the prosecuting authorities started to suspect that *the activities carried out were quite different from actual being bunkering*,[131] and they consisted in criminal activities under the Italian Criminal Code, and that they occurred in Italy.

C. The arrest of the *M/V Norstar* while in Spanish waters

83. Panama claims that it constitutes bad faith the fact that Italy waited until the *M/V Norstar* was in the internal waters of Spain to order its arrest.[132] Italy has already explained that arresting the vessel within the internal waters was necessary precisely in order to be sure not to breach Article 87.[133]

84. Italy finds that Panama is not advancing any new argument or explanation as to why conduct put in place precisely to avoid breaching a provision of the Convention should become, in Panama's narrative, conduct in breach of good faith. Panama's position is only that "if Italy admits that it cannot arrest the *M/V Norstar* on the high seas as that constitute a violation of the freedom of navigation, Italy is clearly not acting in good faith when it decides to wait until that foreign vessel has left the high seas to arrest it in relation to lawful activities carried out on the high seas".[134] This is Panama's usual argument, much heard in these pleadings, and Italy does not feel it has to address it again, after having devoted a significant part of the Counter-Memorial and of the Rejoinder in explaining while Panama's accounts are factually and legally wrong.

85. Also, Italy is unable to understand Panama's claim that arresting the *M/V Norstar* while in Spanish waters, to avoid a breach of Article 87, would be contrary to the doctrines of constructive presence or genuine link. Indeed, those doctrines, whose legality is not the subject of investigation in the present case, have no relation to Panama's freedom of navigation under Article 87.

D. The alleged premature and unlawful enforcement of the arrest

86. Panama advances a new argument in its Reply that would allegedly prove a breach of Article 300 with respect to Article 87. According to Panama, the order of the arrest of the *M/V Norstar* was premature and unjustified, to the point that the seriousness of the activity of the Italian prosecutor who ordered the arrest must be called into question[135] and the arrest itself considered *arbitrary*.[136]

87. It is at least peculiar that Panama declare at the beginning of its Reply that it "is not in a position to discuss the validity of any of the provisions of Italian domestic law that have

---

[131] *Appeal by the Public Prosecutor of the Tribunal of Savona, 20 August 2003* (**Annex D**), at 2, translating page 2 of the Italian version.
[132] Panama's Reply, para. 222-226 and 294.
[133] Italy's Counter-Memorial, para. 152.
[134] Panama's Reply, para. 225.
[135] Panama's Reply, para. 254.
[136] Panama's Reply, para. 362.

been cited by Italy in its Counter-Memorial",[137] and yet believe to be in a position to criticize and double guess[138] the conduct of the Italian prosecutor – a conduct strictly governed by law and carried out in full compliance with the Italian Code of Criminal Procedure – to the point of suggesting that such conduct is indicative of Italy's bad faith.

88. Leaving aside this peculiarity in Panama's approach, however, the adoption of the Decree was neither premature nor unjustified.

89. First, the purpose of the Decree was to secure evidence assessing the commission of a crime by certain individuals also through the *M/V Norstar*. This emerges clearly from a mere textual reading of Article 253 of the Italian Code of Criminal Procedure.

> "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*".[139]

90. Panama's statements and authorities concerning *fumus bonis iuris* and *periculum in mora* are therefore misplaced[140] since the passages quoted in Panama's Reply concern requests for provisional measures before the European Court of Justice, a situation which is incomparable and bears no resemblance to a Decree of Seizure issued in the context of criminal proceedings. Italian case law by the Supreme Court specifies what kind of *fumus bonis iuris* is necessary in order adopt a Decree of Seizure of the nature adopted by the Prosecutor in *M/V Norstar*:

> "Given that probative seizure aims at gathering evidence in respect of facts which may constitute an offence, it cannot itself rely on the certainty of the relevance of the seized good as body of evidence. The existence of a fumus, that is the mere possibility of a relationship between the good and the offence, is sufficient for lawful seizing. Therefore, whenever the ongoing investigation substantiates a fumus, the seizure is lawful and appropriate, since it is aimed at establishing, in itself or through further investigation, whether a relationship exists between the good and the offence. (Case concerning probative seizure of documents ordered during the preliminary investigation on the alleged offence of usury. The applicant claimed that the documents subject to seizure lacked any representative value and, therefore, were not to be considered as 'things pertaining to the offence')".[141]

91. Similarly, the Italian Supreme Court held that:

> "The lawfulness of probative seizure is not to be assessed on the basis of the merits of the claim. Rather, it is to be assessed by looking at the extent to which the constitutive elements of the *notitia criminis* reasonably require further investigation aimed at gathering further forms of evidence, which

[137] Panama's Reply, para. 2.
[138] Panama's Reply, para. 270-271.
[139] *Italian Code of Criminal Procedure, Articles 20, 253, 548 and 606* (**Annex H**), Article 253 (emphasis added).
[140] Panama's Reply, paras. 261-264.
[141] *Italian Court of Cassation, Second Criminal Section, Judgment No. 3273, 20 November 1999 (Maxim)* (**Annex P**).

> may not be obtained without either depriving the indicted person of the availability of the good, or making the latter available to Judicial Authority".[142]

92. This kind of *fumus* was clearly present in this case, and Italy explained in the Counter-Memorial that the Italian investigative authorities had found evidence of the fact that the *M/V Norstar* was being used in the context of a suspected criminal enterprise of which it constituted the *corpus delicti*.[143] Italy would like to refer the Tribunal to paragraphs 27-41 of its Counter-Memorial, where these issues are discussed in details.

93. The very text of Article 253 of the Italian Code of Criminal Procedure expressly requires prosecutors to explain the reasons for the adoption of a Decree of Seizure, in order to avoid any measure of arbitrariness in the adoption of the measures and allow judicial review of those reasons, if required by those affected by the Decree. The prosecutor in the *M/V Norstar* case did explain the reasons for the adoption of the Decree, and made reference to the outcome of the investigations carried out by the Italian authorities:

> "*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;
> It was also found that the mv NORSTAR positions itself beyond the Italian, French and Spanish territorial seas, mostly inside the contiguous vigilance zone and promptly supplies with fuel (so-called "offshore bunkering) mega yachts that are exclusively moored at EU ports. Thus, they willingly and consciously give the sold product a destination that differs from the one for which the tax exemption was granted (with reference to products bought in Italy and Spain, which are then surreptitiously 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)".[144]

94. It is also necessary to specify, in this regard, that it is true that the Italian fiscal police transmitted its findings on the investigation regarding the *M/V Norstar* to the Public Prosecutor on 24 September 1998, and that the Decree of Seizure against the *M/V Norstar* was issued on 11 August 1998. But that does not mean, as Panama hastily concludes, that the arrest of the *M/V Norstar* was "without foundation".[145] As Italy has stated in its Counter-Memorial, and Panama has failed to consider in its analysis, "the investigation on the 'M/V Norstar' commenced in September 1997".[146] It is customary for investigative authorities to be

---

[142] *Italian Court of Cassation, Third Criminal Section, Judgment No. 15177, 14 April 2011 (Maxim)* (**Annex Q**).
[143] Italy's Counter-Memorial, para. 40.
[144] *Seizure order by the Public Prosecutor of the Tribunal of Savona, 11 August 1998* (**Annex B**), at 1; emphasis added.
[145] Panama's Reply, para. 237.
[146] Italy's Counter-Memorial, para. 27.

in close touch with prosecutorial authorities, and to share with them interlocutory reports on the ongoing investigations. This is confirmed by the ample reference in the Decree of Seizure to the investigations carried out regarding the vessel. Given the requirements for the adoption of a Decree of Seizure under Article 253 of the Italian Code of Criminal Procedure specified above, the public prosecutor rightly considered the information shared interlocutorily by the Italian investigative authorities sufficient. About 6 months after the transmission of the final investigations from the Italian investigative authorities, and based on their results, the Italian magistrates then issued a Decree of Preventative Seizure of the *M/V Norstar* and registered a criminal case against Mr Rossi and others.[147]

95. Third, Panama also complains that the Decree was "rushed and enforced without the final and definitive approval of the Italian jurisdictional authorities".[148] It is true that the Decree was adopted without the approval of the jurisdictional authorities, but only because such approval is not even contemplated, let alone required, by the Code of Criminal Procedure. As mentioned, the Code provides on the other hand a clear procedure that can be activated against a Decree of Seizure, *ex post*, which involves the review by jurisdictional authorities up to the Court of Cassation.[149] A judicial review *ex ante* would be illogical as it would defeat the purpose of a measure which, as explained previously, entails a degree of secrecy and surprise effect in order to be at all useful. Panama is frankly delusional when it states that in the context of criminal proceedings the Italian authorities, trying to secure the evidence of a crime, should have summoned the ship-owner and the other persons involved in the operation of the *M/V Norstar* "to discuss the lawfulness of its bunkering activities on the high seas before taking forceful action".[150]

96. Ultimately, there was nothing in the behaviour of the prosecutor suggesting procedural misconduct, arbitrariness, malice, and let alone bad faith. And Italy would like to remark as a last point that even if Panama also claims that "a State is not allowed to detain a foreign vessel in advance of determining the existence of a crime. It must first investigate in order to ascertain probable culpability", its own Code of Criminal Procedure provides for this possibility. In particular, Article 259 of the Panamanian Code, features the possibility to issue a Decree of Seizure for probative purposes, of the same nature as the one issued by the Public Prosecutor at the Court of Savona. According to Article 259:

> "Whenever precautionary reasons so require during a criminal investigation, the Supervisory Judge, upon request by the Prosecutor, may order the judicial seizure of the *corpus commissi delicti* in order to avoid the disposal, disappearance or destruction of the seized goods".[151]

IV. Conduct unrelated to Article 87

97. In its attempt to prove a breach of Article 300 by Italy, Panama imputes to Italy a number of conducts that bear no connection with Article 87 of the Convention, contrary to the

---

[147] Italy's Counter-Memorial, para. 41.
[148] Panama's Reply, para. 255.
[149] *Italian Code of Criminal Procedure, Articles 20, 253, 548 and 606* (**Annex H**), Article 606.
[150] Panama's Reply, para. 272.
[151] *Panamanian Code of Criminal Procedure, Article 259* (**Annex R**).

Tribunal's decision that the relevant question to investigate is whether Italy has fulfilled in good faith the obligations assumed under Article 87 of the UNCLOS. Italy's primary argument, therefore, with regard to all the conducts described in the following paragraphs, is that they are not in any way connected to the freedom of navigation under Article 87, and as such, they fall outside the jurisdiction of the Tribunal. Even if the Tribunal had not limited the relevance of Article 300 to Article 87, Panama would still have failed to identify what provisions of the Convention Italy would have breached, continuing, untenably, to invoke Article 300 as a stand-alone provision. For this position, Italy wishes to refer the Tribunal to the same arguments made in paragraphs 161-168 of the Counter-Memorial[152]. Without prejudice to them, Italy wishes to make some additional considerations, below, concerning the merits of Panama's arguments on breach of good faith.

A. Conduct of negotiation prior to the commencement of ITLOS Proceedings

98. In its Reply, Panama insists that Italy's lack of response to Panama's communications before the commencement of proceedings before this Tribunal is an indication of bad faith. No new argument is adduced to substantiate this claim, in addition to what Panama has already articulated in its Memorial. For these reasons, Italy would like for the most part to refer the Tribunal to the position presented in the Counter-Memorial at paragraphs 156-181. Three things need to be noted here, though.

99. First, Panama holds in its Reply that "Italy has not provided any valid justification for this inconsiderate behaviour [Italy's silence in negotiations] and, despite the 4 November 2016 Judgment, where the Tribunal held that its *excuses* [emphasis added] were not valid, Italy has continued to claim that it did not answer Panama's entreaties because the Panamanian counsel was not vested with the powers to negotiate and did not have the authorization to represent Panama".[153] This is a wrong representation of Italy's position. What Italy is saying is that it did not respond to Panama's communications because it *believed* – and, Italy accepts that this belief was legally wrong since 31 August 2004 – that the requests from Panama were coming from individuals not authorized to represent Panama.[154] In the Decision of 4 November 2016, the Tribunal held that:

> "[S]ince 31 August 2004, when Italy received the first note verbale of Panama, it cannot validly question that Mr Carreyó was duly authorized to represent Panama in all exchanges relating to the detention of the M/V 'Norstar'".[155]

100. Italy also provided an explanation as to why it felt that Panama's response did not need an answer, namely that it thought the authorization from Panama to Mr Carreyò only

[152] Italy's Counter-Memorial, paras 161-168.
[153] Panama's Reply, para. 287.
[154] Written Observations and Submissions of Italy in Reply to Observations and Submissions of the Republic of Panama, paras. 12-20.
[155] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 97.

concerned a specific kind of procedure before the Tribunal, namely prompt release under Article 292, and was not a general authorization to negotiate on behalf of Panama.[156]

101. The reality is that Italy incurred in misappreciation, but did not act in bad faith. It is not disputed that good faith in international law presents also a subjective dimension, as noted by Professor Kolb in his seminal work on the topic. According to Kolb:

> "Subjective good faith refers therefore to a doctrine of 'erroneous belief'. Such errors of fact can lead to a legal protection of the subject suffering from the erroneous representation, when the latter cannot be attributed to any fault. Good faith here means a subjective or psychological legal fact. […] In international law, the notion of good faith in the subjective sense is known and applicable in several contexts".[157]

102. For its wrong belief as a matter of law, Italy has already been sanctioned during the incidental proceedings with the rejection of its arguments on the question of the authority of those from Panama addressing communications to Italy, for purposes of objections to jurisdiction and admissibility.

103. Second, Panama seems to presume Italy's bad faith, to the point that there cannot be any other explanation for Italy's conduct than bad faith. This emerges with clarity from the rhetorical questions that Panama asks: "despite confessing that its conduct was wrong as a matter of law, however, Italy persists in claiming that this does not mean that there was no reason for Italy other than bad faith. What is the other reason that Italy has failed to identify?" Italy has already identified the "other reason" above, but would also like to remind Panama that the ease with which Panama presumes bad faith on Italy's part is against fundamental principles of international law. It is well known, as corroborated by case law, that:

> "Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognized in private law and cannot be ignored in international law".[158]

104. And:

> "[I]l est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas".[159]

105. Third, Panama could have argued Italy's bad faith if Italy had been "leading Panama on", behaving inconsistently and cunningly giving Panama false hopes of a positive outcome, with the purpose of obtaining some undue advantage. However, this was not the case. Even if Italy has provided a reason for its decision not to communicate with Panama, it would like to stress that *silence is an entirely legitimate* position in negotiations. Silence, for example, can be interpreted, and ordinarily is, as the rejection of a claim, or as unwillingness, or unavailability, to entertain it by way of negotiations. Silence by one of the parties and failure

---

[156] Written Observations and Submissions of Italy in Reply to Observations and Submissions of the Republic of Panama, paras. 19-22.
[157] Robert Kolb, *Good Faith in International Law* (Hart 2017) 16.
[158] *Lighthouses case between France and Greece*, Separate Opinion by M. Séfériadès, PCIJ Rep Series A/B No. 62, p. 47.
[159] *Affaire du lac Lanoux (Espagne, France)*, in *Report of International Arbitral Awards*, 1957, p. 281, at 305.

to engage, for example, is ordinarily used by international courts and tribunals as evidence that a dispute exists between them. In *Georgia v. Russia*, the International Court of Justice held that:

> "[T]he existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".[160]

106. Similarly, in *Land and Maritime Boundary between Cameroon and Nigeria*, the Court held that:

> "[A] disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party".[161]

107. This case law was quoted by the Tribunal in its decision of 4 November, in which it was held that:

> "In the view of the Tribunal, the existence of such a dispute [between Panama and Italy] can be inferred from Italy's failure to respond to the questions raised by Panama regarding the detention of the M/V 'Norstar'".[162]

108. In sum, failure to respond, and silence in general, are legitimate conducts in negotiations, and are ordinarily interpreted as disagreement. They are not indicative of bad faith.

B. Italy's qualification of the *M/V Norstar* as *corpus delicti*

109. In its Reply, Panama argues as follows:

> "Italy has acted, and still acts, in a manner contrary to international law by continuing to mischaracterize the *M/V Norstar* as *corpus delicti*. In so doing, Italy is breaching its good faith obligations in a manner which constitutes an abuse of rights as set forth in Article 300 of the Convention".[163]

110. Italy has referred to the *M/V Norstar* as *corpus delicti* in describing the reasons why the *M/V Norstar* was arrested, namely that it was considered to be instrumental in the commission of the crime of tax evasion and smuggling.

---

[160] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70, at 84, para. 30.
[161] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275, at 315, para. 89.
[162] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 101.
[163] Panama's Reply, para. 25.

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

C. The Duration of Italian Domestic Proceedings

112. In its Memorial, Panama has accused Italy of:

> "[N]eglecting to release the vessel when its own courts had decided that no crime had been committed" and of "detaining the vessel as *corpus delicti* for an unreasonable period of time" and of "disregard[ing] the decisions of its own courts".[164]

113. In the Reply, Panamas' position is similarly that:

> "[T]he M/V Norstar was detained for an inordinate period of time. […] [T]he detention was prolonged and the vessel was kept, in effect, incommunicado under Italy's control and authority over the years. This can only be considered as a betrayal of good faith. […] *[I]t is the prolonged detention that brings the applicability of Article 300 to this case*".[165]

114. And that:

> "Italy did not take any operative measures to promptly return the vessel to its owners or to Panama as the flag State".[166]

115. Panama's allegations of impropriety on Italy's part are devoid of any ground on the merits. Italy simply has not detained the *M/V Norstar* for an unreasonable period of time; what appears from the facts of the case, quite simply, is that at the latest on 11 March 1999, that is, less than 6 months after the execution of the Decree of Seizure on 25 September 1998, the *M/V Norstar* was released and could have been collected by its owner, who however failed to do so. Italy would like to refer the Tribunal to paragraphs 53-55 of its Counter-Memorial and to paragraphs 13-40 of these pleadings for a complete account of the relevant facts.

116. Less than 6 months is hardly an unreasonable time, considering that the *M/V Norstar* was involved in a criminal investigation and *that its owner only filed a request for the release of the vessel on 12 January 1999, that is, 3 and a half months after the actual arrest of the ship*. The truth is that *after only 2 months from the request by the owner*, the Italian judicial system authorized the release of the vessel. Panama alleges that Italy is in bad faith when it suggests that 5 or 6 months is hardly a long period of detention, and that the ship-owner started to incur damages from the moment of the arrest of the vessel.[167] This is a most

[164] Panama's Memorial, para. 114.
[165] Panama's Reply, paras. 228-229 (emphasis added).
[166] Panama's Reply, para. 302.
[167] Panama's Reply, para. 119.

peculiar proposition, considering that, as said, the ship-owner waited nearly 4 months before filing a request for the release of the ship – a request that he could have filed on the same day of the arrest of the vessel.

117. Panama also "contends that if Italy had realized that the shipowner was not taking any steps to take the vessel back, it should have instituted proceedings and or contacted the Government of Panama, which, in turn, would have taken the necessary measures".[168] Since Panama is making this claim in trying to prove Italy's bad faith, the argument of Panama can properly been paraphrased as follows: "Italy acted in bad faith because it failed to institute proceedings against the owner of the *M/V Norstar* to force him to collect a vessel that the owner had shown no interest in collecting". Italy wishes to leave it to the wisdom of the Tribunal to decide whether conduct of this nature is indicative of a lack of good faith on Italy's side, or whether, rather, it signals a complete lack of diligence on the part of the ship-owner.

V.Panama's claim that Italy has abused rights under Article 300

118. Also with regard to the alleged breach of Article 300 due to abuse of rights, Panama has failed for the most part to address the arguments that Italy has articulated in its Counter-Memorial. In summary, Italy's position is that:

(a) A claim concerning abuse of rights under Article 300 is not part of the present dispute;

(b) Also with regard to abuse of rights, Panama invokes Article 300 as a stand-alone provision, and fails to link it with Article 87 in any way;

(c) Italy has in any event not abused any right under Article 300 with respect to Article 87.

119. For the full discussion on these aspects, Italy would like to refer the Tribunal to the relevant paragraphs of its Counter-Memorial (paragraphs 185-202). However, a few notations appear in order also in these pleadings:

120. First, Panama claims that Italy's position according to which the Tribunal has limited the relevance of Article 300 to its good faith component – not including therefore the abuse of rights component – "is simply not true".[169] The only argument that Panama advances to sustain this proposition is that the Judgment of the Tribunal of 4 November 2016 makes Article 300 relevant to the present case.[170] Italy would like to specify that its position, as expounded in its Counter-Memorial, is not that Article 300 is not relevant in its entirety. Rather, that Article 300 is comprised of two distinct components – good faith and abuse of rights, and that only the good faith component is part of the present dispute. And in fact, while Panama expressly agrees with Italy that Article 300 has two components and that the Tribunal can specify which one is relevant of the two,[171] it quotes selectively from the

[168] Panama's Reply, para. 307.
[169] Panama's Reply, para. 243.
[170] Panama's Reply, para. 242.
[171] Panama's Reply, para. 244.

decision of the Tribunal, to justify its position that both components are relevant in the *M/V Norstar* case. However, read in its completeness, the decision shows that the Tribunal did specify which of the two components of Article 300 is relevant to the present case, in the following terms:

> "The Tribunal considers that the question arises *as to whether Italy has fulfilled in good faith* the obligations assumed by it under article 87 of the Convention. Therefore, the Tribunal is of the view that article 300 of the Convention is relevant to the present case".[172]

121. Second, Panama tries to enlarge the scope of the dispute when it states that "Italy, as a coastal State, abused its right enshrined in Article 21 of the Convention to legally prevent the infringement of its customs or fiscal regulations by foreign ships which enter its territorial sea". Italy does not intend to engage the merits of this argument, but wishes to note that Article 21 of the Convention is not part of the present dispute as determined by the Tribunal, and therefore does not fall within its jurisdiction in the present case.[173]

122. Third, Panama is fundamentally mistaken about the relevant notion of abuse of rights crystallized in Article 300. Article 300 reads as follows:

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

123. Article 87, on its part, reads:

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

124. The only way in which Article 300 could be linked with freedom of navigation under Article 87 would be if a State, in exercising the freedom of navigation under 87, abused the rights of other States. This corresponds to the second paragraph of Article 87, namely a situation in which the State that is entitled to freedom of navigation under Article 87(1) does not pay *due regard to the interests of other States* under Article 87(2), in a manner that is so

[172] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 132 (emphasis added).
[173] Panama's Reply, paras. 356-359.

serious as to constitute an abuse of the rights conferred under Article 87(1). For example, as noted by Wendel:

> "According to Art. 87, para. 2 LOSC, the freedom of navigation "shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas. A vessel enjoying freedom of navigation [under Article 87(1)], which pollutes the sea and thereby harms fish stocks, significantly impedes the enjoyment by fishing vessels of the freedom of fishing [in breach of Article 87(2)]".[174]

125. This clearly does not apply in the *M/V Norstar* case, in which it is Panama that is invoking rights under Article 87(1), and not Italy. Italy is not entitled to any right under Article 87 in the present case, and therefore it cannot have abused any right. This also explains why the Tribunal did not mention abuse of rights in declaring Article 300 relevant in the present case. However, Panama insists that "it is highly contradictory for Italy to claim that Article 87 does not confer any right or jurisdiction to Italy in the present dispute after having ordered the seizure of the M/V Norstar".[175] What Panama has failed to understand is that Italy has not grounded the arrest of the *M/V Norstar* on Article 87 the Convention, for the simple fact that Article 87 of the Convention does not confer States any right in this regard.

126. Again, Panama shows that it has misconceived the notion of abuse of rights under Article 300, read in conjunction with Article 87, when it states that the Public Prosecutor in Savona "abused[d] the rights of the M/V Norstar"[176] when it speaks of the abuse of the rights of the people involved in the *M/V Norstar*.[177] For the reasons specified above, this notion of abuse of rights does not concern Article 300 in connection with Article 87.

---

[174] Philipp Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer 2007) 47.
[175] Panama's Reply, para. 241.
[176] Panama's Reply, para. 269.
[177] Panama's Reply, para. 267.

CHAPTER 5
THE APPLICATION OF OTHER RULES OF INTERNATIONAL LAW

I. Articles 92(1), 97(1) and 97(3) of the Convention

127. In its Reply, Panama argues that, contrary to Italy's analysis, by attempting to introduce Articles 92(1), 97(1) and 97(3) within the purview of the dispute between the Parties, it is not trying to enlarge such a dispute, or to make new claims.[178] Italy takes good notice of this position, as well as of the fact that in its submission Panama does not ask the Tribunal to rule on any alleged breach by Italy of the contested provisions.[179]

128. However, despite Panama's assurances, it appears that attempting to surreptitiously enlarge the dispute is precisely what Panama is doing, for example when it states that "the fact that only articles 87 and 300 have [...] been considered relevant to the present dispute does not preclude the Tribunal *from considering other violations of international law closely related to these provisions*".[180] If, by this sentence, as it appears,[181] Panama intends that the Tribunal should investigate whether Italy has violated Articles 92(1), 97(1) and 97(3), Panama is, for all intents and purposes, trying to enlarge the dispute and make new claims.

129. For the reasons already specified by Italy in its Counter-Memorial, the Tribunal cannot investigate in the present dispute whether Italy has violated Articles 92(1), 97(1) and 97(3) of the Convention. These are recapitulated below.

130. Article 24 of the Statute of the Tribunal indicates that "[d]isputes are submitted to the Tribunal, as the case may be, either by notification of a special agreement *or by written application*, addressed to the Registrar. In either case, the subject of the dispute and the parties shall be indicated" (emphasis added).

131. The Rules of the Tribunal specify at Article 54(1) and (2) that:

> "1. When proceedings before the Tribunal are instituted by means of an application, the application shall indicate the party making it, the party against which the claim is brought and the subject of the dispute.
> 2. The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Tribunal is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based".

Italy would like to stress that these rules are not mere formalities, but, as the Tribunal has stressed:

---

[178] Panama's Reply, para. 370.
[179] Panama's Reply, para. 593.
[180] Panama's Reply, para. 367 (emphasis added).
[181] Panama's Reply, paras. 372-378.

> "[T]hese provisions are essential from the point of view of legal security and the good administration of justice".[182]

132. Last, with respect to incidental proceedings, Article 97(1) of the Rules speaks of "any objection to the jurisdiction of the Tribunal or to the admissibility of the application".

133. In Panama's original application to the Tribunal there was no reference whatsoever to either Articles 92(1), 97(1) or 97(3). Based on Panama's claims and provisions as stated in the application, Italy has instituted preliminary proceedings before the Tribunal, also for the subsidiary purpose of having the scope of the dispute determined. The scope of the dispute has been determined by the Tribunal as concerning Article 87 and Article 300; there is no reference in the Tribunal's judgment delimiting its jurisdiction and the admissibility of the dispute to any of the provisions that Panama now tries to invoke next to those. It would render preliminary proceedings entirely nugatory if a party were allowed to bring new provisions under the purview of a dispute after those preliminary proceedings. For this reason, Italy's main claim is that the Tribunal simply does not have jurisdiction to hear Panama's claims on Articles 92(1), 97(1) or 97(3).

134. Even if preliminary proceedings had not occurred in the present case, Panama's claim concerning Articles 92(1), 97(1) or 97(3) would be a belated one, and hence inadmissible. The Tribunal confirmed this approach in the *Louisa* case, in which it held that a new claim based on a different provision of the UNCLOS not originally mentioned in the application is not admissible unless it arises directly out of the application or is implicit in it.

135. The relevant passages from the decision read as follows:

> "The Tribunal considers that this reliance on article 300 of the Convention [a provision not mentioned in the Application] generated a new claim in comparison to the claims presented in the Application; it is not included in the original claim. The Tribunal further observes that it is a legal requirement that any new claim to be admitted must arise directly out of the application or be implicit in it
> In this context, the Tribunal wishes to draw attention to article 24, paragraph 1, of its Statute. As noted earlier, this provision states, inter alia, that when disputes are submitted to the Tribunal, the "subject of the dispute" must be indicated. Similarly, by virtue of article 54, paragraph 1, of the Rules, the application instituting the proceedings must indicate the "subject of the dispute". It follows from the above that, while the subsequent pleadings may elucidate the terms of the application, they must not go beyond the limits of the claim as set out in the application. In short, the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character".[183]

136. This position, and the focus on the application as the pleadings that must identify the nature and scope of the dispute, is in line with the case law of other international courts and

[182] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4, para. 148.
[183] *Ibid.*, paras. 142-143.

tribunals. The Permanent Court of International Justice in *Prince von Pless Administration* explained that:

> "[U]nder Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein".[184]

137. The International Court of Justice has also discussed the question of new claims that are not made *ab initio* in the application instituting a dispute before the Court. In *Certain Phosphate Lands in Nauru*, quoting with approval its settled 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)".[185]

138. In the *Oil Platforms* case, similarly, the Court noted that:

> "It is well established in the Court's jurisprudence that the parties to a case cannot in the course of proceedings 'transform the dispute brought before the Court into a dispute that would be of a different nature'".[186]

139. Considering that Articles 92(1), 97(1) or 97(3) and their content were not even mentioned in Panama's Application and therefore do not arise directly from it, the issue that Italy would like to address is whether these claims can be considered as implicit in Panama's Application. The answer should be most definitely in the negative. Panama does try to show the existence of a link between its original application and the provisions that it now seeks to introduce into the dispute. The link, according to Panama, is constituted by a single expression in Panama's application, namely that the seizure of the *M/V Norstar* was made "upon request of the Italian authorities".[187]

140. However, this is a mere statement of fact, uncontested between the parties, and in no way suggestive of any implicit claim in Panama's Application concerning Articles 92(1), 97(1) or 97(3). And in fact, in order to try and argue that a claim under Articles 92(1), 97(1) or 97(3) is implicit in Panama's claim, it is necessary for Panama to resort to another passage, which reads as follows: "on the high seas, the *M/V Norstar* was subject to the exclusive jurisdiction of Panama as its flag State".[188] This passage, however, does not feature in Panama's Application. Rather, it is to be found in Panama's Memorial as Panama itself

---

[184] *Case concerning the Administration of the Prince Von Pless (Germany v. Poland)*, Preliminary Objection, Order of 4 February 1933, PCIJ Series A/B No. 52, p. 14.

[185] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, ICJ Reports 1992, p. 240, at 266, para. 67.

[186] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, p. 161, at 213, para. 117.

[187] Panama's Reply, para. 380.

[188] Panama's Reply, para. 381.

says.[189] A Memorial that was submitted months after the Application, and months after the Judgment of the Tribunal that decided on the phase of incidental proceedings. A Memorial that Italy has already contested on this aspect in its Counter-Memorial.

141. Nor is Panama's argument acceptable that "Articles 92 and 97 are integral parts of [...] freedom of navigation on the high seas".[190] This is a self-serving reading of Articles 92 and 97. By Panama's logic, virtually every provision of the Convention can be linked to freedom of navigation under Article 87, and hence brought into the dispute. This would amount to the obliteration of the principles of *legal security and good administration of justice* of which the Tribunal spoke in *Louisa*,[191] and that the Rules and Statute of the Tribunal protect and promote.

II. The claims concerning human rights

142. Italy has already addressed Panama's claims concerning the alleged breach of human rights in its Counter-Memorial, where it has explained the reasons why the Tribunal does not have jurisdiction to make a finding of the nature asked by Panama, namely that Italy has breached certain human rights provisions that have an independent enforcement regime outside the Convention. Italy would like to refer the Tribunal to the arguments presented at paragraphs 215-223 of its Counter-Memorial.

143. Panama's reply to Italy's argument on the matter is based on a fundamental confusion between the law that the Tribunal can apply to disputes under the Convention by virtue of Article 293, and the extent of the jurisdiction of the Tribunal under Article 288(1). The difference between these two notions, however, is glaring, and has been addressed a number of times by law of the sea courts and tribunals.

144. In the *MOX Plant* Procedural order No. 3, a Tribunal constituted under Annex VII to the UNCLOS, determined that:

> "The Parties discussed at some length the question of the scope of Ireland's claims, in particular its claims arising under other treaties (e.g. the OSPAR Convention) or instruments (e.g. the Sintra Ministerial Statement, adopted at a meeting of the OSPAR Commission on 23 July 1998), having regard to articles 288 and 293 of the Convention. The Tribunal agrees with the United Kingdom that there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under article 293 of the Convention, on the other hand".[192]

145. In line with this distinction, Italy's position is not that the Tribunal cannot consider human rights obligations in interpreting the Convention and Article 87, or that human rights

[189] Panama's Reply, para. 381.
[190] Panama's Reply, para. 383.
[191] *Supra*, note 182.
[192] *MOX Plant (Ireland v. United Kingdom)*, PCA Case No. 2002-01, Procedural Order No. 3, 24 June 2003, para. 19.

law and law of the sea are "separate planets rotating in different orbits",[193] but that the Tribunal does not have the jurisdiction to make a judicial finding that Italy has breached any human rights provision. Provisions concerning the applicable law cannot be used to expand beyond its limit the jurisdiction of an adjudicative body, with special regard to a law of the sea Tribunal. There is ample authority that substantiates Italy's position with regard in particular to the relationship between the jurisdiction of a law of the Sea Tribunal under Article 288(1) of the Convention, and the applicable law under Article 293. Italy has already quoted the *Artic Sunrise* case, in which an Annex VII Arbitral Tribunal held that:

> "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*".[194]

146. Panama claims that Italy has quoted selectively from the *Artic Sunrise* case, and brings to Italy's and the Tribunal's attention another passage from the quoted decision, which reads as follows:

> "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". [195]

147. However, as it is clear from the quotation from *Artic Sunrise* made by Italy, which is exactly the same quotation Italy made in its Counter-Memorial,[196] Italy has not quoted selectively from *Arctic Sunrise*, or cherry-picked passages to its own advantage. The passage reported by Panama is already contained in the passage quoted by Italy. However, it does not

[193] Panama's Reply, para. 403.
[194] *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).
[195] *Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation)*, PCA Case No. 2014–12, Award on the Merits, 14 August 2015, para. 198.
[196] Italy's Counter-Memorial, para. 222.

advance in any way Panama's proposition that the Tribunal has jurisdiction to declare that Italy has breached a number of human rights provisions external to the Convention, such as Article 17 of the Universal Declaration of Human Rights;[197] Articles 17 and 54 of the Charter of Fundamental Rights of the European Union;[198] Articles 1 and 2 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms;[199] Articles 4 of Protocol 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms.[200]

148. In the *Duzgit Integrity Arbitration*, the Annex VII Arbitral Tribunal confirmed the approach of the *Artic Sunrise* Tribunal and explained:

> "Article 288(1) limits the jurisdiction of this Tribunal to disputes concerning the interpretation or application of the provisions of the Convention. Article 293(1) provides that the Tribunal shall apply the Convention and other rules of international law not incompatible with the Convention. The combined effect of these two provisions is that the Tribunal *does not have jurisdiction to determine breaches of obligations not having their source in the Convention (including human rights obligations) as such*, but that the Tribunal "may have regard to the extent necessary to rules of customary international law (including 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".[201]

149. Without prejudice to Italy's position articulated above that Panama's human rights claims do not fall within the jurisdiction of the Tribunal, and cannot result in a determination that Italy has breached the human rights law provisions indicated by Panama, Italy has also explained in its Counter-Memorial that human rights claims would be inadmissible, since they have belatedly been advanced by Panama only in the Memorial, and not in the Application instituting proceedings.[202] It appears that Panama agrees that the late presentation of a claim prevents the Tribunal from entertaining it, since at paragraph 393 of its Reply Panama reminds Italy that in the *Louisa* Case, "the Tribunal determined that its lack of jurisdiction [over certain human rights provisions] ensued because such claim was presented "after submitting the application".[203]

150. Last, Italy would like to recall that for the reasons indicated in its Counter-Memorial,[204] and without prejudice to the arguments against the jurisdiction of the Tribunal over Panama's human rights claims, and their admissibility, Italy's conduct has not, on the merits, constituted a breach of the human rights of those involved in the *M/V Norstar*. Without the need to recall in full those arguments here, Italy would like to add only some additional notations.

---

[197] Panama's Memorial, para. 139.
[198] Panama's Memorial, paras. 140-141.
[199] Panama's Memorial, paras. 142-143.
[200] Panama's Memorial, para. 148.
[201] *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, paras. 207-208 (emphasis added).
[202] Italy's Counter-Memorial, para. 224.
[203] Panama's Reply, para. 393.
[204] Italy's Counter-Memorial, paras. 224–232.

151. First, the test concerning the application of human rights standards to the law of the sea under Article 293 is one of reasonableness. As the Tribunal stated in the *Duzgit Integrity Arbitration,*

> "The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed by certain rules and principles of general international law, *in particular the principle of reasonableness*. This principle encompasses the principles of necessity and proportionality".[205]

152. There is absolutely nothing unreasonable or disproportionate in the way Italy has treated those involved in the *M/V Norstar*. As explained in Italy's Counter-Memorial, no one involved in this case was deprived of his personal freedom and no one spent even a single day in detention,[206] and this matter is not disputed between the parties.[207] The entire procedure of arresting the *M/V Norstar* was carried out in full compliance with the Italian Code of Criminal Procedure.

153. In some passages of its Memorial, Panama is essentially moving a denial of justice claim against Italy. It does so when it accuses Italy of having breached procedural rights to an effective remedy, actual reparation, and the general principles of fair trial.[208] These claims are entirely devoid of any merits. Not only has Italy not breached any of the rights guaranteed to those involved in the *M/V Norstar*, including rights to personal freedom and to property, but it has made available to those concerned the entire plethora of the domestic means that the Italian judicial system provides to review judicial decisions, and to seek reparation, in the event a judicial wrong is alleged. Those involved in the *M/V Norstar* have been partly resorted to this system, for instance by successfully securing the lifting of the Decree of Seizure (only to fail later on to collect the released vessel) by way of a review of the decision of the Prosecutor.[209] Partly, they have decided not to follow the road of domestic justice, even when this was entirely available. For instance, Mr. Morch claims that it was not in the position to pay the bond upon which the release was conditional.[210] And yet, he has never requested the review of that sum, despite the fact that a review procedure was possible and available. As Italy has explained in its Counter-Memorial, but would like to recall here for ease of reference:

> "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. 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

---

[205] *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016, para. 209 (emphasis added).
[206] Italy's Counter-Memorial, paras. 227–231.
[207] Panama's Reply, para. 21.
[208] Panama's Memorial, para. 134.
[209] Italy's Counter-Memorial, paras. 53–55.
[210] Panama's Memorial, para. 28; Panama's Reply, para. 455.

> before the Court of the capital of the province where the office of the judicial authority which ordered the measure is situated".[211]

154. Similarly, as Italy has explained, if those involved in the *M/V Norstar* felt that they suffered procedural misconduct by the Italian courts, domestic remedies would have been available to seek damages.[212]

155. Italy's position is that, in the circumstances, Panama cannot claim a denial of justice, as it seems to be doing. As explained in the introduction to these pleadings, the question of exhaustion of local remedies for the purposes of the jurisdiction and admissibility phase of these proceedings is distinct from the question as to whether a substantive breach of the nature Panama has invoked – breach of fair trial and lack of effective remedy – can occur before having resorted to, and exhausted, the road of domestic justice. There are several authorities supporting this proposition. According to Crawford and Grant, for instance:

> "There is also a class of cases in which failure of the local courts is the gist of the wrong—the delict of denial of justice, which has its close analogy in the field of human rights to breaches of due process such as those stipulated in Art. 14 of the International Covenant on Civil and Political Rights. Since what fails here is the system of justice and not the individual judge, the principle of exhaustion applies as a matter of substance to the definition of denial of justice, and not to the process of denial of justice as a matter of admissibility".[213]

156. In a similar fashion, Prof. Paulsson, for example, explained:

> "[T]he very definition of the delict of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial before exhaustion. (To put it more precisely, the offending State must be given reasonable opportunity to correct actions which otherwise would ripen into delicts.) […] To take one step further: denial of justice is by definition to be distinguished from situations where international wrong materialises before exhaustion of local remedies".[214]

157. Case law confirms the validity of this position. The Tribunal in *Lowen*, after a review of the relevant case law, concluded that

> "[N]o instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system".[215]

---

[211] Italy's Counter-Memorial, para. 277(b); footnotes omitted.
[212] Written Observations and Submissions of Italy in Reply to Observations and Submissions of the Republic of Panama, paras. 114-122.
[213] James R. Crawford and Thomas D. Grant, 'Local Remedies, Exhaustion of' in *Max Planck Encyclopedia of Public International Law* (January 2007) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e59> accessed 13 June 108, para. 41.
[214] Jan Paulsson, *Denial of Justice in International Law* (CUP 2005) 111.
[215] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 154.

158. In the *Waste Management* case, an ICSID Tribunal explained with the utmost clarity that:

> "[T]he tribunal held that, where the minimum standards of international law in question in a particular case are raised in respect of a claim of judicial action—that is, a denial of justice—what matters is the system of justice and not any individual decision in the course of proceedings. *The system must be tried and have failed, and thus in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim*".[216]

[216] *Waste Management Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), par. 97 (emphasis added).

CHAPTER 6
DAMAGES

I. None of the alleged damages are a consequence of the alleged illegality of the Decree of Seizure

159. Before addressing the positions regarding damages in Panama's Reply, Italy would like to stress a fundamental point which it believes is crucial for the correct characterization of the dispute and the general discussion in the field of damages. It is necessary to recall once again paragraph 122 of the Judgment of 4 November 2016, in which the Tribunal limited its investigation to the compatibility with Article 87 of the Decree of Seizure and the Request for its Execution, as opposed to their actual execution. In this regard, Italy would like to stress that any damage that Panama claims to have suffered, by Panama's own admission, would not derive from the Decree of Seizure or from the Request for Execution as such, but rather *from the actual enforcement of the order of arrest*.

160. At paragraph 405 of its Reply, by way of example, Panama states that it will demonstrate that "all damages caused have directly resulted *from the enforcement of the arrest of the M/V Norstar* [...]".[217] Also, at paragraph 410 it claims that "the lost profits resulting from the detention of the *M/V Norstar*, and its consequential inability to conduct further business, as well as all of the damages caused to the persons connected therewith have one and one only root cause: *the arrest enforcement"*. Not only is the question of the enforcement of the arrest not part of the present dispute, but Italy has also shown how the arrest was entirely legal under Article 87, since it was performed in an area of the sea where the *M/V Norstar* did not enjoy freedom of navigation.

161. Therefore, even if, contrary to Italy's arguments, the Tribunal should find that the Decree of Seizure and the Request for its execution as such (e.g. rather than the execution of the arrest) constitute a breach of Article 87, Italy believes that the remedy should be a declaratory judgment finding the illegality of those acts, but not the awarding of *any* damage, since no damage ensued from the Decree of Seizure of the Request for Execution. Put in other words, there is no causal link between the mere existence of the Decree of Seizure and the Request for Execution, and any of the damages that Panama claims to have suffered. Until the Decree of Seizure was actually executed, it did not deploy any effect at all on Panama: nor on its freedom of navigation, nor as regards any damage that it may have suffered.

II. Most of Panama's claimed heads of damages are not a direct consequence of the arrest of the *Norstar*

162. Without prejudice to this argument, Italy has shown in its Counter-Memorial that even the execution of the Decree of Seizure and the enforcement of the arrest of the *M/V Norstar*, assuming for the sake of the argument that they were illegal, cannot be considered to have

[217] Panama's Reply, para. 405 (emphasis added).

determined all the damages that Panama tries to impute to Italy. In this sense, Italy has shown that the causative link between the arrest and the damages can only be said to exist with respect to the loss of the vessel and of the cargo, and even in this case only for a limited period of time.

163. Italy's position as articulated in the Counter-Memorial is that, as established by case law, it is only damages that are the direct consequence of an illegal act that can be compensated in international law. As indicated by the International Law Commission,

> "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*".[218]

164. There is no need to go again through the case law that Italy has already indicated in its Counter-Memorial.[219] However, it may be worth to notice that the rationale for allowing compensation only to direct and natural consequences of an illegal act is precisely to avoid doing what Panama is doing, namely trying to extend the scope of compensable damages also to damages that are speculative, not proximate by time and logic and not naturally connected to the alleged illegal act. Panama's logic is not dissimilar to what would be called "*regressus in infinitum*" in the context of criminal law: the cause of a homicide, in general principles, could be traced back to the birth of the murderer. Surely, but for the birth of a murderer, a homicide would not have occurred; however, the "but for" is not a valid way to establish causality and the process of mental elimination of a remote cause to prove causality is not a sound method to proceed, precisely due to the illogical consequences to which it leads.

165. Panama also claims that Italy makes generic statements about how certain heads of damages are not the direct consequence of the arrest of the *M/V Norstar*, and urges that Italy show how such damages are not direct. However, it is not for Italy to show that the damages are not the natural consequences of Italy's conduct. It is for Panama, if it seeks compensation of alleged direct damages, to prove how the connection between Italy's conduct and those damages can be said to be direct. Something which, again, Panama does not do, basing its assessment on speculative considerations and a faulty logic, and trying to reverse the burden of proof where it cannot discharge it. Italy will show here the most glaring examples of Panama's faulty logic.

166. Panama complains that, due to the arrest of the *M/V Norstar*, it was unable to pay the wages of the crew and the captain, and the taxes due to the Panama Maritime Authority. Yet, for instance, the crew and the captain could have been paid by revenues generated by the ship-owner in other manners, or by taking out a loan, or from savings of the ship-owners, or again by selling any asset of the company. Not being able to pay the wages of employees is not a natural consequence of the arrest of a ship. The same can be said with regards to the question of the payment of taxes and fees to the Panama Merchant Marine.[220]

---

[218] 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).
[219] Italy's Counter-Memorial, para. 241, and footnotes thereto.
[220] Panama's Reply, paras. 412 and 414.

III. The breakage of the link of causality

167. In its Counter-Memorial, Italy has explained why, even if a link of causality should be found to exist between Italy's conduct and some of the damages incurred by Panama, such link of causality has been interrupted on at least two occasions: first, when the conditional release of the *M/V Norstar* was authorized in 1999; second, and in any event, when the ship was unconditionally released in 2003.

168. To this latter point, Panama has essentially replied by stating that the release of the *M/V Norstar* was never communicated to the ship-owner.[221] Since this is a mere question of fact, Italy has already addressed it in Chapter 2, Section V, of this Rejoinder, and has demonstrated that the ship-owner had been made aware a number of times that the vessel could have been collected, and yet did not act upon Italy's communications. Panama's argument should therefore fail already at the level of the facts.

169. In a last attempt to salvage its position, Panama has also claimed that, in any event, the ship-owner could not have taken possession of the ship, since this had not received the necessary maintenance and could not have left port of Palma de Mallorca. Panama's point deserves some observations. First, it was not for Italy to carry out the maintenance of the ship, or make sure that the necessary bureaucracy concerning the M/V *Norstar* was duly executed. A custodian was appointed for this purpose, and any alleged failure to take due care of the ship is not to be blamed on Italy. Second, there would have been several ways for Panama and the ship-owner to collect the ship from Palma de Mallorca once released, independent of the existence of the ship's class and certificates. Yet, none of these were put in place. Last, but most importantly, for the purposes of the discussion in this Section, it is entirely irrelevant that, for whatever reason, Panama claims that the ship-owner was not in a position to collect the ship. What matters is that the ship was collectable, no more under seizure and ready to be delivered. The detention simply came to an end, so that Panama's alleged cause of the damages was simply non-existent.

170. Even before the definitive release of the ship in 2003, however, the causative link between the alleged illegal act by Italy and the damages suffered by Panama was interrupted, in 1999, when the Public Prosecutor in Savona ordered the conditional release of the vessel, and allowed the ship-owner to collect the ship, subject to the payment of a bond.[222] Panama's counterargument in respect to Italy's argument is, on the one hand, that requesting a bond in order to secure the release of a ship is illegal *per se*; on the other hand, that the requested bond was in any event unreasonable as to its amount.

171. On both aspects, Italy would like to refer the Tribunal to what Italy has stated in its Counter-Memorial (paras. 255-265) and to stress that, not only is requesting a bond entirely warranted under both domestic and international law, but that the amount of the requested bond was not unreasonable.

172. The fact that the ship-owner was not in the financial position to post a reasonable bond, and have the ship released, is immaterial to the discussion as to whether the causal link was breached. The ship-owner's inability to provide a reasonable bond, and Inter Marine's

[221] Panama's Reply, paras. 459-468.
[222] Italy's Counter-Memorial, paras. 255-265.

financial position, with poor liquidity and a high level of short-term debt,[223] as Panamas' own documents demonstrate, cannot become a reason of grievance against Italy.

173. Last, Panama argues that:

> "[F]inally, even if the owner had the financial means to post the bond, this payment would not have been reasonable because once the M/V 'Norstar' had been released after posting the bond, it would probably have been arrested again at the next opportunity doing its business".[224]

174. This is an entirely unsubstantiated claim, that shows Panama's lack of knowledge of even the most basic principles of criminal procedure. It does not need to be addressed any further.

IV. Contributory negligence and the duty to mitigate damages

175. At paragraph 270 of its Counter-Memorial, Italy has argued that:

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

176. Italy has invoked contributory negligence and the duty to mitigate damages as defences to counter Panama's claim on the amounts of damages allegedly due from Italy to Panama. Indeed, "the concept of contributory fault (or contributory negligence) in international law has been developed to address the consequences of blameable conduct of a party injured by an internationally wrongful act".[225] However, Panama has entirely misconceived Italy's reliance on contributory negligence and the duty to mitigate damages, stating that Italy's argument constitutes a counterclaim, and as such it would be inadmissible under the rules of procedure of the Tribunal.[226]

177. Panama's characterization of Italy's arguments as counterclaims is patently wrong, by the very definition of counterclaim that Panama quotes in its own pleadings. According to Panama, a counterclaim "is defined as one made by a defendant who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff, instead of bringing a separate action".[227]

178. In more elaborate terms, the International Court of Justice has explained that:

---

[223] *Letter sent by Sparebanken NOR to the ship-owner by fax denying a guarantee to lift the arrest, 16 September 1998* (**Annex S**).
[224] Panama's Reply, para. 457.
[225] Wojciech Sadowski, 'Yukos and Contributory Fault' (2015) 5 TDM <www.transnational-dispute-management.com/article.asp?key=2257> accessed 13 June 2018.
[226] Panama's Reply, paras. 487 and 492-495.
[227] Panama's Reply, para. 486.

> "Whereas it is established that a counter-claim has a dual character in relation to the claim of the other party; whereas a counter-claim is independent of the principal claim in so far as it constitutes a separate 'claim', that is to say an autonomous legal act the object of which is to submit a new claim to the Court, and, whereas at the same time, it is linked to the principal claim, in so far as, formulated as a "counter" claim, it reacts to it; whereas the thrust of a counter-claim is thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings — for example, that a finding be made against the Applicant; and, whereas in this respect, the counter-claim is distinguishable from a defence on the merits".[228]

179. However, Italy is not making any claim against Panama, nor seeking any relief that it could seek through a separate action. Italy is not trying to broaden the scope of the dispute, nor invoking any provision that Panama would have breached. Italy is simply advancing its defence on Panama's claim regarding damages. Panama's argument that "by proposing the existence of contributory fault on the part of Panama [...] Italy is seeking relief against the former" is simply wrong.[229] The entirety of Panama's arguments revolving around the nature of counterclaim of Italy's argument should therefore fail.

180. In the same manner, Panama's position that by invoking contributory fault Italy is admitting that damages have been caused by Italy to Panama is simply wrong. As is customary in litigation, Italy is articulating arguments in the alternative, and according to a certain order of logic. By invoking contributory fault Italy is not saying that damages have occurred. It is simply saying, and quite obviously so, that if any other line of defence made by Italy (such as the lack of any breach of Article 87, the lack of a causal link between the alleged illegal conduct and the damages, the interruption of the causal link, etc.) should fail, and if the Tribunal should find that damages have occurred, these are also the consequence of Panama's own negligent conduct.

V.The individual heads of damages

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

181. In its Reply, Panama has not properly answered the three arguments put forward by Italy at paragraphs 288-294 of its Counter-Memorial according to which: a) the estimation of the value of the vessel is not based on physical inspection; b) Panama has not produced evidence supporting the quantification submitted; c) Panama conflates *lucrum cessans* with *damnum emergens* considerations in the quantification, hence incurring in double recovery.

---

[228] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Counter-claims, Order of 17 December 1997, ICJ Reports 1997, p. 243, at 256, paras. 26-27.

[229] Panama's Reply, para. 487.

182. First, as to the Italian arguments according to which an estimation not based on a physical inspection of the ship would be necessarily flawed,[230] and would be affected by Panama's speculative allegation of the "very good conditions" of the ship,[231] Panama simply replies that "it is inexact to state that C.M. Olsen A/S did not know the M/V 'Norstar'"[232] because he "had seen the photos of the vessel taken before the Italian detention"[233] and "it had inspected [the ship] prior to the signature of the [Charter contract]".[234]

183. The above allegations by Panama about the presumed "very good conditions" of the vessel remain unsupported by evidence, if only for the fact that the photos are not dated and cannot counter Italy's considerations advanced in the Counter-Memorial as to the lack of evidentiary relevance of the estimation produced by Panama. As stressed in the Counter-Memorial,[235] it was the estimation by C.M. Olsen A/S himself that called into question its own accuracy, as follows:

> *"[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 relevant information given is correct
>
> CM Olsen A/S repudiate any responsibility by presentation of this estimation of value".[236]

184. Second, Panama surprisingly claims that "by providing such a standard of evidence, the burden of proof now shifts to the respondent to prove that this assessment was wrong".[237] The fact of the matter, however, is that Panama has not discharged her own burden of proof by any standard of evidence. Panama's argument on the estimation of the ship is entirely based on an estimation made in April 2001, almost three years after the arrest of the *M/V Norstar*, without any inspection of the ship and apparently on the basis of the same photos that Panama attaches to its Reply,[238] which are not dated. Were one to consider that C.M. Olsen had inspected the vessel prior to the signature of the Charter contract, it would mean that the inspection had been made before 10 May 1998, *i.e.* four months before the request by Transcoma to the Palma de Mallorca Port authority to get the ship into the port and moor it to the quay due to the break of the starboard anchor, the very bad condition of the portside anchor and the breakdown of the main generator.[239]

185. Third, as to Italy's arguments according to which "Panama confuses the criteria used for estimation of the damage for the direct loss with the criteria used for estimation of *lucrum cessans*",[240] Panama simply asserts that "[w]ithout detailed reasoning, however, it is just as

---

[230] Italy's Counter-Memorial, paras. 290-291.
[231] Italy's Counter-Memorial, para. 292.
[232] Panama's Reply, para. 530.
[233] Panama's Reply, para. 531.
[234] Panama's Reply, para. 532.
[235] Italy's Counter-Memorial, para. 290.
[236] *Statement for estimation of value of M/V Norstar by C.M. Olsen, 4 April 2001* (**Annex T**), at 2 (emphasis added).
[237] Panama's Reply, para. 533; in a similar vein, para. 539.
[238] Panama's Reply, Annex 4.
[239] *Report of the seizure by the Spanish Authorities, 25 September 1998* (**Annex U**), at 3.
[240] Italy's Counter-Memorial, para. 594.

impossible for Italy to sustain its argument as it is for Panama to oppose it".[241] Again, Panama seems oblivious of the documents the it has attached to its own pleadings. As Italy has shown in its Counter-Memorial, it is C.M. Olsen that maintains that the estimation is based on *pro futuro* considerations, as follows:

> "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".[242]

186. In sum, the Statement for estimation by C.M. Olsen A.S., which is the only piece of evidence provided by Panama with regard to the value of the *M/V Norstar*, is irrelevant for the purposes of the assessment of the material value of the vessel at the time of the issuance of the Decree of Seizure, as it is based on exclusively *lucrum cessans* considerations.

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

187. Italy in its Counter-Memorial argued that Panama "failed to provide any objective quantification of the profits allegedly lost" and that "Panama's claim is remarkably deficient in terms of its evidence".[243] In its Reply, Panama could not make up for any such deficiencies, but confined itself to maintain that Italy's arguments are "unfounded" and "incorrect"[244] without any evidentiary or argumentative support.

188. Against this background, without wishing to repeat arguments put forward in the Counter-Memorial at paragraphs 295-303, Italy will limit itself to singling out the main flaws of Panama's stand on its claim for damage based on loss of profit.

189. First and foremost, Panama patently reiterates the *lucrum cessans* evaluations which it improperly applied to the calculation of the *damnum emergens*, as indicated out above, thus incurring in double recovery.[245]

190. Second, on the basis of such a vitiated argument, Panama is further unjustly applying interest to loss of potential revenue incurring twice in double recovery. The unjust nature of Panama's claim in both respects is most clearly illustrated in systemic terms by the following statement of Professor Stephan Wittich,

> "A special problem involved with lost profits is that of double recovery. This is relevant in two respects. First of all, expenditures arising as a consequence of a breach may be taken into account in calculating either the principal damage or lost profits, but not both. And second, if lost profits are to be awarded they may not be the basis for an award of interest [...]

---

[241] Panama's Reply, para. 538.
[242] *Statement for estimation of value of M/V Norstar by C.M. Olsen, 4 April 2001* (**Annex T**), at 2.
[243] Italy's Counter-Memorial, para. 298.
[244] Panama's Reply, para. 543.
[245] *Supra*, para. 185.

because the capital sum cannot be simultaneously earning interest and generating profits".[246]

1. Causation of the claim for loss of profit

191. The Panamanian claim for loss of profit is factually grounded only on the Charter contract between Inter Marine A.S. and Nor Maritime Bunker Co. Ltd of 10 May 1998.[247] Panama replies to Italy's claim in its Counter-Memorial that "Panama's projected profits are entirely speculative in nature and based on events that are, at best, uncertain"[248] arguing that its assessment is based on "*the possibility* of twice exercising the option of renewal for one year [of the Charter contract]".[249]

192. Even conceding that the contract might have remained in force for the whole duration of 5 years plus the renewal option, the Charter party would have remained in force for a maximum of 6 years. Panama does not reply to Italy's question why the Charter contract[250] should be considered to ground the claim for alleged loss of revenue up until 2010, nor does it provide evidence supporting this assertion.

193. Panama only speculates that the contract would be prolonged until 2010, while the contract clearly provided for a 5-year duration, renewable for one year, that is until June 2004. Speculations or inferences of the kind put forward by Panama are not admissible. As clearly stated by Sir Percy Spender in his Dissenting Opinion in *Temple of Preah Vihear*, but clearly concurrent with the majority on the general point at issue, "[n]o presumptions can be made and no inference can be drawn which are inconsistent with facts incontrovertibly established by the evidence".[251]

194. Nor does Panama provide evidentiary grounds in support of its assertion that it is entitled to present "calculations […] updated taking into account the probable date of the hearing, the date of the judgment and the date on which Italy actually fulfils its obligation and effectively pays the amount that the Court decides".[252]

195. Panama could not make up for a situation which recurrently leads to the rejection of similar claims. As pointed out by Sir Hersch Lauterpact,

---

[246] Stephan Wittich, 'Compensation', in *Max Planck Encyclopedia of Public International Law* (May 2008) <http://opil.ouplaw.com.ezproxy.unibo.it/view/10.1093/law:epil/9780199231690/law-9780199231690-e1025?prd=EPIL#law-9780199231690-e1025-div2-8> accessed 13 June 2018, para. 34.
[247] Panama's Reply, para. 543.
[248] Italy's Memorial, para. 300.
[249] Panama's Reply, para. 543 (emphasis added).
[250] *Time Charter Party between Inter Marine & Co. A/S and Nor Maritime Bunker Co. Ltd, 10 May 1998* (**Annex V**), at 2, para. 4.
[251] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Dissenting Opinion of Sir Percy Spender, ICJ Reports 1962, p. 101, at 109.
[252] Panama's Reply, para. 548.

> "The instances of rejection of claims [for loss of profit] are due [...] to the lack of adequate proof and a reasonably reliable basis of compensation, or to uncertainty, or their speculative character of their remoteness".[253]

196. In *Shufeldt*, the *Ad Hoc* Arbitral Tribunal held that the Party claiming *lucrum cessans* has to demonstrate that it is "the direct fruit of the contract and not too remote or speculative".[254] In a similar vein, the Tribunal in the *Amco* resubmitted case referred to "foreseeability" of loss[255] as the criterion to be applied in assessing loss of revenue. Similarly, the *S.D. Meyers* Arbitral Tribunal held that "[c]laimed profits must not be merely speculative. They must have been anticipated reasonably; in that sense, reasonably foreseeable at the time of the breach".[256]

197. In the light of the above, Panama has to demonstrate that the *quantum* of the profits allegedly lost could be foreseeable on the basis of sound evidentiary ground, but it failed to do so in its Memorial, and it has not made up for this in its Reply.

2. *Quantification of loss of profit*

198. In its Counter-Memorial Italy argued that for the purposes of quantification of loss of profit Panama has way overestimated the potential use of the *M/V Norstar*[257] and that it has not taken into account expenses associated to the use of the vessel.[258] Panama has not replied to the point at issue except for stating that it was for Italy to "give [...] reason why such a vessel could not be still a prosperous navigating enterprise"[259] and that the "expenses are already a part of the calculations and withdrawn from the revenue in the time charter hire".[260]

199. Even conceding that Panama has already considered those expenses in its "Loss-of-Profits calculation",[261] which is patently not the case, Panama still does not provide evidence about the sources and methods of this calculation. The Charter contract does not contain an estimation of those expenses which, according to said contract,[262] were to be discharged by the ship-owner. Panama just maintains that it is up to Italy to provide "any evidence for, or calculations of, the extent of maintenance required".[263] This is yet another attempt by Panama to reverse the burden of proof which is untenable.

---

[253] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co. 1927), pp. 149–150.
[254] *Shufeldt claim (Guatemala, USA)* (1930) 2 RIAA 1079, 1099.
[255] *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. The Republic of Indonesia*, ICSID Case No. ARB/81/1, Award (5 June 1990), paras. 175-176.
[256] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award (21 October 2001), para. 155.
[257] Italy's Counter-Memorial, para. 302.
[258] Italy's Counter-Memorial, para. 303.
[259] Panama's Reply, para. 547.
[260] Panama's Reply, para. 545.
[261] Panama's Memorial, Annex 18.
[262] *Time Charter Party between Inter Marine & Co. A/S and Nor Maritime Bunker Co. Ltd, 10 May 1998* (**Annex V**), at 2, para. 6.
[263] Panama's Reply, para. 547.

200. Panama's claim concerning the loss of revenue is remote at best, and totally unproven. Panama has not produced a single invoice, document or other piece of evidence in support of this head of damage.

C. Continued payment of wages and payment due for fees and taxes to the Panama Maritime Authority

201. In its Counter-Memorial, Italy pointed out that no direct causal link exists between Panama's alleged loss under the above two heads of damage and Italy's conduct.[264] With regard to the continued payment of wages, Italy has also maintained that "no evidence is provided to ground these assertions".[265]

202. In its Reply, Panama has not answered to the Italian argument on causation related to the two heads of damage in point, nor has it provided any piece of evidence concerning the existence of labour contracts, their number and amount of the wages. It has simply maintained that "the labor contracts for the crew remained in effect after the termination of the activities of the vessel [...]. As the State responsible for this unjustified seizure, Italy bears total responsibility for this".[266] It only added that the causal link between the alleged Italian wrongful act and the damages claimed would result from the fact that the ship-owner could have paid the wages, as well as the taxes, from the charter income.[267] Panama's lines of defense are faulted for the following reasons.

203. First, the fact that the labour contracts remained in force independently from the seizure, and that the *M/V Norstar* was still a Panamanian-flagged vessel at the time of the Application, demonstrate that no causal link exists between the Decree of seizure and the alleged "damage" stemming from the above two heads of damage. The case law, including from this Tribunal, substantiates the assertion to the effect that there cannot be a causal link between measures of constraint and costs ordinarily pertaining to the ship.

204. In *Saiga (No. 2)* this Tribunal maintained that:

> "The Tribunal notes that no evidence has been produced by Saint Vincent and the Grenadines that the arrest of the *Saiga* caused a decrease in registration activity under its flag, with resulting loss of revenue. The Tribunal considers that any expenses incurred by Saint Vincent and the Grenadines in respect of its officials must be borne by it as having been incurred in the normal functions of a flag State. For these reasons, the Tribunal does not accede to these requests for compensation made by Saint Vincent and the Grenadines".[268]

205. In the *Certain Activities* case, the ICJ held that:

---

[264] Italy's Counter-Memorial, paras. 305 and 313.
[265] Italy's Counter-Memorial, para. 305.
[266] Panama's Reply, para. 551.
[267] Panama's Reply, paras. 552 and 559.
[268] *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadine v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, para. 177.

> "The Court considers that salaries of government officials dealing with a situation resulting from an internationally wrongful act are compensable only if they are temporary and extraordinary in nature. In other words, a State is not, in general, entitled to compensation for the regular salaries of its officials".[269]

This reasoning applies all the more to wages of crew paied by a private natural or legal person on behalf of whom a State brings a case before an international court or tribunal.

206. Second, with specific regard to wages, Panama, again, does not produce any invoice, document or other piece of evidence concerning the number and *quantum* of wages.

207. On the basis of the above, Italy contends that also this head of damage claimed by Panama is unfounded in law and in fact.

D. Costs and legal fees

208. In its Counter-Memorial Italy counters Panama' extravagant claim of all legal fees and costs by referring to the general rule, codified at Article 34 of ITLOS Statute, that "unless otherwise decided by the Tribunal, each party shall bear its own costs".[270] Italy further left "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".[271]

209. In its Reply, Panama has simply stated that it "has only had to incur legal costs in the first place because Italy's conduct leading up to and following the arrest was such that without legal counsel, none of Panama's rights would have been duly protected".[272]

210. Panama's statement is clearly not apt to ground a departure from the Tribunal's established case law.

211. Panama further argues that "[s]ince Italy has not responded to any of the specifics, [it] requests the Tribunal to consider this as a tacit acceptance of its accounting, including that of its legal fees, as valid".[273] This statement totally misconceives the Italian position. Italy's acknowledgement of the Tribunal's power under Article 34 of its Statute to decide whether each party shall bear its own costs can in no way be interpreted as a tacit acceptance of Panama's accounting. If it retained any doubt on this point, Panama can rest assured that this is not the case.

---

[269] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (Compensation) <http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf> accessed 5 May 2018, para. 177.
[270] Italy's Counter-Memorial, para. 308.
[271] Italy's Counter-Memorial, para. 310.
[272] Panama's Reply, para. 556.
[273] Panama's Reply, para. 555.

E. Loss and damages claimed on behalf of the Charterer of the *M/V Norstar*

212. In its Counter-Memorial, Italy maintains that Panama's assessment of the loss and damages suffered by the Charterer were too remotely linked to the Italian alleged wrongful conduct,[274] are not supported by any evidence[275] and that, in any case, they are not credible.[276]

213. In its Reply, Panama has not properly answered to the Italian arguments also on this point. Panama plainly states that damages "can only be estimated because, due to the long time lapsed, documents are no longer available".[277]

214. Panama also offers the speculation that "if the vessel arrived to Palma *it is unlikely* that it did not have any fuel on board"[278] and that "it is obvious that the charterer would have made a profit if the M/V 'Norstar' had not been arrested and if it could have continued to be in operation".[279] In order to substantiate its speculation that "[t]he vessel arrived Palma de Mallorca [*sic*] almost full of gasoil in separate bunkertanks",[280] Panama finally produces an e-mail sent by the Mr. Vadis,[281] who Panama qualifies as the Managing Director of Inter Marine A.S.[282]

215. The e-mail in point, dated 27 May 2001 – that is, almost three years after the seizure – merely consists of a list of supposed purchasers, an indication of a supposed gasoil supply allegedly loaded in Algeria at a time which is not indicated and allegedly on board of the ship at the time of the seizure. Most importantly, this e-mail is not accompanied by any objectively assessable documents. In particular, it contains no receipts, nor invoices.

216. As it clearly appears from the Ship details sheet of the *M/V Norstar*,[283] Inter Marine A.S., of which Mr. Vadis was the Managing Director, was not the Charterer of the ship, but the owner. Accordingly, the e-mail in question is devoid of probative value, not only for its date and contents, but also because of the conflict of interest of its sender.

F. Material and non-material damage claimed on behalf of natural persons

217. In its Counter-Memorial, Italy has argued that "there is no causal connection between the criminal proceedings instituted against the individuals mentioned in Panama's Memorial, and the alleged violation by Italy of Article 87 of the Convention".[284]

---

[274] Italy's Counter-Memorial, para. 317.
[275] Italy's Counter-Memorial, paras. 315 and 318.
[276] Italy's Counter-Memorial, para. 319.
[277] Panama's Reply, para. 566.
[278] Panama's Reply, para. 561 (emphasis added).
[279] Panama's Reply, para. 566.
[280] Panama's Reply, para. 562.
[281] *E-mail of Mr Petter Vadis, Managing Director of Inter Marine A.S., 27 May 2001* (**Annex W**).
[282] Panama's Reply, para. 563.
[283] M/V Norstar *Ship Details sheet* (**Annex X**).
[284] Italy's Counter-Memorial, para. 321.

218. Panama has not replied to this. Quite astonishingly, it maintains in its Reply that "article 87 has not only been violated by the seizure but also by unlawfully charging innocent persons for performing legal activities".[285] Panama goes on claiming that "[t]hese damages would not have been incurred if Italy had not violated article 87 of the Convention by applying its customs laws and exercising its criminal jurisdiction for acts performed beyond its territorial waters".[286]

219. Without prejudice to the arguments put forward by Italy in its Counter-Memorial, especially, in paragraphs 227-229, and in this Reply, which show that claim behind this head of damage is devoid of any ground of merits based on the full compliance with the principles of due process of law and fair trial by the Italian Judiciary, Italy notes that by advancing a claim for immaterial damage Panama tries to make up for its inability to substantiate and provide evidence for material damage. This is not admissible. As it has been stressed in *Rompetrol Group N.V. v. Romania* in terms most germane to the present case, "'moral damages' cannot be admitted as a proxy for the inability to prove actual economic damage".[287]

220. Most importantly, and again without prejudice to the arguments recalled above concerning the lack of merits of Panama's claim grounding the head of damage in question, Italy is to recall, once again, that the Tribunal curtailed the scope of the present dispute in it Judgment of 4 November 2016 as follows:

> "*The Decree of Seizure* by the Public Prosecutor at the Court of Savona against the M/V 'Norstar' with regard to activities conducted by that vessel on the high seas and *the request for its execution* by the Prosecutor at the Court of Savona may be viewed as an infringement of the rights of Panama under article 87 as the flag State of the vessel".[288]

221. By delineating the present dispute so as to refer only to the request of execution of the Decree of Seizure, the Tribunal has excluded from the scope of its jurisdiction issues pertaining to the actual execution of the Decree of Seizure, which was not carried out by a Party to the present case. In so doing, the Tribunal made no reference to the Italian domestic criminal proceedings with regard to natural persons for the purposes of including them within the scope of the dispute with respect to which it has assessed its jurisdiction. Therefore, Panama's claim concerning material and non-material damage to natural persons falls outside the scope of the present dispute. Consequently, the head of damage grounded on this claim is inadmissible as much as the claim itself.

222. Finally, and without prejudice to the above arguments, Italy wishes to point out that Panama does not provide evidence supporting also this head of damage.

---

[285] Panama's Reply, para. 570.
[286] Panama's Reply, para. 572.
[287] *The Rompetrol Group N.V. v. Romania*, ICSID Case No ARB/06/3, Award (6 May 2013), para. 293.
[288] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, para. 122 (emphasis added).

G. Interests rate

223. In its Memorial, Panama maintains that an interest of 8%, 6% and 3% should be applied to its various claims for damages.[289]

224. Without prejudice to the above Italian arguments concerning the admissibility of Panama's claims and related heads of damage, the lawfulness of Italy's conduct, the lack of a causal link between the alleged Italian wrongful act and the damages claimed and the lack of evidence supporting those claims, Italy wishes to point out that Panama's definition of the interest rate is unreasonable and disproportionate.

225. In its decision in the *M/V Virginia G* case, also recalling its decision in the *Saiga (No. 2)* case, this Tribunal linked the definition of the interest rate to the London Interbank Offered Rate (LIBOR).[290]

[289] Panama's Memorial, para. 186.
[290] *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, paras. 443-445.

SUBMISSIONS AND RELIEF SOUGHT

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

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

13 June 2018

CERTIFICATION

Pursuant to Articles 63(1) and 64(3) of the Rules of the Tribunal, I hereby certify that the copies of the present Rejoinder, and the documents herewith annexed, 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

13 June 2018

TABLE OF CONTETS